

Wah Kok Realty Corp. v Feith

2010 NY Slip Op 30142(U)

January 19, 2010

Supreme Court, New York County

Docket Number: 603666/08

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT: J.S.C.

PART 11

Index Number : 603666/2008
WAH KOK REALTY CORP.
VS.
TRACY FEITH, INC.
SEQUENCE NUMBER : # 001
DISMISS

Justice

INDEX NO. 603666-08

MOTION DATE

MOTION SEQ. NO. #007

MOTION CAL. NO. _____

re 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 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
JAN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 19, 2010

J
HON. JOAN A. MADDEN ^{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
WAH KOK REALTY CORP.,

Plaintiff,

INDEX NO. 603666/08

-against-

TRACY FEITH and TRACY FEITH, INC.,

Defendants.

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

In this action based on a commercial lease and guaranty, plaintiff landlord moves for an order pursuant to CPLR 3212, granting judgment dismissing defendants' affirmative defenses and counterclaim, and awarding plaintiff summary judgment in the amount of \$42,688.44, together with attorney's fees and costs. Defendants oppose the motion and cross-move for summary judgment on its counterclaim for an accounting. As determined below, plaintiff's motion is granted in part and denied in part, and defendants' cross-motion is denied.

The following facts are not disputed unless noted otherwise. By lease dated August 19, 1998, plaintiff as "landlord" leased to defendant Tracy Feith, Inc. ("Feith Inc.") as "tenant," the ground floor and basement spaces in the building located at 209 Mulberry Street a/k/a 48 Spring Street in Manhattan. The lease provided for a ten-year term, commencing on September 1, 1998 and expiring on August 31, 2008. Paragraph 42 of the Rider to the Lease Agreement provided for base rent for the final year of the lease, September 1, 2007 through August 31, 2008, at the monthly rate of \$8,539.87. Pursuant to Paragraph 45 of the Rider, Feith Inc. was also obligated to pay real estate tax escalation charges as "additional rent." Pursuant to Paragraph 73, Feith

Inc. “deposited” the sum of \$18,000, as security, “to be held in an interest bearing with the interest to accrue to the benefit of the Tenant.” Simultaneously with the execution of the lease, individual defendant Tracy Feith executed a “Limited Guaranty,” which states that it “is an irrevocable, absolute and unconditional guaranty of payment and of performance.”

Although the lease expired on August 31, 2008, Feith Inc. did not surrender possession until sometime in September 2008. While plaintiff alleges that it did not receive the key from Feith Inc. until September 30, 2008, defendants allege that they vacated the premises on September 9, 2008.

On December 12, 2008, plaintiff commenced the instant action against the corporate tenant and the individual guarantor. The complaint asserts a first cause of action against Feith Inc. for breach of the lease, seeking damages in the amount of \$25,417.56, comprising base rent for August 2008 in the amount of \$8,539.87, and real estate tax escalation charges for the period of January 2008 through September 2008 in the amount of \$16,877.69. The second cause of action against Feith Inc. seeks a late charge equal to 5% of the unpaid base rent and additional rent, in the sum of \$1,270.88, pursuant to Paragraph 60 of the lease. The third cause alleges that in September 2008, Feith Inc. “wrongfully held over after the expiration of the lease,” and seeks the “fair value of use and occupancy” in the amount \$16,000, based on a lease signed by Spread NYC. The fourth cause of action against individual defendant Tracy Feith, is based on the guaranty and seeks damages in the total amount of \$42,688.44 (comprising base rent of \$8,539.87, real estate tax escalations of \$16,877.69, late fees of \$1,270.88, and September use and occupancy of \$16,000). The fifth and sixth causes of action seek an award of reasonable attorney’s fees against both defendants, based upon the terms of the lease and the guaranty.

Defendants answered asserting a first affirmative defense of failure to state a cause of action; a second affirmative defense “reserving” the defenses of “accord and satisfaction, assumption of risk, duress, estoppel (judicial and equitable), failure of consideration, fraud, illegality, laches, payment, release, res judicata, statute of frauds, waiver and any other matter constituting an avoidance or affirmative defense which the further investigation of this matter may prove applicable herein”; a third affirmative defense of failure to mitigate damages; a fourth affirmative defense that the action is barred by the statute of limitation; a fifth affirmative defense of set off; a sixth affirmative defense allege that plaintiff “is prohibited from seeking enforcement of the Lease and the Purported Guarantee as the aforesaid Lease and Purported Guarantee were constructively terminated by the Plaintiff”; and a first counterclaim for an “accounting . . . to determine “what, if any sums are owed by TF and/or Feith to the Plaintiff.”

Plaintiff is now moving for summary judgment dismissing defendants’ affirmative defenses and counterclaim, and summary judgment on the complaint. Defendants oppose the motion and are cross-moving for summary judgment on its counterclaim, for plaintiff’s “failure to account for and return” Feith, Inc.’s security deposit.

First, the court will address plaintiff’s motion for summary judgment dismissing defendants’ affirmative defenses and counterclaim. It is well established that a party moving for summary judgment may seek to dismiss “one or more defenses, on the ground that a defense is not stated, or has no merit.” Butler v. Catinella, 58 AD 3d 145-147 (2nd Dept 2008). In their opposition papers, defendants have consented to withdraw their second affirmative defense, with the exception of the defenses of accord and satisfaction, equitable estoppel and payment, and to withdraw their third, fourth and sixth affirmative defenses,

As to the remaining defenses, the first affirmative defense of failure to state a cause of action is dismissed as without merit, in light of the record and the discussion herein below as to plaintiff's claims for base rent, additional rent, and use and occupancy.

The second affirmative defense is dismissed in its entirety as improperly pleaded, since defendants' merely "reserve" their right to assert several specified defenses in the event "further investigation of this matter may prove" such defenses "applicable." If and when appropriate, however, defendants have the right to move for leave to amend their answer to assert any additional meritorious defenses that arise in this matter.

The fifth affirmative defense of set-off shall stand, in view of the \$18,000 security deposit that defendant Feith, Inc. gave plaintiff when the parties executed the lease in August 1998.

The first counterclaim for an accounting to determine the amounts owed, is dismissed as without merit. "A fiduciary relationship between the parties is necessary in order to obtain an accounting." Top-All Varieties, Inc. v. Raj Development Co, 173 AD2d 604, 650 (2nd Dept 1991). Defendants have not established a fiduciary or confidential relationship necessary to justify such remedy. Id. Just as in Top-All Varieties, Inc. v. Raj Development Co, the parties in the instant action are engaged in a landlord/tenant dispute regarding the amount due and owing to the landlord under the lease, which does not establish a fiduciary relationship. Id. The case cited by defendants, Keating v. Weinberger, 160 AD2d 675 (2nd Dept 1990), is distinguishable on the facts, as in that case plaintiff satisfied his initial burden of proving a fiduciary relationship, since defendant had been the plaintiff's attorney and accountant for many years. However, although defendants cannot assert a claim for an accounting, the issues raised as to precise amounts owed,

including defendants' claim that they are entitled to a set-off based on the security deposit and the question of plaintiff's calculations as to the real estate tax escalation charges, necessarily will be addressed in determining plaintiff's claims for rent and additional rent.

Turning to plaintiff's motion for summary judgment on the complaint, the court concludes that plaintiff is not entitled to such relief. This action is based on a commercial lease and personal guaranty, yet plaintiff's motion papers do not include a copy of either document. Plaintiff's motion will not be denied on that ground, since defendants have submitted the documents with their papers. Rather, the motion is denied based on the triable issues of fact that exist as to the amounts due and owing, the date on which defendant Feith, Inc. vacated or surrendered possession of the premises, and defendants' right to a set-off for the security deposit. The affidavit of plaintiff's president, Edmond Li contains bare and conclusory statements as to the amounts due and owing, without any rent records or explanation as to its calculations as to such amounts, including the real estate tax escalation charges. The affidavit also contains inconsistent amounts and incorrectly calculated amounts, some of which differ from the amounts alleged in the complaint. For example, both the affidavit and the complaint state that plaintiff owes base rent and additional rent in two different sums, \$23,919.25 and \$25,417.56. The affidavit also states that plaintiff is seeking judgment for base rent and additional rent in the amount of \$25,417.56, together with \$16,000 in use and occupancy for September 2008, "totaling \$42,688.44," which is incorrect; the correct total is \$41,417.56. The complaint additionally seeks a late charge of \$1,270.88, which is not mentioned in Li's affidavit. Plaintiff also seeks "the reasonable value of use and occupancy" for the month of September 2008, in the amount of \$16,000, alleging that it entered into a written lease dated July 7, 2008

with a new tenant, Spread NYC, for base rent of \$16,000. Plaintiff does not submit a copy of that new lease or any other document to support its allegation the rent would have nearly doubled in value from August 2008; when the parties's lease provided for monthly rent in the amount of \$8,539.87.

Finally, in light of the court's dismissal of defendants' counterclaim for an accounting, defendants' cross-motion for summary judgment on the counterclaim is denied as moot.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted only to the extent of dismissing defendants' First, Second, Third, Fourth and Sixth Affirmative Defenses, and defendants' First Counterclaim, and in all other respects plaintiffs' motion is denied; and it is further


ORDERED that defendants' cross-motion for summary judgment is denied as moot; and it is further

ORDERED that the court is transferring this action to the Civil Court of the City of New York pursuant to CPLR 325(d).

The court is notifying the parties by mailing copies of this decision and order.

DATED: January 19, 2010

ENTER:



J.S.C.
ED
JAN 25 2010
NEW YORK COUNTY CLERK'S OFFICE

At an Individual Assignment Part 11 of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse thereof in the County of New York, City, and State of New York, on the 19 of January, 2010

PRESENT:

HON: JOAN MADDEN
JUSTICE.

PRE-NOTE OF ISSUE

ORDER OF TRANSFER-325(d)

Wah Kok Realty Corp

vs.

Tracy Faith, Inc.

County Clerk's

Index No. 603666 19/2008

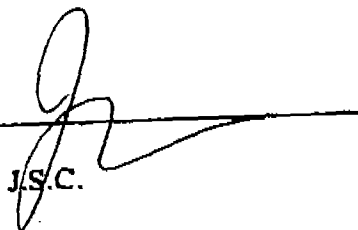
It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

ORDERED, that this cause bearing Index Number 603666/08 be, and it hereby is, removed from this court and transferred to the Civil Court of the City of New York, County of New York, and it is further

ORDERED, that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

ENTER,



J.S.C.