

**Seventh Ave. Fine Foods Corp. v Rod Baltimore
Music Co., Ltd.**

2011 NY Slip Op 32751(U)

October 11, 2011

Supreme Court, New York County

Docket Number: 600562/10

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

SEVENTH AVENUE FINE FOODS CORP.,

Plaintiff,

-against-

INDEX NO. 600562/10

MOTION SEQ. NO. 002

**ROD BALTIMORE MUSIC CO., LTD.,
JON BALTIMORE MUSIC CORP., and
JONATHAN BALTIMORE,**

Defendants.

The following papers, numbered 1-4 were considered on this motion for summary judgment and default judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits <u>(memo)</u> _____	<u>4</u>

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

BACKGROUND

Plaintiff Seventh Avenue Fine Foods Corp. (Plaintiff) commenced this action for an alleged breach of lease against defendants Rob Baltimore Music Co., Ltd. (RB Music), Jon Baltimore Music Corp. (JB Music), and Jonathan Baltimore (Baltimore) to recover unpaid rent and use and occupancy. Plaintiff was a commercial sublessee of the third floor, excluding two easterly rooms, in the building located at 719 Seventh Avenue, New York, New York (the Premises). RB Music was the sub-subtenant of the Premises pursuant to a written lease dated December 21, 1992 and amended May 1993 (Lease), between Great Location New York, Inc. (Great Location), Plaintiff's predecessor, and RB Music.

The Lease was extended by written agreement dated August 23, 2003 (Extended Lease) between Plaintiff and RB Music, expiring on August 31, 2008. Baltimore signed a limited guaranty (Guaranty),

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dated September 1, 2003, which was made part of the Extended Lease, to the benefit of Plaintiff. During the course of the Extended Lease, there was an alleged assignment from RB Music to JB Music¹. At the expiration of the Extended Lease, RB Music and JB Music held over and did not vacate the Premises until November 31, 2008.

Thereafter, Plaintiff commenced this breach of lease action seeking unpaid rent and use and occupancy, alleging that RB Music and JB Music only made sporadic partial payments of rent. Plaintiff now moves for summary judgment, pursuant to CPLR 3212, against all defendants and for a default judgment, pursuant to CPLR 3215, against RB Music.

DISCUSSION

Plaintiff alleges that RB Music and JB Music breached the Lease and Extended Lease by failing to pay the full amount of rent owed through August 31, 2008, the expiration of the Extended Lease. Plaintiff states that defendants are liable for \$32,000 in unpaid rent, \$16,882.59 in use and occupancy, and \$7,853.40 in attorneys' fees. Plaintiff further states that Baltimore personally guaranteed monies owed by RB Music as rent, additional rent, use and occupancy, and reasonable attorneys' fees through the date of surrender. Additionally, Plaintiff contends that a default judgment should be entered as against RB Music, as RB Music has failed to appear or answer the complaint, which was properly served.

To date, RB Music has failed to answer Plaintiff's complaint or appear in this action. Furthermore, RB Music has not submitted any opposition to Plaintiff's current motion. CPLR 3215 provides that "[w]hen a defendant has failed to appear, . . . the plaintiff may seek a default judgment against him. . . . The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305." Generally, New York

¹ The Court notes that no proof of such assignment is supplied in the moving papers.

courts favor resolution of actions on their merits rather than on default. *Picinic v Seatrain Lines, Inc.*, 117 AD2d 504, 508 (1st Dep't 1986). However, similar to the standard for vacating a default judgment, a party attempting to prevent a default judgment from being entered must demonstrate a reasonable excuse for the default and a meritorious defense to the action. *Wehringer v Brannigan*, 232 AD2d 206, 206 (1st Dep't 1996). At this juncture, RB Music has failed to put forth any reasonable excuse for the failure to appear or answer in this action, as RB Music has not opposed the motion for a default judgment. As such, Plaintiff's motion, for a default judgment against RB Music, is granted as to liability, with damages to be determined as detailed below.

Plaintiff also moves for summary judgment. The standards of summary judgment are well settled. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "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. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985) (internal citations omitted). Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility". *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dep't 1989). The court's role is "issue-finding, rather than issue-determination." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

In support of his motion, Plaintiff proffers, *inter alia*, a copy of the Lease, the Extended Lease, and the Guaranty. Plaintiff contends that this evidence demonstrates that RB Music and JB Music owed rent, use and occupancy, and attorneys' fees. Additionally, Plaintiff contends that Baltimore is personally liable for the amounts due pursuant to the Guaranty. Plaintiff states that no issues of fact exist to preclude summary judgment.

JB Music and Baltimore oppose the portion of Plaintiff's motion seeking summary judgment. Baltimore proffers his own affidavit, along with pictures of the Premises, arguing that triable issues of fact exist, in that Rob Baltimore was the sole owner of RB Music and that all the leases were made with RB Music, not JB Music or himself. Baltimore does not deny that he signed the Guaranty. However, he states that he did so because Great Locations agreed to do a substantial amount of work on the Premises to repair conditions. Baltimore claims that there were leaks in the Premises for years, making the Premises unusable. Baltimore contends that no work was done in the Premises and he was constructively evicted due to the conditions. Additionally, Baltimore states that he complained to Joon Park (Park), principal of Plaintiff, on numerous occasions about the leaks and other serious conditions in the Premises needing repair. Baltimore contends that Park orally agreed, on several occasions, that he did not have to pay rent until the leaks stopped. Additionally, Baltimore states that he was not credited for rent payments which he made in cash.

As stated above, "[f]ailure to make...[a prima facie showing of entitlement to judgment as a matter of law] requires the denial of the motion regardless of the sufficiency of the opposing papers." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). Here, as to Baltimore, Plaintiff has established entitlement to judgment as a matter of law. Specifically,

Plaintiff has established the existence of a written agreement with RB Music for the rental of the Premises in which RB Music agreed to pay monthly rent. Additionally, Plaintiff has shown, as a matter of law, that Baltimore signed a personal guaranty for rent, additional rent, and use and occupancy. In fact, Baltimore admits to signing the Guaranty. The plain language of the Guaranty states, in relevant part, that Baltimore “does hereby personally, unconditionally, and absolutely agree to guarantee all of the obligations of the Sub-Subtenant [, RB Music,] to the Sub-Sublandlord [, Plaintiff,] in the...Sub-Sublease [, Extended Lease].” When interpreting unambiguous contract provisions “matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument.” *See Chimart Assoc. v Paul*, 66 NY2d 570, 572-573 (1986).

As Plaintiff has shown entitlement to summary judgment with regard to Baltimore, the burden shifts to Baltimore to raise a triable issue of fact. Here, Baltimore has failed to provide any admissible evidence to raise an issue of fact as to liability based upon the Guaranty. The Guaranty is clear and unambiguous, stating that Baltimore guarantees the obligations of RB Music under the Extended Lease, including rent and use and occupancy. Baltimore only claims that repairs were needed in the Premises and that he and JB Music were constructively evicted. However, regardless of any alleged repairs needed in the Premises, the obligation to pay rent is unaffected. “[I]t is well settled that such breaches of covenant [to repair] by a landlord are breaches of an independent covenant which afford no excuse for a refusal or failure to pay rent.” *Baitzel v Rhineland and Rhineland*, 179 AD 735, 740-741 (1st Dep’t 1917). “In the absence of an express agreement to make repairs, the landlord in a commercial lease has no obligation to do so, and the tenant’s obligation to pay the rent is not affected by the landlord’s failure to repair.” *NYC Economic Development Corp. v Harborside Mini Storage, Inc.*, 819 NYS2d 211 (Civ Ct, Kings Cty 2006). Additionally, “in order to assert a defense of constructive eviction, the tenant must abandon the premises”. *The Gallery at Fulton Street, LLC v Wendnew LLC*, 30 AD3d 221, 221 (1st

Dep't 2006). Here, Baltimore does not allege that he abandoned the Premises or even a portion of the Premises, due to the alleged leaks. As such, Baltimore has failed to raise an issue of fact with regards to liability based upon the Guaranty. Thus, Plaintiff's motion, to the extent that it seeks summary judgment against Baltimore is granted as to liability.

However, with respect to JB Music, Plaintiff's proof is lacking. Aside from conclusory statements that JB Music is obligated to pay rent, no evidence has been provided to show JB Music's liability for the alleged unpaid rent. The Court notes that while Plaintiff claims there was an assignment of the Lease or Extended Lease from RB Music to JB Music, no proof of such alleged assignment has been submitted. Moreover, in opposition, Baltimore maintains that JB Music is not a party to the Lease or Extended Lease, thus raising issues of fact as to JB Music's liability for any alleged unpaid rent and use and occupancy. Accordingly, Plaintiff's motion, to the extent that it seeks summary judgment against JB Music, is denied.

While Plaintiff has established entitlement to a default judgment against RB Music and summary judgment as to defendant Baltimore with respect to liability, there are factual issues with respect to the claimed damages. In support of damages, Plaintiff submits an affidavit by Joon Park in which he merely claims that \$32,000 is owed in unpaid rent and \$16,882.59 is owed in unpaid use and occupancy, without any documentary proof such as an accounting or a rent ledger; nor is a detailed breakdown of the monies sought supplied. In opposition, Baltimore disputes such amounts by asserting that Plaintiff did not credit certain rental amounts paid in cash and that Park agreed Baltimore did not have to pay rent for a certain period of time. Drawing all reasonable inferences in favor of Baltimore and JB Music, there is an issue of fact as to the amount of damages.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment, is granted with regard to liability

against defendant RB Music; it is further

ORDERED that plaintiff's motion for summary judgment, is granted with regard to liability against Baltimore; it is further

ORDERED that the remainder of plaintiff's motion is denied; and it is further

ORDERED that this action, as to RB Music and Baltimore, is referred to a Special Referee who shall hear and determine the issue of damages pursuant to CPLR 4317; and it is further

ORDERED that the claims against remaining defendant is severed and continues and the parties are directed to complete discovery expeditiously and file a note of issue on or before December 21, 2011; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties and upon the Clerk of the Judicial Support Office to arrange a calendar date for the reference to a Special Referee with notice of entry.

This is the decision and order of the court.

Dated: 10/12/11


DORIS LING-COHAN, J.S.C.

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Check if Appropriate: DO NOT POST

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