

JPMorgan Chase Bank, N.A. v Rocar Realty Northeast, Inc.
2009 NY Slip Op 32643(U)
September 30, 2009
Supreme Court, New York County
Docket Number: 117237/04
Judge: Joan A. Madden
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. JOAN A. MADDEN**

PART 11

J.S.C. Motion

Index Number : 117237/2004
JPMORGAN CHASE BANK, N.A.
 vs.
ROCAR REALTY
 SEQUENCE NUMBER : 003
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion are determined in accordance with the annexed decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
OCT 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: September 30, 2009

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
JPMORGAN CHASE BANK, N.A.,

Plaintiff,

INDEX NO. 117237/04

-against-

ROCAR REALTY NORTHEAST, INC. and
JEFFERSON VALLEY MALL LIMITED
PARTNERSHIP,

Defendants.

FILED
OCT 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
JOAN A. MADDEN, J.:

In this commercial landlord tenant dispute, plaintiff JPMorgan Chase Bank, N.A. ("Chase") moves for an order pursuant to CPLR 3212 granting summary judgment against defendant Jefferson Valley Mall Limited Partnership ("Jefferson Valley") in the amount of \$44,819.36¹ based on an indemnification provision in a March 2004 stipulation between Chase and Jefferson Valley, together with interest and attorney's fees. Jefferson Valley opposes the motion and in the event Chase's motion is granted, Jefferson Valley cross-moves for summary judgment on its cross-claim against defendant Rocar Realty Northeast, Inc. ("Rocar"). Rocar takes no position as to Chase's motion, but opposes Jefferson Valley's cross-motion.

At the outset, the court must emphasize the binding effect of the Appellate Division First Department's decision in this case, JPMorgan Chase Bank, N.A. v. Rocar Realty Northeast, Inc.,

¹The \$44,819.36 total is comprised of: 1) the \$33,097.02 in rent that Chase paid Rocar for February and March 2004, pursuant to the sublease; and 2) the \$11,722.16 balance in rent found to be due to Rocar from Chase by the January 8, 2008 order of the Appellate Division First Department. For the same months of February and March 2004, Chase paid Jefferson Valley \$30,166.66, pursuant to their March 2004 stipulation.

47 AD2d 425 (1st Dept), lv app dismiss, 11 NY3d 761 (2008), which determined that after the expiration of Rocar's ground lease with Jefferson Valley on January 31, 2004, Rocar continued as a month-to-month tenant, Chase continued as the subtenant in possession of the premises, and "the same relationships of sublessor-paramount landlord and sublessor-tenant persisted" during the period of the month-to-month tenancy, which ran from February through November 2004. Based on that determination, the First Department awarded Rocar judgment on its counterclaim against Chase for rent, holding that Rocar was entitled to rent from its subtenant Chase during the entire period of the month-to-month tenancy, from February through November 2004.

Recognizing that Chase had made double payments of rent to Rocar and Jefferson Valley for February and March 2004, and had paid Jefferson "use and occupancy" from April 1, 2004 onward, the First Department held that "[a]ny rent paid by plaintiff [Chase] to the paramount landlord [Jefferson Valley] is properly offset against amounts owing to Rocar under the sublease" and "[t]o the extent any excess remains, plaintiff [Chase] is liable therefor to Rocar for the period from February 1, 2004 to November 30, 2004, which is the difference between the \$15,083.33 in monthly rent it paid Jefferson from April through November 2004, and the rent plaintiff owed Rocar under the sublease [\$16,548.60]." Pursuant to that formula, the Appellate Division awarded Rocar judgment against Chase on its counterclaim for rent in the total amount of \$11,722.16 ($\$16,548.60 - \$15,083.33 = \$1,465.27 \times 8$ months [April through November]).

Now, Chase is pursuing its claim against Jefferson Valley to recover the double payments of rent it made for February and March 2004. As the First Department explained, "[a] subtenant like plaintiff [Chase], faced with loss of possession because his sublessor has defaulted under the paramount lease, must nonetheless continue to perform the terms and conditions of its sublease

(1 Dolan, Rasch's Landlord & Tenant – Summary Proceedings § 9:63 [4 cd]). Indeed, a subtenant has the right to perform covenants of the paramount lease breached by its sublessor in order to protect its possession. Thus, the subtenant may pay the paramount landlord the rent due it from the sublessor. Such payment, if made in good faith and under compulsion, is a defense to an action brought by the sublessor against the subtenant for the same rent (id. at § 9:56 - § 9:57)."

The Appellate Division held that Chase's rent payments, consisting of the double payments to Rocar and Jefferson Valley for February and March 2004, and the subsequent payments to Jefferson Valley alone, "were made in good faith and under compulsion." The Court explained that as the subtenant in possession, Chase faced competing demands for rent from Jefferson and Rocar, risked eviction if rent were not paid, and commenced the underlying action against Jefferson and Rocar "to clarify to which party it owed the rent."

Although the issue of Chase's obligation vis-a-vis Jefferson Valley was not before the Appellate Division, the Court determined the nature of their relationship when it held that a month-to-month tenancy existed from February through November 2004, and during that period the "parties continued in the same relationships with each other." On that basis, the Appellate Division determined that Chase was obligated under the sublease to pay Rocar rent for the entire period of the month-to-month tenancy from February through November 2004, with the amounts Chase paid to Jefferson Valley "offset against amounts owing to Rocar under the sublease." As it was not disputed that Chase had directly paid rent to Rocar for February and March 2004, the Appellate Division found that no further amounts were due to Rocar in connection with those months. In view of the holding that Chase's obligations under the sublease continued, this court

is bound to conclude that as a subtenant, Chase cannot be compelled to pay rent to both Rocar and Jefferson Valley for the identical months of February and March 2004. Any issue as to whether Jefferson Valley accepted rent from Rocar for those months, thereby giving rise to a month-to-month tenancy, was resolved in Rocar's favor, when the Appellate Division held that a month-to-month tenancy was created, noting that Jefferson Valley "made a strategic choice not to continue to litigate the issue of whether a valid month-to-month tenancy had been created, and thus must abide by its choice."² Thus, since the Appellate Division concluded that Chase was obligated to pay rent to Rocar for February and March 2004, and found that Chase in fact made those payments, this court must conclude that Chase is entitled to recover the sums paid to Jefferson Valley for those same months, in the total amount of \$30,166.66.

In seeking summary judgment against Jefferson Valley, Chase relies on the indemnification provision in its March 2004 stipulation with Jefferson Valley. At that time, Rocar's ground lease with Jefferson Valley had expired and Jefferson Valley commenced a summary holdover proceeding against Rocar and Chase. Seeking to protect its right to remain in possession during the pendency of the proceeding and "after Rocar's legal possession of the subject premises has been terminated," Chase and Jefferson Valley executed a stipulation stating that "Chase and Petitioner [Jefferson Valley] are contemplating entering into a written lease agreement which provides that Chase shall lease the subject premises when Petitioner regains legal possession of the subject premises from Rocar." Jefferson Valley agreed to grant Chase

²The Appellate Division explained that Rocar claimed it tendered February and March 2004 rent to Jefferson Valley, which created a month-to-month tenancy, and that "[r]ather than contesting such claim, Jefferson served Rocar with a 30-day notice, terminating the putative 30-day month-to-month tenancy as of November 20, 2004."

“the right to occupy the subject premises on a temporary basis,” and “[i]n connection with such occupancy, commencing from February 1, 2004 and until Petitioner obtains legal possession of the subject premises, conditioned upon Chase actually occupying the premises, Chase shall pay use and occupancy to Petitioner at the monthly rate of \$15,083.33 per month,” and [o]n or before April 7, 2004, Chase shall pay Petitioner the sum of \$30,166.66 representing use and occupancy due from February 1, 2004 through March 31, 2004.” The stipulation included the following indemnification clause:

If anyone other than Petitioner [Jefferson Valley] seeks rent or use and occupancy from Chase, Chase agrees to forward any notice or demand seeking rent to Petitioner’s counsel within 72 hours of receipt by mail and facsimile at (212) 371-0081. If Petitioner is so notified, Petitioner will indemnify Chase for any liability to said third party for rents due under the Lease for the periods in which Chase has paid same to Petitioner. Petitioner’s indemnification of Chase shall be limited to sums paid to Petitioner under this Stipulation.

Chase’s reliance on the foregoing language is misplaced. By its clear and express terms the indemnification clause cannot be read to apply to the February and March 2004 rent payments Chase made to Rocar, or the \$11,722.16 judgment issued by the Appellate Division in favor of Rocar and against Chase. “When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.” Hooper Assocs Ltd v. AGS Computers, Inc., 74 NY2d 487, 491 (1989); accord Tonking v. Port Authority of New York & New Jersey, 2 AD3d 213, 214 (1st Dept 2003); Dunham v. Weissman, 281 AD2d 220, 222 (1st Dept 2001).

The indemnification provision begins with the word “if,” and the use of that word evinces a clear intent to create a right to indemnification triggered by a future notice or demand for rent

or use and occupancy. It is undisputed that when Chase and Jefferson Valley executed the stipulation in March 2004, Chase had already paid rent to Rocar for February and March 2004, pursuant to the terms of their sublease. Since those payments were made prior to the execution of the stipulation and in accordance with Chase's obligations under the sublease, they are not covered under the indemnification provision.

The indemnification clause is likewise inapplicable to the \$11,722.16 judgment that the Appellate Division awarded against Chase on Rocar's counterclaim for rent. Chase has failed to establish that it received a "notice or demand" for such rent, which it forwarded to Jefferson Valley "within 72 hours of receipt" as required under the express terms of the indemnification clause. Moreover, the stipulation explicitly limits Chase's right to indemnification "to sums paid to [Jefferson Valley]," and the judgment amount of \$11,722.16 amount was not actually "paid" to Jefferson Valley. Rather, Jefferson Valley received only the stipulated rent of \$15,083.33, which was \$1,465.27 less than the \$16,548.60 monthly rent amount Chase owed Rocar under the sublease ($\$1,465.27 \times 8$ months [April through November 2004] = \$11,666.66).

Notwithstanding the foregoing conclusions, as determined above, based on the Appellate Division First Department's decision as to the existence of a month-to-month tenancy in which Chase remained obligated to pay rent to Rocar pursuant to the sublease, Chase is entitled to recover from Jefferson Valley the double payments of rent made to Jefferson Valley for February and March 2004, in the amount of \$30,166.66. Chase's motion for summary judgment is therefore granted only to the extent of awarding Chase judgment against Jefferson Valley in the amount of \$30,166.66, and in all other respects the motion is denied.

Finally, Jefferson Valley's cross-motion for summary judgment on its cross-claim against Rocar for "rent/use and occupancy," is denied, as Jefferson Valley fails to provide a factual or legal basis for granting such relief. The record establishes that Rocar tendered rent³ to Jefferson Valley for February and March 2004 through a "lock box" arrangement, in which the rent payments were automatically deposited in Jefferson Valley's bank account. While Jefferson Valley asserts that it "promptly returned" those payments to Rocar, Rocar maintains that it "never accepted the purported refund checks." Jefferson Valley submits no evidence showing that Rocar ever cashed the checks, and in the absence of such evidence, Jefferson Valley has not established that the February and March 2004 rent payments were in fact "refunded" to Rocar, and that Rocar still owes rent for those months. As to the balance of the month-to-month tenancy, it is undisputed that Jefferson Valley received rent or use and occupancy from Chase in amount of \$15,083.33 per month. Under these circumstances, no basis exists for awarding Jefferson Valley judgment against Rocar, and Jefferson Valley's cross-claim is dismissed.

Accordingly, it is hereby

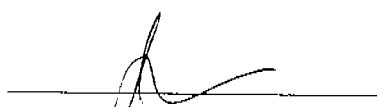
ORDERED that the motion by plaintiff JPMorgan Chase Bank N.A. for summary judgment against defendant Jefferson Valley Mall Limited Partnership, is granted only to the extent that plaintiff JPMorgan Chase Bank N.A. is entitled to judgment against defendant Jefferson Valley Mall Limited Partnership in the amount of \$30,166.66, and the motion is denied in all other respects, and the Clerk is directed to enter judgment accordingly; and it is further

³Jefferson Valley's lease with Rocar provided for Rocar to pay monthly rent of \$5,583.33.

ORDERED that the cross-motion by defendant Jefferson Valley Mall Limited Partnership for summary judgment on its cross-claim against defendant Rocar Realty Northeast, Inc., is denied, and said cross-claim is dismissed, and the Clerk is directed to enter judgment accordingly.⁴

DATED: September 30, 2009

ENTER:



J.S.C.

FILED
OCT 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

⁴The court is marking this case as a final disposition. If the parties believe that there is any surviving claim, counterclaim or cross-claim, the court should be notified immediately.