

**South St. Seaport Ltd. Partnership v Craft Mkt. Am.,
Inc.**

2011 NY Slip Op 33032(U)

November 15, 2011

Supreme Court, New York County

Docket Number: 101586/11

Judge: Eileen A. Rakower

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

PRESENT: ~~WILLIAM A. RAKOWER~~
Justice

PART 15

SOUTH STREET Seaport, LP

INDEX NO. 101586/11

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Craft Market America, et al

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

NOV 18 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/16/11


~~WILLIAM A. RAKOWER~~ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK -
COUNTY OF NEW YORK: PART 15

-----X
SOUTH STREET SEAPORT LIMITED PARTNERSHIP,

Plaintiff,

Index No. 101586/11

Seq No.: 001

- against -

CRAFT MARKET AMERICA, INC. d/b/a
American Craftsman and RICHARD ROTHBARD,

Defendants.

Decision and Order
FILED

NOV 19 2011

-----X
HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff brings this action against defendants Craft Market America, Inc. d/b/a American Craftsman ("Craft") and Richard Rothbard seeking to recover unpaid rent, enforce a guaranty, and to recover attorneys fees¹. Plaintiff now moves for summary judgment pursuant to CPLR 3212 against Rothbard, and is seeking an Order declaring Craft in default pursuant to CPLR §3215. Craft and Rothbard submit opposition papers².

On April 12, 2010, plaintiff entered into a commercial lease agreement with Craft for a term of three years. Rothbard guaranteed the lease for payment of up to six months' rent and extra charges. The monthly rents agreed upon for the 2,808 square foot space were: for the first year, \$65.00 per square foot, for the second year, \$67.60 per square foot, and for the third year, \$70.30 per square foot.

Plaintiff alleges that Craft defaulted on its November 2010 rent and extra charges. On November 29 and November 30, 2010, plaintiff served Craft with a three day notice to pay rent or quit the property. Thereafter a nonpayment proceeding was commenced against Craft in Civil Court wherein plaintiff sought a judgment in the

¹Plaintiff now waives the attorneys fees.

²The papers were filed after the motion was marked fully submitted.

amount of \$16,922.47. Pending that proceeding, Craft vacated the premises peacefully and the petition was withdrawn without prejudice.

Plaintiff, in support of its motion, submits: the affidavit of Michael Piazzola, Senior General Manager of Seaport Marketplace LLC, plaintiff's general partner; the summons; an affidavit of service showing service upon Craft on February 11, 2011; a bill of costs; the *pro se* answer of Rothbard; an amended summons and complaint; an affidavit of service showing service of the amended summons and complaint on March 16, 2011; Rothbard's *pro se* answer to the amended summons and complaint; an affidavit of additional mailing, dated April 28, 2011; a copy of the lease agreement; and a copy of the notice to pay rent and notice to quit.

Plaintiff asserts that, as Craft has failed to answer or otherwise appear, it is in default. Further, Rothbard, who answered both the complaint and the amended complaint, is responsible for six months of unpaid rent and extra charges, pursuant to the guaranty agreement.

Defendants submit their attorney's affirmation in opposition. Counsel states that Craft did not serve its answer because Rothbard was involved in settlement discussions with plaintiff. Counsel asserts, in opposition to the summary judgment motion, that "the subject premises experienced significant leakage and Defendants sustained significant water damage." Counsel contends that, pursuant to the lease, such damage gave defendants the option to terminate the lease.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Initially, in light of the strong public policy in this State to dispose of cases on

* 4]

their merits, plaintiff's motion for a default judgment as against Craft is denied, and Craft's proposed answer, in the form appended to its moving papers, is deemed served(see; CPLR §3012(d); and *Rodgers v. East Tremont Heights Housing Development Fund Corp.*, 69 AD2d 510[1st Dept. 2010]).

It is undisputed that Craft failed to pay its November 2010 rent and vacated the premises prior to the expiration of its lease, as averred to in Mr. Piazzola's affidavit. Upon a default, §17.3 of the lease entitles plaintiff to collect:

an amount equal to the Rental which, but for termination of [the] Lease, would have become due during the remainder of the Term, less the amount of Rental, if any, which Landlord shall receive during such period from others to whom the Premises may be rented . . .

Mr. Piazzola states that, after accounting for payments made by the replacement tenant, Craft owes a total of \$459,728 22. The above constitutes prima facie evidence of Craft's liability. (*East Main Street Realty Corp. v. Bernstein*, 282 AD2d 428[2nd Dept. 2001]).

Further, "on a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." (*City of New York v. Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept., 1998]). Plaintiff has submitted evidence of the debt, and the guaranty signed by Rothbard unconditionally obligates him to "perform the covenants and obligations" of the lease in the event of Craft's default.

In opposition, defendants merely submit their attorneys' affirmation, wherein he claims that the premises sustained significant water damage. However, defendants fail to submit evidence of the existence of any water damage, let alone an affidavit from someone with knowledge attesting to the cause and extent of such damage.

Even if defendants had submitted evidence of water damage, the lease only permits the tenant to terminate if the premises becomes "untenantable" for a period exceeding 20 days, or if the landlord fails to repair damage within 18 months. In both instances, termination is conditioned upon the tenant providing notice. Here, defendants, without alleging they gave such notification, simply stopped paying rent

in November. The water damage was allegedly sustained in the "Spring and summer of 2010."

Wherefore it is hereby

ORDERED that the motion for a default judgment as against Craft Market America, Inc. is denied; and it is further

ORDERED that the motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant Richard Rothbard in the sum of \$90,779.22, plus 9% interest from the date of entry of judgment until the date the judgment is paid; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against Craft Market America, Inc., in the amount of \$459,728.2, plus 9% interest from the date of entry of judgment until the date the judgment is paid, plus costs and disbursements, as calculated by the Clerk.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: November 15, 2011



EILEEN A. RAKOWER, J.S.C

FILED

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COUNTY CLERK'S OFFICE