

1412 Broadway, LLC v Wilk Shirt Corp.

2010 NY Slip Op 30065(U)

January 12, 2010

Supreme Court, New York County

Docket Number: 108094/2009

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE
J.S.C.

PRESENT: _____

PART 10

Index Number : 108094/2009

1412 BROADWAY, LLC

vs

WILK SHIRT CORP.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ 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


motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

JAN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

JAN 12 2010

Dated: 1/12/10


HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----x

1412 Broadway, LLC.,

Plaintiff,

DECISION/ ORDER
Index No.: 108094/2009
Seq. No.: 001

-against-

PRESENT:
Hon. Judith J. Gische
J.S.C.

Wilk Shirt Corp.,

Defendant.

-----x

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers **Numbered**
Notice of motion, MB affirm, DS aff'd, exhibits 1

FILED
JAN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action to recover unpaid rents under a commercial lease. Plaintiff moves, pursuant to CPLR § 3212, for summary judgment in its favor against Defendant, Wilk Shirt Corporation. Issue was joined on July 29, 2009 with the filing of a verified answer. The answer consists of a two page general denial signed by Defendant's attorney, Herbert J. Silver. Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. [CPLR § 3212, Brill v. City of New York, 2 NY3d 648 (2004)].

Defendant has not submitted any opposition to Plaintiff's motion for summary judgment, despite due proof of service of the instant motion. Therefore, this motion is

considered on default. Plaintiff is entitled to summary judgment against Defendant and in its favor, provided it otherwise demonstrates that it has a *prima facie* entitlement to judgment as a matter of law. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

The following facts are established by the documentary evidence and affidavits submitted in support of this motion. On or about March 31, 2007, Plaintiff, as landlord, and Defendant, as tenant, entered into a Commercial Lease agreement (the "Lease") for the premises located at 1412 Broadway, New York, NY (the "Premises"). The Lease commenced on March 31, 2007 and was set to expire 4 years and 5 months from the commencement of the lease. Because 1412 Broadway delivered possession on or around September 1, 2007, the commencement date for purposes of establishing the lease term and rent increase is September 1, 2007 under Lease Rider Article 37C. Pursuant to Article 37G of the Lease, Defendant promised to pay Plaintiff a monthly rent of \$16,112.81 in the Lease's first year, a monthly rent of \$16,555.13 in the second year, a monthly rent of \$17,010.71 in the third year, a monthly rent of \$17,479.96 in the fourth year, and a monthly rent of \$17,963.28 in the final five months of the Lease.

On or before October 31, 2008, Defendant vacated the premises and ceased making rent payments, thereby breaching the Lease. Plaintiff was unable to re-let the Premises to another tenant. Plaintiff now seeks \$201,722.75 in liquidated damages, representing the monthly accrual of all unpaid rent and additional rent since October 2008 through and until October 2009. Plaintiff also seeks its attorneys fees.

Discussion

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 116 AD2d 694 (2d Dept 1986). A lease is a contract. Ford v. Domino's Pizza, LLC., 67 AD3d 633 (2d Dept 2009). Plaintiff's claims and the proof submitted on this motion establish the elements of a *prima facie* cause of action for breach of the Lease against Defendant.

The Court examined the Lease, the tenant rent ledger, and the affidavit of David Sturner. Plaintiff is entitled to base rent, which includes electricity, and Plaintiff is entitled to real estate taxes. While Plaintiff seek an additional fee for "Tenant Billback," it is not explained how this number was calculated or what "Tenant Billback" includes. Accordingly, Plaintiff's motion for summary judgment is granted only to the extent of awarding Plaintiff base rent (inclusive of electricity charges) and real estate taxes.

For the months of November 1, 2008 through August 1, 2009, Plaintiff is entitled to an award of monthly rent of \$16,555.13, totaling \$165,551.30. For the months September 1, 2009 through October 1, 2009, Plaintiff is entitled to an award of monthly rent of \$17,010.71, totaling \$34,021.42. Plaintiff's total rent and electricity charges for November 1, 2008 through October 1, 2009 are, therefore, \$199,572.72. Plaintiff is also entitled to \$1,156.04 in real estate taxes. Additionally, Defendant is entitled to a credit for prepaid rent in the amount of \$2.01. Accordingly, Plaintiff is entitled to summary judgment on its complaint in the amount of against Defendant for \$200,726.75 plus interest, costs, and disbursements. The judgment represents rent and additional rent through October 2009.

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Here, the Lease expressly provides that Defendant is liable for Plaintiff's reasonable attorneys fees, costs and expenses incurred in this action. Plaintiff has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The Court, therefore, refers the issue of what Plaintiff may recover from Defendant for its reasonable attorneys fees, costs and disbursements to hear and determine. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Plaintiff's motion is granted to the extent that Plaintiff is entitled to summary judgment against Defendant; and it is further

ORDERED that the clerk is directed to enter a money judgment in Plaintiff's favor and against the Defendant Wilk Shirt Corp., in the following amount: \$200,726.75 plus interest from March 1, 2009 (as a reasonable intermediate date); and it is further

ORDERED that the issue of what Plaintiff may recover from Defendant for its reasonable attorneys fees, costs and disbursements is hereby referred to a Special Referee to hear and determine; and it is further

ORDERED that Plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that the reference identified herein can be assigned.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
January 12, 2010

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

**HON. JUDITH J. GISCHE
J.S.C.**

FILED
JAN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE