

Joralemon Assoc., LLC v Barrett

2011 NY Slip Op 32713(U)

October 14, 2011

Supreme Court, New York County

Docket Number: 112982/10

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

SALIANN SCARPULLA

PRESENT: _____

PART 19

Index Number : 113982/2010

JORALEMON ASSOCIATES LLC

vs

BARRETT, JANE N.

Sequence Number : 001

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

DISMISS DEFENSES

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**motion and cross-motion are decided in accordance
with accompanying memorandum decision.**

FILED

OCT 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/14/11


SALIANN SCARPULLA, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
JORALEMON ASSOCIATES LLC,

Plaintiff,

- against-

Index No.: 112982/10
Submission Date: 07/20/11

JANE N. BARRETT and JANE N. BARRETT
ASSOCIATES LLC

Defendants.

----- X

For Plaintiff:
Harriet M. Polinsky, Esq.
377 Broadway
New York, NY 10013

For Defendants:
Tenenbaum & Berger LLP
26 Court Street, Penthouse
Brooklyn, NY 11242

Papers considered in review of this motion for summary judgment:

Notice of Motion	1
Aff in Support of Summary Judgment Motion	2
Notice of Cross Motion	3
Reply Aff.	4
Aff in Opposition to Defendant's Motion	5

FILED

OCT 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for lost rent and legal fees, plaintiff Joralemon Associates LLC ("Joralemon") moves for summary judgment pursuant to CPLR 3212 on its complaint against defendants Jane N. Barrett ("Barrett") and Jane N. Barrett, Associates LLC ("Defendant LLC") (collectively "Defendants"). Joralemon also moves pursuant to CPLR 3211(b) to strike Defendants' affirmative defenses. Defendants cross move pursuant to CPLR 3211(a)(1), (3) and 3212 to dismiss the complaint.

This action arises from Defendant LLC's alleged default on a lease agreement for premises located at 186 Joralemon Street in Brooklyn. On January 9, 2007, Defendant LLC entered into the lease, valid from February 1, 2007 to February 28, 2017, to use the premises as a law office. Joseph P. Day Realty Corp. ("JPD") prepared and signed the lease on behalf of Joralemon. Joralemon authorized JPD to manage the building's affairs, including preparing and signing leases as Joralemon's agent.

The 186 Joralemon Street lease listed the landlord as "Joseph P. Daly Realty Corp. as agent for 186 Joralemon Street." The parties do not dispute that no entity named "186 Joralemon Street" exists. In his affidavit, Robert J. Oliver, JPD's Senior Vice President, stated that the lease preparer inadvertently listed the property's address instead of "Joralemon Associates, LLC" as the landlord.

Pursuant to the lease, paragraph 18, the tenant would remain liable for rent unless the landlord released the tenant from the balance of its term. Paragraphs 19 and 54 stated that the tenant would be liable for all attorneys' fees the landlord incurred in enforcing the lease terms. Moreover, paragraph 72 in the lease rider stated that "[e]ach of the Principals agrees to be jointly and severally liable for all of the Tenant's obligations including payments and performances under the lease" Directly below this paragraph, Barrett signed her name and wrote her home address and social security number. Barrett is a principal of Defendant LLC.

In January 2008, Joralemon commenced a summary nonpayment proceeding against Defendant LLC, captioned *186 Joralemon Associates LLC v. Jane N. Barrett & Associates LLC*. In February 2008, Joralemon and Defendant LLC entered into a stipulation whereby Defendant LLC consented to the entry of final judgment for Joralemon in the sum of \$13,693.87 for all unpaid rent through March 31, 2008. The stipulation did not address whether Defendant LLC would be responsible for paying attorney's fees Joralemon incurred in the proceeding.

Defendants unilaterally vacated the 186 Joralemon Street premises in July 2009. Since then Joralemon has neither relet the premises nor released Joralemon from the balance of the lease's term. In January 2011, Joralemon commenced this action to recover \$75,487.07 in unpaid rent. This figure included rent owed under the 2008 stipulation and additional rent owed for August 2009 through October 2010. Joralemon also seeks compensation for \$11,085 in legal fees, costs and disbursements it allegedly incurred in the 2008 summary proceeding. The first complaint filed in this action listed 186 Joralemon Associates as the plaintiff. Joralemon subsequently filed an amended complaint listing its name as Joralemon Associates LLC.

Joralemon now moves for summary judgment pursuant to CPLR 3212 for \$117,595.86 in unpaid rent¹ and for a hearing to determine an attorney's fees award. Joralemon argues that the lease is valid and binding because Joralemon was permitted to

¹This figure includes only rent and additional rent for August 2009 through January 2011 and does not include any remaining payment under the 2008 stipulation.

act through its agent, JPD, when entering into the lease with Defendants. It maintains that the mistake in the landlord's name was only a typographical error. Joralemon further argues that because Barrett signed the lease and paragraph 72 stated that she, as a principal of Defendant LLC, would be personally liable, she is jointly and severally liable for damages under the lease. Joralemon also argues that the Court should strike Defendants' breach of warranty of habitability claim because this defense is not available in commercial lease disputes.

In opposition, Defendants cross-move for summary judgment, asserting that Joralemon does not have standing to sue because 186 Joralemon Street, not Joralemon Associates LLC, was the party to the lease. Defendants maintain that the claim against Barrett should be dismissed because she signed the lease in her capacity as Defendant LLC's principal and is therefore not individually liable. Defendants also argue that, in any event, Joralemon is not entitled to legal fees from the summary proceeding because it did not reserve its right to those fees in the 2008 stipulation.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68

N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Defendants do not contest Joralemon's calculation of obligations or payments under the lease. Thus, the only dispositive issue is whether the lease itself was valid.

Courts may under limited circumstances amend contract terms to carry out the parties' intentions. *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995). "However, such an approach is appropriate only in those limited instances where some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part." *Wallace*, 86 N.Y.2d at 548.

Because 186 Joralemon is a non-entity, enforcing the lease as written would render the contract meaningless. Thus, reformation to correct the landlord name is appropriate here. *See Cerberus Int'l, Ltd. v. BanTec, Inc.*, 16 A.D.3d 126, 126-27 (1st Dept. 2005) (holding that reformation was appropriate where a note's wording would result in junior note holders not receiving any payments under the note). Defendants argue that Oliver has no first-hand knowledge of the lease's execution and therefore, his affidavit is insufficient to support Joralemon's summary judgment motion. Though Oliver may not have been present when the parties signed the lease, he does have first hand knowledge of the dispositive issue here: the agency relationship between JPD and Joralemon and Joralemon's ownership interest in the premises. Therefore, his affidavit is sufficient to make a *prima facie* showing that the lease is enforceable.

Defendants also argue that Joralemon should be judicially estopped from arguing that Defendants defaulted under their payment obligations from the 2008 stipulation because Joralemon used 186 Joralemon LLC as its name in the summary proceeding. The estoppel doctrine does not apply here because Joralemon is not changing its position for its own benefit but simply fixing a pleading midescription that did not prejudice Defendants. *See Bianchi v. N.Y. State Div. Of Hous. & Comty. Renewal*, 5 A.D.3d 303, 304 (1st Dept. 2004).

Further, Barrett may not escape individual liability under the lease. Generally, corporate officers are not individually liable under contracts they sign on behalf of their organizations “unless there is clear and explicit evidence” of their intention to be personally liable. *Mencher v. Weiss*, 306 N.Y. 1, 4 (1953). The terms of this agreement/guarantee are undoubtedly clear. Barrett signed directly below paragraph 72, which states specifically that the principal signing the lease agrees to be jointly and severally liable for the lease obligations. *See Paribas Properties, Inc. v. Benson*, 146 A.D.2d 522, 525-26 (1st Dept. 1989). She also included her personal home address and social security number under the signature. Nowhere did she indicate that she was signing solely in a representative capacity. *See PNC Capital Recovery v. Mech. Parking Sys.*, 283 A.D.2d 268, 270 (1st Dept. 2001). Thus, Barrett is jointly and severally liable for Defendant LLC’s default.

However, because Joralemon did not reserve its claim for legal fees in the 2008 stipulation, it may not recover attorney fees incurred during that summary proceeding. Unless a party to a settlement stipulation reserves its right to sue for attorney's fees, it waives that right. *Gaisi v. Gaisi*, 48 A.D.3d 744, 745 (2nd Dept. 2008). *See also J.D. Realty Assoc. v. Shanley*, 288 A.D.2d 27, 28 (1st Dept. 2001). Thus, Joralemon may only recover for attorney's fees it incurred after resolving the summary nonpayment proceeding by stipulation.

Finally, this Court will strike Defendants' warranty of habitability defense because this defense is not available in the context of commercial leases. *See Azour, LLC v. Tax Sister, Inc.*, 29 Misc. 3d 29, 32 (App. Term 2nd Dept. 2010).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Joralemon Associates LLC's motion for summary judgment insofar as Defendants' liability for remaining payments due under the lease is granted, but in all other respects denied; and it is further

ORDERED that defendants Jane N. Barrett's and Jane N. Barrett, Associates LLC's cross-motion for summary judgment is denied; and it is further

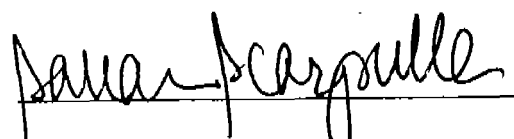
ORDERED that Joralemon Associates LLC shall file and serve a note of issue for trial on the issue of damages within thirty (30) days of the date of this order; and it is further

ORDERED that the Clerk is directed to place this matter on the appropriate calender for an assessment of damages.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 14, 2011

ENTER:


Saliann Scarpulla, J.S.C.

FILED
OCT 19 2011
NEW YORK
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