

Retail Prop. Trust v SHNS Corp.

2011 NY Slip Op 31728(U)

June 15, 2011

Supreme Court, Nassau County

Docket Number: 17108/10

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

**THE RETAIL PROPERTY TRUST, a Massachusetts
Business Trust,**

Plaintiff(s),

-against-

**SHNS CORP. d/b/a J & A GALLERY, BASHIR
JALILI, AND ROGIN JALILI,**

Defendant(s).

_____ X

Index No. 17108/10

Motion Submitted: 4/22/11

Motion Sequence: 003

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Plaintiff moves this Court for an Order granting summary judgment in its favor against defendant SHNS Corp. ("SHNS"), in the sum of \$459,820.41, plus attorney's fees in the amount of \$21,863.49, pursuant to a commercial lease agreement. Plaintiff also seeks summary judgment against the Jalili defendants in the amount of \$206,923.81, plus attorney's fees in the amount of \$21,863.49, pursuant to a Guaranty of the commercial lease. Defendants oppose the requested relief.¹

¹Although the opposition is submitted by Bashir Jalili only, the Court will consider it as opposition on behalf of the other named defendants, as the Jalili defendants are guarantors of the commercial lease executed by the corporation in which they are principals.

Plaintiff and defendant SHNS executed a ten-year commercial lease for a gallery located in Roosevelt Field Mall, Garden City, New York. The commercial lease was executed on June 10, 2002, and was signed by defendant Bashir Jalili. On or about May 10, 2002, the Jalili defendants each signed a personal guaranty of SHNS's obligations under the commercial lease, limited to "the amount equal to the total of Fixed Rent, Additional Rent and all other sums and charges which would have been due from Tenant to Landlord pursuant to the lease for a period of one (1) year following Tenant's default."

The terms of the lease and Guaranty also provide that the parties thereto agree to pay all expenses incurred by plaintiff in the enforcement of the covenants and agreements contained in the lease and Guaranty, including attorney's fees.

Defendant SHNS is alleged to have defaulted in its rent payments beginning on March 1, 2010. As a result of SHNS's default, plaintiff obtained from the Nassau County District Court, First District Civil (Fairgrieve, J.), a Warrant for Non-Payment against SNHS, dated December 17, 2010. The Warrant commanded plaintiff to remove SHNS from the premises it occupied at the Roosevelt Field Mall, and plaintiff was put in full possession thereof.

In their verified answer to this action, defendants admit that SHNS is a New York corporation with its principal office located at an address in Massapequa, that Rogin Jalili is the vice president of defendant SHNS, and that Bashir Jalili is the president of SHNS. Defendants further admit that plaintiff and SHNS executed the lease for particular premises located in the mall, and that the Jalili defendants executed the Guaranty. According to the terms of the lease, to which defendants agreed, there is due a minimum annual rent, plus additional monthly charges, including common area maintenance, trash removal, sprinkler charges, and media and promotion charges.

Defendants generally deny plaintiff's allegations regarding SHNS's failure to pay rent since March 1, 2010, and the amounts alleged to be due and owing pursuant to the lease and Guaranty. Defendants also assert seven affirmative defenses in their answer, including that the amount demanded in the complaint is inaccurate and inflated, that defendants have not been given credit for their security deposit, and that the action is barred by the doctrines of unclean hands and estoppel.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue

as to any material fact. (*Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the defendants (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

Plaintiff's causes of action sound in breach of contract, the contracts in this case being the lease and Guaranty. As such, plaintiff must establish its *prima facie* entitlement to summary judgment by providing evidence in admissible form of the existence of a contract between the parties, plaintiff's performance and defendants' alleged breach. (*Furia v. Furia*, 116 A.D.2d 694, 498 N.Y.S.2d 12 [2d Dept., 1986]).

"A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement (citations omitted). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (citations omitted)" (*Johnston v. MGM Emerald Enterprises, Inc.*, 69 A.D.3d 674, 677, 893 N.Y.S.2d 176 [2d Dept., 2010]).

In view of the fact that eviction terminates the landlord-tenant relationship, a landlord is ordinarily precluded from seeking rent after the eviction, unless the lease specifically provides that the tenant remains liable for rent following eviction (*Johnston*, 69 A.D.3d at 676).

Furthermore, where there is neither a special relationship between the parties, or a statutory prohibition, or any overriding public policy, a clear contractual provision in a guaranty limiting damages is enforceable (*Schietinger v. Tauscher Cronacher Professional Engineers, P.C.*, 40 A.D.3d 954, 838 N.Y.S.2d 95 [2d Dept., 2007]).

In support of its motion, plaintiff has submitted, *inter alia*, the lease, Guaranty, and the lower court's Warrant for Non-Payment establishing that SHNS has defaulted in its rental payments. Plaintiff is not seeking to nullify the limitation on damages contained in the Guaranty as it pertains to the Jalili defendants, and this Court finds no reason, as outlined above, to strike such a clear contractual provision.

The plain reading of the lease and Guaranty establish defendant SHNS's liability pursuant to the lease, and the Jalili defendants' liability pursuant to the Guaranty, which is

limited to one year's worth of rent and various other charges. Moreover, defendants admit executing the lease and the Guaranty, and they do not deny that rent is due and owing to plaintiff. Instead, defendants assert in their opposition papers that the monies alleged to be due under the lease are "inflated, inaccurate, [and] fail[] to account for Defendants' security deposit . . ." Thus, plaintiff has established its entitlement to summary judgment as a matter of law with respect to the issue of defendants' breach of the lease and Guaranty.

Defendants' bare assertions of the doctrines of unclean hands and estoppel, without more, fail to raise a triable issue of fact with respect to their breach of the lease and Guaranty. Defendants utterly fail to assert any facts with respect to either one or both of those defenses in their opposition papers.

Plaintiff's motion for summary judgment is granted to the extent that the defendants are liable to plaintiff for breach of the lease and Guaranty.

As to the issue of the calculation of damages, the Court notes that plaintiff has requested an inquest to determine those amounts as they relate to each of the defendants.

Defendants are claiming that their security deposit should be credited toward the outstanding monies owed.

The Court also notes that, although the damages are limited to "the amount equal to the total of Fixed Rent, Additional Rent and all other sums and charges which would have been due from Tenant to Landlord pursuant to the lease for a period of one (1) year following Tenant's default" with respect to the Jalili defendants, plaintiff's calculations contained in its Exhibit F raise an issue of fact. Based upon a review of the spreadsheet constituting Exhibit F, a charge of \$26,087.72 is included in the total amount owed. As that sum is part of a "running total" that apparently accrued prior to March 1, 2010, there is a question of fact as to whether that amount should be included in the total amount of \$206,923.81 allegedly due and owing from the Jalili defendants.²

There is also a question of fact with respect to plaintiff's "net present value calculation" of amounts allegedly owed by defendant SHNS contained in its Exhibit H. Based on its submissions, plaintiff has not adequately explained how it has arrived at the sum of \$459,820.41.

²The complaint requests damages from the Jalili defendants in the amount of \$205,326.24, raising a further issue of fact to be determined at an inquest on damages.

Thus, the Court grants plaintiff's request for an inquest as to the issue of the calculation of damages.

Subject to the approval of the Justice there presiding and provided a note of issue has been filed at least ten (10) days prior thereto, this matter shall appear on the calendar of CCP for an Inquest on 3rd of August, 2011, at 9:30 a.m.

A copy of this order shall be served on the Calendar Clerk and accompany the note of issue when filed. The failure to file a note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

The Court further directs the parties to resolve the discrepancy in the spelling of Ms. Jalili's first name, in an expeditious manner, without resort to motion practice.³

The foregoing constitutes the Order of this Court.

Dated: June 15, 2011
Mineola, N.Y.

Karen V. Murphy
J.S.C.
ENTERED
JUN 20 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

³The complaint lists her name as being spelled "Rogin," but her verified answer spells her name as "Roqia."