

Relyea French, Ltd. v Spagnolo

2011 NY Slip Op 32709(U)

October 13, 2011

Supreme Court, New York County

Docket Number: 107127/10

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

RELYEA FRENCH, LTD.,
Plaintiff,

Index No.: 107127/10

Motion Date: 07/26/11

- v -

Motion Seq. No.: 01

ALEX SPAGNOLO, Individually and d/b/a
LIRA STONEWORKS, INC., and LIRA
STONEWORKS. INC.,
Defendants.

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1

2

3

FILED

Cross-Motion: Yes No

OCT 19 2011

Upon the foregoing papers,

Plaintiff moves, pursuant to CPLR 3212, for summary judgment against defendants, jointly and severally, for the sum certain set forth in the complaint of \$374,775.57, plus interest from November 30, 2009. At oral argument on this motion, held on June 7, 2011, the court denied that branch of plaintiff's motion seeking summary judgment as against the individual defendant, Alex Spagnolo and upon a search of the record granted summary judgment in favor of the individual defendant dismissing the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

complaint as against him.¹

Plaintiff, as landlord, and Lira Stoneworks, Inc. (Lira), as tenant, entered into a commercial lease commencing on January 1, 2008, and ending on December 31, 2012. After Lira defaulted on the rent due in May of 2009, plaintiff instituted a commercial nonpayment proceeding in September of 2009, which was settled by stipulation, dated November 19, 2009. The stipulation stated:

Respondents hereby give possession forthwith to Petitioner. Keys to be 'overnighted' to petitioner's attorney. Claims for monies due and defenses are reserved (in a plenary action) and discontinued herein w/o prejudice.

After plaintiff recovered possession, it subsequently relet the premises, and is now seeking the amount due pursuant to the lease with Lira, mitigated by the rent that it received from the subsequent commercial tenant. Plaintiff also provides evidence that it continued to send invoices to Lira after it recovered possession.

In opposition to the instant motion, Lira claims that it abandoned possession to plaintiff and that plaintiff thereafter converted the premises to its own use by reletting the property without notifying Lira of its intention to do so, thereby relieving Lira of any further rent obligations. In addition,

¹ The court relied on PNC Capital Recovery v Mechanical Parking Systems, Inc (283 AD2d 268 [1st Dept 2001]), Salzman Sign Co. v Beck, 10 NY2d 63, 67 (1961) and Newman v Berkowitz (50 AD3d 479 [1st Dept 2008]) in reaching this determination.

Lira points out that the total amount allegedly due, according to the invoices attached to the motion papers, equals \$47,788.90, not the sum claimed in the notice of motion. Lira contends that the amount claimed includes all future rent due but, because the lease did not have an acceleration clause, plaintiff's damages would be limited only to the amount allegedly owing at the time the present action was commenced.

Paragraph 16 of the lease states, in pertinent part:

Then, upon the happening of any one or more of such events of default and the expiration of the applicable period to cure the default, Landlord may, without further notice to Tenant and without further demand for Rent due or for the observance or performance of any of said terms, conditions or agreements, elect to do one or more of the following: . . . (z) exercise any other right or remedy available to the Landlord at law or equity. In the event Landlord re-enters the Premises and removes Tenant (if Tenant is still in possession) from the Premises, regardless of whether or not Landlord shall have terminated this Lease, Tenant will nevertheless remain liable for all Rent which may then be due and which shall thereafter become due for the balance of the Term, reduced, however, by any sums received by the Landlord upon any reletting of any portion of the Premises during the term. Landlord shall make every reasonable effort to mitigate such loss by reletting the Premises upon reasonable terms as soon as reasonably possible thereafter. In no event shall Landlord be entitled to any acceleration of any portion of the Rent. In addition, Tenant shall be responsible for all reasonable costs, fees and expenses (including reasonable attorneys' fees) incurred by Landlord in pursuit of its remedies hereunder.

In reply, plaintiff states that the tenant to whom it relet the premises vacated the premises on or about October 29, 2010, and, upon information and belief, has left the country.

Therefore, asserts plaintiff, Lira is still responsible for the remainder of its lease obligations, since its mitigation is limited to the amount it actually received from the subsequent tenant. Lira has deducted that amount from the total claimed.

However, plaintiff states that, should the court agree that, at present, it is not entitled to the rent for the full term of the lease left outstanding, both parties are in agreement that plaintiff should be entitled to the amount of rent due and owing up to the present (January of 2011 at the time of the filing of the opposition), plus attorneys' fees, less the amount of rent received in mitigation, bringing the total due to \$157,675.57.

Plaintiff maintains that Lira has presented no valid defense to its claims.²

Lira has submitted a sur-reply without leave of court, which the court will not consider.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent

²It is noted that, in the papers, both sides argued about the liability of the individual defendant but, since that claim has already been disposed of, those arguments are not incorporated into this decision.

to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006); see Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 (1978).

That portion of plaintiff's motion seeking summary judgment as against Lira is granted on the issue of liability only.

The surrender of a lease may be accomplished by the parties' express agreement or impliedly by operation of law. A surrender by agreement requires that the landlord accept the premises and waive its right to recover damages pursuant to the lease. Bank of America Securities LLC v Solow Building Company II, L.L.C., 77 AD3d 533 (1st Dept 2010).

A surrender by operation of law occurs when the parties to a lease do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated. A surrender by operation of law is inferred from the parties' conduct, where not only must the tenant abandon the premises, but the landlord must accept the premises as a surrender.

Ford Coyle Properties, Inc. v 3029 Avenue V Realty, LLC, 63 AD3d 782, 782 (2d Dept 2009) (internal quotation marks and citation omitted); Stahl Associates Co. v Mapes, 111 AD2d 626 (1st Dept 1985).

In the case at bar, the parties' stipulation, which concluded the summary proceeding, did not act as a surrender of the premises.

The record herein, as well as the stipulation itself, does not contain any facts to indicate that the parties manifestly intended the stipulation to constitute a surrender and acceptance of the premises or that it terminated plaintiff['s] rights to recover damages under the lease. Neither in the stipulation nor in the record is there any clear and unambiguous waiver by plaintiff[] of [its] rights to recover under the terms of the lease, regardless of the termination of the landlord-tenant relationship itself. Inasmuch as the parties clearly contracted to make defendant liable for damages following termination, the lease provides that defendant shall be liable for rent after eviction, and that provision is enforceable.

Ring v The Printmaking Workshop, Inc., 70 AD3d 480, 480-481 (1st Dept 2010) (internal citations omitted).

The stipulation clearly states that plaintiff did not thereby waive its rights to recover damages under the terms of the lease, and its retention of the keys does not constitute an act of accepting a surrender. Ford Coyle Properties, Inc. v 3029 Avenue V Realty, LLC, 63 AD3d 782, supra. Although eviction proceedings generally terminate the landlord-tenant relationship, precluding a landlord from seeking rent after eviction, when the lease provides otherwise, as in the instant matter, the tenant will remain liable for rent due and owing. Johnston v MGM Emerald Enterprises, Inc., 69 AD3d 674 (2d Dept 2010).

Since the lease herein provides that Lira will remain liable for rent after default, and the stipulation specifically reserves

plaintiff's rights to seek damages, there has been no surrender by agreement.

Lira contends that plaintiff's act of reletting the premises without notifying it of its intention to do so on behalf of Lira constitutes an act of surrender by operation of law. In support of this position, Lira cites to Holy Properties Limited, L.P. v Kenneth Cole Productions, Inc. (87 NY2d 130, 133-134 [1995] [internal citations omitted]), which states that, once a tenant abandons a premises prior to the expiration of a lease,

the landlord [has] three options: (1) it could do nothing and collect the full rent due under the lease, (2) it could accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the tenant's benefit. If the landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and reletting and then to pay the tenant's rent obligation.

However, pursuant to paragraph 16 of the lease, quoted above, Lira agreed that, upon its default, plaintiff had the automatic right to relet the premises to mitigate Lira's damages.

Therefore, under these circumstances, no additional notice was required, and plaintiff's act of reletting constitutes its contractual obligation to use reasonable efforts to mitigate Lira's damages.

As a consequence of the foregoing, the court concludes that there has been no surrender by agreement or operation of law,

thereby entitling plaintiff to seek the rent due under the lease from Lira.

However, plaintiff is not entitled to the full rent due under the lease from the time of Lira's default until the lease's termination. "[B]ecause the lease in question does not contain an acceleration clause, the defendant[is] not liable to the plaintiff landlord . . . for any rent deficiency that [has] not yet accrued." Runfola v Cavagnaro, 78 AD3d 1035, 1035 (2d Dept 2010); Barr v Country Motor Car Group, Inc., 15 AD3d 985 (4th Dept 2005).

Based on the foregoing, plaintiff's motion is granted with respect to liability only, and the issue of damages is referred to a Special Referee to hear and report on the amount of rent due to date, plus the amount of reasonable attorneys' fees to which plaintiff is entitled.

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion seeking summary judgment as against Alex Spagnolo in his individual capacity is denied, as previously determined at oral argument; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment as against Lira Stoneworks, Inc. is granted with regard to liability; and it is further

ORDERED that the issue of rent due and reasonable attorneys' fees is referred to a Special Referee to hear and report with recommendations, except that in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,³ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee Part (Part 50R) for the earliest convenient date.

³ Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

This is the decision and order of the court.

Dated: October 13, 2011

ENTER:

~~Debra A. James~~
J.S.C.

DEBRA A. JAMES

FILED

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**NEW YORK
COUNTY CLERK'S OFFICE**