

John Adams Owners, Inc. v Wagner

2012 NY Slip Op 31989(U)

July 23, 2012

Supreme Court, New York County

Docket Number: 106275/11

Judge: Donna M. Mills

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT : DONNA M. MILLS
Justice

PART 58

THE JOHN ADAMS OWNERS, INC.,

INDEX No. 106275/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

RICHARD WAGNER and FRANCK CORNIQUET,
Defendants.

MOTION CAL No. _____

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

PAPERS NUMBERED

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

1

Answering Affidavits- Exhibits _____

2

Replying Affidavits _____

3

CROSS-MOTION: _____ YES NO

FILED

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

JUL 27 2012

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION
NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/23/12

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

FILED

-----x
THE JOHN ADAMS OWNERS, INC.,

JUL 27 2012

Plaintiff,

NEW YORK
COUNTY CLERK'S OFFICE
Index No.

-against-

RICHARD WAGNER and FRANCK CORNIQUET,

106275/11

Defendants.
-----x

DONNA MILLS, J. :

Plaintiff moves for summary judgment, an order dismissing the first through ninth affirmative defenses in defendant Franck Corniquet's (Corniquet) answer, and an order scheduling a hearing to determine attorney's fees and other costs upon the granting of plaintiff's motion.

Plaintiff, a commercial landlord, is seeking the recovery of overdue rent and additional costs. The defendants in this suit are guarantors of payment on behalf of non-party tenant Sohalia 485 Avenue of the Americas d/b/a Sohalia Hair Salon (Sohalia). Defendants allegedly guaranteed Sohalia's performance under the lease between plaintiff and Sohalia. The lease was for a term commencing October 16, 2006 through October 15, 2016.

On June 9, 2011, Sohalia was served with a rent demand by personal service to Corniquet. Upon Sohalia's failure to make payment, plaintiff brought a nonpayment proceeding in Civil Court, New York County, under Index No. L & T 71698/11. Sohalia interposed its answer, which alleged five affirmative answers. Plaintiff thereafter moved for summary judgment and an order dismissing said defenses. That motion was granted by the Civil Court judge.

Plaintiff is seeking payment in this action for all rent and additional rent due through and including July 12, 2011, the date when Sohalia surrendered possession of the premises. Plaintiff asserts that the guaranty provides for payment of all such rent. To date, defendant Richard Wagner has not answered the complaint. Corniquet has answered with nine affirmative defenses.

Plaintiff moves for summary judgment on the ground that the guaranty clearly and unconditionally provides plaintiff with the right to seek relief from Corniquet, and that there are no material factual issues in dispute here. In addition, plaintiff seeks an order dismissing each of Corniquet's affirmative defenses.

Plaintiff's main argument for dismissal is that the defenses are not pleaded with particularity and fail to state a defense. The first affirmative defense is that plaintiff lacks standing to sue. Plaintiff argues that this defense was raised by its tenant in Civil Court and thereafter dismissed. Plaintiff states that the guaranty at bar provides plaintiff with proper standing. The second affirmative defense states that plaintiff has no interest in the lease, the basis for which is that plaintiff procured a collateral assignment of leases and rents with HSBC as a security interest relating to a refinancing of the building's mortgage. Plaintiff contends that there is no proof that it has defaulted on its mortgage.

The third and fourth affirmative defenses involve waiver. Plaintiff argues that Corniquet has not provided a prima facie case of waiver and that the lease and the guaranty contain a "no waiver" provision. The fifth affirmative defense alleges that conditions precedent or subsequent have not occurred pursuant to the guaranty. Plaintiff avers that the nature of the guaranty is unconditional. The sixth affirmative defense is that the tenant surrendered the premises. Plaintiff argues that the surrender is not relevant to the terms of the guaranty. The seventh

affirmative defense alleges unclean hands. Plaintiff contends that this defense is not specific and that its tenant's conduct is less than ethical. The eighth affirmative defense alleges laches. Plaintiff asserts that laches are not proper here in the absence of an inexcusable delay or prejudice. The last affirmative defense alleges a breach of the covenant of good faith and fair dealing by plaintiff. Plaintiff avers that within this defense, there is no assertion of specifically arbitrary or irrational conduct on its part.

Plaintiff moves for a hearing to be scheduled after the granting of summary judgment. This hearing is sought in order to evaluate the attorney's fees incurred in this suit. Plaintiff claims that such fees are authorized pursuant to the guaranty.

In opposition, Cornquiet argues that plaintiff is seeking a recovery of money which is not covered by the terms of his guaranty. While the payment of Sohalia's rent is covered by the guaranty, Cornquiet contends that he is not obligated to pay what he terms "additional rent." Moreover, Cornquiet claims that the guaranty covers only that period when Sohalia remained in possession of the premises. There is no dispute that Sohalia vacated the premises on July 12, 2011. Cornquiet states that he is not obligated to make excessive payments.

Cornquiet argues that the rent ledger on which plaintiff relies is unclear and not self-explanatory. According to him, the copy submitted by plaintiff is vague and that its figures are inaccurate. He states that the claims owed need to be accurately assessed through further discovery, which precludes summary judgment.

Cornquiet states that, in December 2009, plaintiff, after conferring with Sohalia, changed the terms of the lease, and accepted a reduced rent payment. He holds that this event prevented Sohalia from vacating the premises at an earlier time. He asserts that he was never informed of

or allowed to consent to the modification. Corniquet claims that the change released him from the guaranty. Otherwise, he claims that the change would have improperly extended his obligations pursuant to the guaranty.

With respect to the affirmative defenses, Corniquet argues that each states a valid defense. Alternatively, he claims the right to move to replead them.

In reply, plaintiff argues that the terms of the guaranty clearly cover those funds sought in its action, including taxes, late fees and attorney's fees. Plaintiff denies any modification in the lease and any release from guaranty obligations. Plaintiff attests to the clarity and accuracy of the aforesaid ledger. Plaintiff states that Corniquet should have moved for leave to replead at this time. Plaintiff avers that his failure to do so should entitle plaintiff to a dismissal of these defenses.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc [ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corp.*, 298 AD2d 224 (1st Dept 2002).

In cases of contract interpretation, it is settled that ““ when parties set down their

agreement in a clear, complete document, their writing should ... be enforced according to its terms” *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004), quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 (1990). The guaranty provides that the guarantor is responsible for the “full payment of all rent ” by the tenant under the lease, and all modifications to the lease. The guaranty also provides that it will remain in full force as long as the tenant is in possession of the premises. There is no mention of “additional rent” or attorney’s fees in this guaranty.

Whether or not the parties to the lease agreed to a reduction of rent payments and there was a modification in the lease, such actions would not release Corniquet from the guaranty. Its terms would bind him to modification, whether or not he consented to one. Plaintiff has submitted evidence that provides that a modification was not made. However, pursuant to the guaranty, Corniquet is only liable for overdue rent payments prior to July 12, 2011, the day Sohalia surrendered the premises.

As for the dismissal of the affirmative defenses, in order to properly plead a defense, a degree of particularity is sufficient to confer notice of the transaction and the material elements. *See CPLR 3013.*

The first affirmative defense alleges that plaintiff lacks standing to sue. “The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution (citation omitted).” *Security Pacific National Bank v Evans*, 31 AD3d 278, 279 (1st Dept 2006). The guaranty, whose execution is not in dispute, gives plaintiff standing to bring this action. This defense shall be dismissed.

The second affirmative defense alleges that plaintiff lacks interest in the lease. As stated in the Civil Court decision, plaintiff has a legitimate interest in the lease. This defense shall be dismissed.

The third and fourth affirmative defenses allege waiver. “[A] waiver, by definition, is the intentional relinquishment of a known right- it must be clear, unequivocal and deliberate (internal quotation marks and citation omitted).” *Silverman v Silverman*, 304 AD2d 41, 46 (1st Dept 2003). There is no specific explanation of any conduct on plaintiff’s part which would indicate waiver. As plaintiff asserted, there are no waiver provisions in the lease and guaranty. The third and fourth affirmative defenses shall be dismissed.

The fifth affirmative defense alleges the existence of conditions precedent or subsequent relating to the guaranty. These conditions are not specified in the answer. There is no provision in the guaranty with respect to any conditions. The fifth affirmative defense shall be dismissed.

The sixth affirmative defense alleges that the tenant surrendered the premises. This is not disputed by plaintiff and is not a defense, though it serves to limit Corniquet’s liability under the guaranty.

The seventh affirmative defense alleges unclean hands. This is not specified and plaintiff has not acted in an unethical manner in seeking to enforce the guaranty. The seventh affirmative defense is dismissed.

The eighth affirmative defense alleges laches. “Laches is ‘an equitable bar based on a lengthy neglect or omission to assert a right and the resulting prejudice to the adverse party.’” *Matter of Linker*, 23 AD3d 186, 189 (1st Dept 2005), quoting *Saratoga Cty. Chamber of Commerce v Pataki*, 100 NY2d 801, 816 (2003), cert denied 540 US 1017 (2003). This

condition is not specified in the answer and plaintiff has apparently not acted in any untimely manner in commencing this action. The eighth affirmative defense shall be dismissed.

The ninth affirmative defense alleges a breach of the implied covenant of good faith and fair dealing. This covenant is implicit in all contracts. It is a pledge that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” *Dalton v Educ. Testing Service*, 87 NY2d 384, 389 (1995), quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 (1933). Again, the defense does not specify any negative conduct on plaintiff’s part. The ninth affirmative defense shall be dismissed.

As a consequence of the foregoing, the court shall dismiss all of the affirmative defenses in Corniquet’s answer. Corniquet should have chosen to move for leave to replead at this time. However, Corniquet has not shown that he has any valid defenses to replead. As for summary judgment, plaintiff has shown its right to receive rent payments up until July 12, 2011, pursuant to the terms of the guaranty. Plaintiff is not entitled to any additional costs, including attorney’s fees, since attorney’s fees are not specified in the guaranty. *See Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 (1989). That part of its motion requesting a hearing to assess such costs is denied.

The only other issue concerns the amount of damages sought by plaintiff. The term “all rent” is not defined in the guaranty. While plaintiff refers to late fees as included in its rent recovery, the precise amount is not altogether conclusive.

It appearing to the court that plaintiff is entitled to judgement on liability, and that the only triable issue of fact arising on plaintiff’s motion for summary judgment relate to the amount

of damages to which plaintiff is entitled, it is

ORDERED that the motion is granted as to liability only; and it is further

ORDERED that part of plaintiff's motion seeking to dismiss the affirmative defenses in the answer is granted and the defenses are stricken; and it is further

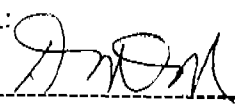
ORDERED that part of plaintiff's motion seeking to schedule a hearing to determine the amount of attorney's fees and other costs is denied.

DATED: 7/23/12

FILED

JUL 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

ENTER: 

J.S.C.

DONNA M. MILLS, J.S.C.