

Joseph P. Day Realty Corp. v Srinivasan

2012 NY Slip Op 31794(U)

July 2, 2012

Sup Ct, New York County

Docket Number: 106159/11

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C.
Justice

PART 11

Index Number : 106159/2011
JOSEPH P. DAY REALTY CORP.
vs.
SPINIVASAN, KULANDAI
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *granted in accordance with the annexed decision and order.*

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

FILED

JUL 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 2, 2012

J.S.C.
HON. JOAN A. MADDEN

- 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: PART 11

-----X
JOSEPH P. DAY REALTY CORP.,

INDEX NO. 106159/11

Plaintiff,

-against-

KULANDAI SRINIVASAN,

Defendant.
-----X

JOAN A. MADDEN, J.:

FILED

JUL 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

This action to recover rent due under a commercial lease guaranteed by defendant.

Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment in the amount of \$52,241,54, and dismissal of defendant's counterclaim for return of the tenant's security deposit. Defendant opposes the motion.

The following facts are not disputed unless otherwise noted. On May 16, 2007, plaintiff Joseph P. Day Realty Corp. "agent for 44 Court Street, LLC," as "Owner," and SRI Consulting and Expediting, a "New York Corporation," as "Tenant," executed a Standard Office Lease for premises located at 44 Court Street, Suite 1217, Brooklyn, New York. The lease provides for a ten-year term commencing on May 1, 2007 and ending July 31, 2017. Defendant Srinivasan signed the lease in his capacity as the principal of the tenant corporation. In accordance with Article 71 of the lease, defendant Srinivasan, as the "principal signing the lease," personally guaranteed the tenant's obligations under the lease, including payments, "until the date that there shall have been delivered to the Owner a *surrender instrument* confirming that the leased premises are vacant, broom clean, free of occupants and free of Tenant and any other party

claiming rights of occupancy. Upon delivery of such an instrument and provided that it is accurate, the obligations of the Principals shall cease as to any future obligations of the tenant under the lease arising after the delivery date” [emphasis added].

On December 26, 2009, the tenant moved out of the premises. It is not disputed that the tenant paid rent up through and including the month of December 2009, and that no rent has paid since that time. It is also undisputed that the tenant did not provide plaintiff with a “surrender instrument” in accordance with Article 71 of the lease. Plaintiff thereafter commenced a summary holdover proceeding in Civil Court, and secured a final judgment of possession upon the tenant’s default. On or about May 24, 2010, the City Marshall took possession of the premises.

On May 26, 2011, plaintiff commenced the instant action against Srinivasan to enforce the guaranty. The first cause of action alleges that the “premises have not been relet to date to any other tenant,” and that base rent in the total amount \$52,241.54 is currently due and owing for the months of January 2010 through May 2011. The second cause of action seeks an award of reasonable attorney’s fees.

Defendant appeared and answered, asserting affirmative defenses of fraud and misrepresentation, “plaintiff by its actions has waived the condition in paragraph 71 of the lease,” defendant “has timely surrendered possession and paid all outstanding rent that was due when it vacated the premises,” breach of contract, failure to state a cause of action, accord and satisfaction, and unclean hands. The answer also includes a First Counterclaim alleging that defendant “personally surrendered possession and keys to the leased premises to the building super on December 26, 2009,” and a Second Counterclaim for return of the tenant’s security

deposit in the amount of \$2,750.33.

Plaintiff is now moving for summary judgment, asserting that defendant guarantor has “no genuine defense to its action for back rent,” and that defendant’s counterclaim “for recovery of the security deposit is without merit and fatally premature.” In support of the motion, plaintiff submits an affidavit of its vice president and building manager, Robert Oliver, along with the pleadings and copies of the lease and other documents. In opposing the motion, defendant submits an affidavit and an attorney’s affirmation.

As the proponent of a motion for summary judgment, plaintiff bears the initial burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact from the case. See Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form establishing the existence of a material issue of fact requiring a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

On a motion for summary judgment to enforce a written guaranty, “the creditor needs to prove an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” Davimos v. Halle, 35 AD3d 270 (1st Dept 2006); accord Kensington House Co. v. Oram, 293 AD2d 304 (1st Dept 2002); City of New York v. Clarose Cinema Corp., 256 AD2d 69 (1st Dept 1998). Moreover, a guaranty must be “interpreted in the strictest manner.” White Rose Food v. Saleh, 99 NY2d 589 (2003). The terms of a guaranty are to be strictly construed in the guarantor’s favor, and the guarantor “should not be bound beyond the express terms of his guarantee.” 665-75 Eleventh Avenue Realty Corp v. Schlanger, 265

AD2d 270 (1st Dept 1999) (quoting Wesselman v. Engle Co, 309 NY 27, 30 [1955]).

Here, based on the affidavit of plaintiff's vice president and building manager, Robert Oliver, and the supporting documents, plaintiff has established prima facie entitlement to judgment as a matter of law on defendant's personal guaranty. By the clear and express term of Article 71 of the lease, defendant unconditionally guaranteed "all of the Tenant's obligations including payments and performances under the lease until the date that there shall have been delivered to the Owner a surrender instrument confirming that the leased premises are vacant, broom clean, free of occupants, free of Tenant and any other party claiming rights of occupancy." Article 71 further provides that "[u]pon delivery of such an instrument and provided that it is accurate, the obligations of the Principals shall cease as to any future obligations of the tenant under the lease arising after the delivery date." Thus, while Article 71 releases the guarantor from continuing liability under the lease, such release is explicitly conditioned on the tenant's delivery of a "surrender instrument." Defendant concedes that plaintiff was never provided with a surrender instrument.

Notwithstanding such concession, defendant argues that his obligations under the guaranty ceased when he "surrendered possession of the premises" on December 26, 2009, by moving out and delivering the keys to the "building 'super,'" as "instructed by plaintiff." Specifically, in his affidavit, defendant states that in September 2009 he "met" and "informed Plaintiff" that he would be vacating the premises before December 30, 2009," and "Plaintiff acknowledged this request and instructed me to contact the building 'super' and to cooperate with the super to show the leased premises to potential tenants, which I agreed to do." Defendant states that he "immediately. . . met with the building 'super' . . . [who] understood that I would

be moving out of the building and surrendering possession” and “he told me that I would [sic] leave the keys with him.” Defendant states that “under the direction of the plaintiff I personally surrendered possession and keys to the leased premises to the building ‘super’ on December 26, 2009.”¹

Defendant’s argument and allegations are unavailing in light of the unambiguous language in the guaranty requiring the tenant to deliver an actual surrender instrument confirming that the “premises are vacant, broom clean, free of occupants, free of Tenant and any other party claiming rights of occupancy.” Since it is undisputed that plaintiff was never provided with a such an instrument, a “surrender” within the meaning of the guaranty did not occur, and defendant’s liability under the guaranty is continuing. See 300 Park Avenue, Inc. v. Café 49, Inc., 89 AD3d 634 (1st Dept 2011). In 300 Park Avenue, Inc. v. Café 49, Inc., the guarantor unconditionally guaranteed payment of rent during the lease “term” and the guaranty provided that the “term” would end on the day after the tenant vacated the premises, removed substantially all of its property, and delivered possession “together with all keys thereto.” The First Department held that the guarantor was liable for damages for the full term of the lease, as it was undisputed that the “last condition was never satisfied.” Here, as in 300 Park Avenue, Inc. v. Café 49, Inc., the terms of the guaranty are unambiguous and it is undisputed that defendant guarantor failed to satisfy the conditions as required by the guaranty necessary to release him from liability.

Plaintiff, therefore, is entitled to judgment as a matter of law against defendant in the sum

¹In contrast to defendant’s assertion, plaintiff submits a copy of the superintendent’s “Move In/Move Out Ticket” for the premises, which lists “12/26/09” as the “date moved out,” but notes “no keys to super.”

of \$52,241.54, the amount of rent due and owing under the lease, for the months of January 2010 through May 2011.

The balance of plaintiff's motion for an order dismissing defendant's counterclaim for return of the tenant's security deposit, is granted, as the tenant is not a party to this action. Such dismissal is without prejudice to the proper party asserting such claim in an appropriate proceeding.

Since plaintiff's notice of motion and motion papers are silent as to its claim for attorneys' fees, such claim is deemed waived and dismissed.

Accordingly, it is

ORDERED that plaintiff's motion is granted and the Clerk is directed to enter judgment in favor of plaintiff Joseph P. Day Realty Corp. and against defendant Kulandai Srinivasan, in the amount of \$52,241.54, together with interest from the commencement of this action, as computed by the Clerk, and costs and disbursements as taxed by the Clerk upon an appropriate bill of costs; and it is further

ORDERED that defendant's counterclaim for return of the tenant's security deposit is dismissed without prejudice, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's second cause of action for attorney's fees is dismissed and the Clerk is directed to enter judgment accordingly.

DATED: *July 10*, 2012

FILED ENTER:

FILED

JUL 10 2012

JUL 10 2012

NEW YORK COUNTY CLERK'S OFFICE

J.S.C.

COUNTY CLERK'S OFFICE
6