

347 W. 36th St. LLC v Fuchs

2009 NY Slip Op 33173(U)

December 24, 2009

Supreme Court, New York County

Docket Number: 101481/2009

Judge: Joan A. Madden

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

Hon Juan A. Mader

PART II

Index Number : 101481/2009

347 WEST 36TH STREET, LLC

VS.

FUCHS, AARON

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

Justice

INDEX NO. 101481-09

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read 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 is decided in accordance with the attached Memorandum Decision + order.

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

FILED

JAN 12 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: December 24, 2009

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
347 WEST 36TH STREET, LLC,

Plaintiff,

-against-

AARON FUCHS,

Defendant.
-----X

JOAN A. MADDEN, J.:

INDEX NO. 101481/2009

FILED
JAN 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this action seeking to recover monies allegedly due and owing based on guaranty of obligations under a commercial lease, plaintiff moves for an order granting it summary judgment (i) on its first cause of action for unpaid rent and additional rent, and (ii) as to liability on its second cause of action for attorneys' fees, costs and expenses. Defendant opposes the motion, arguing that it has viable defenses of unconscionability and fraud in the inducement. For the reasons set forth below, plaintiff's motion is granted.

Plaintiff entered into a commercial lease for a property located at 347 West 36th Street, New York, New York 10018 ("the Building") with Tuf America, Inc. ("Tuf") for the period between June 1, 2008 and May 31, 2009 ("the Lease"). Based on Tuf's failure to pay rent and additional rent (excluding attorneys' fees) owing through February 2009, a judgment in the amount of \$44,493.03 with interest and costs was entered against Tuf in Civil Court of the City of New York on February 10, 2009. Defendant is a guarantor of Tuf's obligations under its lease pursuant to a guaranty agreement ("the Guaranty") dated May 18, 2008. On this motion, plaintiff asserts that it is entitled to summary

judgment against defendant on its first cause of action in the amount of the Civil Court judgment as well as unpaid rent and additional rent from March and April 2009 in the sum of \$55,968.04 with interest and as to liability on its second cause of action for attorney's fees along with costs and expenses. Plaintiff also requests a hearing to determine the amount of damages including legal fees on the second cause of action and to dismiss all of defendant's affirmative defenses.

Defendant opposes the motion, arguing that the Guaranty is unconscionable and that before Tuf entered the lease, plaintiff fraudulently misrepresented the noise levels at the leased premises.

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guarantee." City of New York v. Clarose Cinema Corp., 256 AD2d 69, 71 (1st Dept 1998); see also Kensington House Co. v. Oram, 293 AD2d 304 (1st Dept 2002).

The Guaranty provides for the unconditional guarantee of payment by its express terms. Paragraph 6 of the Guaranty states that "this Guaranty is irrevocable, continuing, indivisible and unconditional and, except as otherwise provided herein, may be proceeded upon immediately after failure by the Tenant to pay, perform or comply with any of the Obligations, without prior action or proceeding against the Tenant."

The guarantor's obligations terminate only when "...Tenant has delivered to Landlord thirty (30) days prior written notice that it intends to: (i) deliver possession of the demised premises to Landlord in the condition required at the expiration of the lease, vacant and free of all tenants, persons in possession and all liens; and (ii) delivers to

Landlord all unpaid Base Rent, additional rent and all other sums and charges which shall have accrued under the terms of the Lease.”

Plaintiff has submitted documentary proof, including copies of the pleadings, the Lease, the Guaranty and the Civil Court decision entering judgment for the plaintiff as well as an affidavit from the plaintiff's managing agent stating, inter alia, that Tuf is in default of its obligations under the Lease. Based on the foregoing, plaintiff has established that defendant provided an unconditional guarantee of payment of rent and additional rent under the lease, that the tenant defaulted in the payment of rent and additional rent, and that defendant has not satisfied his obligation under the Guaranty.

Moreover, defendant has not raised a triable issue of fact as to his liability under the Guaranty based on his assertions that the Guaranty was unconscionable and that plaintiff fraudulently induced Tuf into signing the lease by misrepresenting the noise levels at the leased premises.

A determination of unconscionability generally requires a showing of procedural and substantive unconscionability, i.e., that there was an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party. See Gillman v. Chase Manhattan Bank, 73 NY2d 1, 10-11 (1988).

Defendant contends that the Guaranty is unconscionable because it prohibits defendant from raising any defenses to the enforcement of the Guaranty and purports to relieve plaintiff from overcoming any defenses. Defendant refers to paragraph 8 of the Guaranty which states that the Guarantor “has not and will not set up or claim any defense, counterclaim, set-off or other objection of any kind to the suit, action or proceeding at law, in equity, or otherwise, or to any demand or claim that may be

instituted or made under and by virtue of the Guaranty.”

Plaintiff argues the language referred to by defendant is insufficient to demonstrate unconscionability, particularly as the Guaranty was negotiated by business people in a commercial setting, which gives rise to the presumption of the lack of unconscionability. See Chrysler Credit Corp. v. Kosal, 132 AD2d 686 (1st Dept 1987). In addition, courts have upheld the validity of similar language prohibiting a guarantor from raising defenses to the enforcement of a guaranty. See BNY Fin. Corp. v. Clare, 172 AD2d 203 (1st Dept 1991); Bank Leumi Trust Co. of New York v. D'Evori Intern., Inc., 163 AD2d 26, 34 (1st Dept 1990). Furthermore, defendant's unconscionability defense also fails as he has not substantiated his assertion that the Guaranty was unconscionable or against public policy. See Puntillo Assocs. v. Land, 222 AD2d 425, 426 (2nd Dept 1995)(rejecting guarantor's defense of unconscionability where guarantor failed to submit “any proof that the personal guaranty signed by him or the underlying lease was unconscionable and against public policy”).

As to defendant's second argument concerning fraud in the inducement, the unconditional nature of the Guaranty precludes defendant from raising this defense. See Citibank, N.A. v. Palpinger, 66 NY2d 90, 91 (1985); Newcourt Small Business Lending Corp. v. Grillers Casual Dining Group, Inc. 284 AD2d 681, 683 (3rd Dept 2001); E.D.S. Security Systems, Inc. v. Allyn, 262 AD2d 351 (2nd Dept 1999).

However, even if the court were to consider the fraudulent inducement defense on the merits, defendant's argument falls short. In order to prove fraud in the inducement, defendant must show a false representation of a material fact with scienter and reliance by the defendant to its detriment. See National Union Fire Ins. Co. v. Worley, 257 AD2d

228 (1st Dept 1999). In support of his assertion that plaintiff failed to notify defendant of excessive noise and the extent and duration of noise at the leased premises, which was to be used for recording music, defendant submits an affidavit from Stephen Saperstein (“Saperstein”), a manager at Tuf, who visited the leased premises before the Lease was signed. In the affidavit, Saperstein states that he noticed noise from nearby construction and asked the Building’s superintendent about the duration of the noise. According to Saperstein, the superintendent told him that the noise would last about two weeks while the builder at the construction site prepared a foundation. Saperstein acknowledges that he was “skeptical” of the superintendent’s claim, but when he told this to defendant, defendant “pooh-poohed the noise problem.” Saperstein Affidavit, ¶ 4.

Even assuming arguendo that the statement by the superintendent could be considered a misrepresentation of material fact, defendant cannot prove justifiable reliance on the alleged fraudulent misrepresentation. In showing justifiable reliance, defendant must show that he relied on the alleged misrepresentation and that such reliance was reasonable. See Global Mins. & Metals Corp. v. Holme, 35 AD3d 93, 100 (1st Dept 2006), ly denied, 8 NY3d 804 (2007). Here, the Saperstein affidavit, submitted by defendant, shows that defendant was not only aware of noise, but chose to disregard it. In fact, Saperstein indicates in the affidavit that he was skeptical about the superintendent’s claim about the noise from construction ending in two weeks. Despite this knowledge, neither Tuf nor defendant conducted any investigation regarding the noise issue prior to signing the Lease and/or Guaranty. Therefore, defendant cannot show that reliance on any alleged misrepresentation was reasonable.

Defendant also argues the amount sought by plaintiff on the first cause of action

is excessive and includes attorneys fees which are subject to determination at a hearing. This argument is without merit. The amount sought in the first cause of action is supported by the Civil Court judgment of \$44,493.03 plus an arrears statement showing that \$5,830.20 was due and owing for rent and additional rent in March 2009 and \$5,436.18 was due and owing for rent and additional rent for April 2009, excluding \$4,895.89 for legal fees for a total of \$55,759.41.¹

In view of the foregoing, defendant has failed to establish the existence of any material issues of fact with respect to a viable defense to plaintiff's claim for unpaid rent and additional rent, and as such, plaintiff is entitled to summary judgment on the first cause of action. With respect to the second case of action, plaintiff is entitled to summary judgment as to liability and a trial is directed to determine the reasonable amount of attorneys' fees, costs and expenses.

Accordingly, it is

ORDERED that the motion is granted to the extent that summary judgment is granted on the first cause of action and the Clerk of the Court is directed to enter judgment in favor of plaintiff, 347 West 36th Street, LLC and against defendant, Aaron Fuchs in the amount of \$55,759.41 together with interest, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

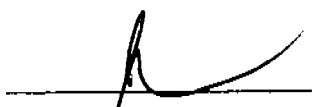
ORDERED that the second cause of action claim for attorneys' fees, costs and expenses is severed for trial; and it is further

¹This amount is slightly less than the \$55,968.04 sought by plaintiff.

ORDERED that on or before January 28, 2010, plaintiff shall file with the Clerk of Trial Support (room 158) a note of issue and statement of readiness and shall pay any appropriate fees and said Clerk is directed to assign this matter to Part 11 for trial; and it is further

ORDERED that plaintiff's failure to timely comply with the immediately preceding paragraph shall result in the dismissal of its second cause of action for attorneys' fees, costs and expenses.

DATED: December 24th 2009



J.S.C.

FILED
JAN 12 2010
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