

Lee v Batra

2012 NY Slip Op 32103(U)

August 7, 2012

Sup Ct, NY County

Docket Number: 105619/11

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EE
Staley
PRESENT: _____
Justice

PART _____

Index Number : 105619/2011
LEE, VELDA
vs.
BATRA, JASJIT S.
SEQUENCE NUMBER : 002
DISMISS DEFENSE

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

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Is decided in accordance with the annexed decision.

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

FILED

AUG 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/7/12

PK, 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: Part 55

-----X
VELDA LEE

Plaintiff,

Index No. 105619/11

-against-

DECISION/ORDER

JASJIT S. BATRA,

Defendant.

FILED

-----X
HON. CYNTHIA S. KERN, J.S.C.

AUG 09 2012

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

NEW YORK
COUNTY CLERK'S OFFICE

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>4</u>

Plaintiff has brought the present motion for summary judgment on her claims and dismissal of defendant's affirmative defenses and an order referring this matter to a Special Referee for a hearing with respect to plaintiff's second cause of action for her reasonable attorneys' fees, costs and disbursements, as well as any other damages which the court might determine cannot be ascertained without a hearing. Plaintiff bases her motion on defendant's guaranty of the obligations under a contract. Plaintiff's motion for summary judgment is granted to the extent set forth below.

The relevant facts are as follows. Plaintiff is the owner of the building located at 227 Mott Street in Manhattan (the "Building"). By lease dated May 12, 2010 (the "Lease"), Liebe Inc. (the "Tenant") leased the North Store and a portion of the basement of the Building (the

“Premises”) from plaintiff for a term commencing May 15, 2010 and ending May 14, 2020.

Pursuant to the Lease, Tenant agreed to pay base rent and water and sewer charges as outlined therein. Pursuant to Article 18 of the Lease, Tenant is also liable to plaintiff for such expenses as may be incurred in re-renting the Premises in the event of any default, including, *inter alia*, broker’s commissions and fees, legal fees, the cost of putting the Premises in rental-ready condition, as well as rent for periods of rent concessions or free rent associated with re-renting the Premises. Finally, pursuant to Article 19 of the Lease, plaintiff is entitled to reasonable attorneys’ fees and costs incurred in pursuing legal action due to Tenant’s default under the Lease.

In connection with the Lease, defendant Jasjit S. Batra executed a personal guaranty of the Lease (the “Guaranty”). Pursuant to the Guaranty, defendant guaranteed the full performance and observance of all the obligations of the Tenant under the Lease, which included, *inter alia*, the payment of all rent and additional rent due under the Lease and all liabilities which might arise in consequence of any failure to comply with any of the terms, covenants or conditions of the Lease. The Guaranty specifically provides that:

the undersigned (hereinafter referred to as “Guarantor”) does hereby, on behalf of itself and its heirs, administrators, executors, successors and assigns, unconditionally guaranty to landlord and its successors and assigns the full and timely payment, performance and observance of, and compliance with, all of the terms, covenants and conditions contained in the Lease on Tenant’s part to perform, observe or comply with, including, without limitation, the payment of all Fixed Rent and Additional Rent (as such terms are defined in the Lease), and all damages that may arise in consequence of any non-payment, non-performance or non-observance of, or non-compliance with, any of such terms covenants or conditions, including, without limitation, **all attorneys’ fees and disbursements and all litigation costs and expenses incurred or payable by Landlord** or for which Landlord may be responsible or liable, or caused by and such default, **without requiring any notice** of non-payment, non-performance, non-observance, or non-compliance, or proof, notice, **or demand** whereby to charge Guarantor therefor, all of which Guarantor hereby expressly waives... (Emphasis added.)

* 4]
The Guaranty also provides that:

Guarantor hereby absolutely, unconditionally and irrevocably waives any and all rights it have have to assert any defense, set-off, counterclaim or cross-claim of any nature whatsoever with respect to this Guaranty or the obligations or liabilities of Guarantor under this Guaranty or the obligations or liabilities of any other person or entity (including, without limitation, Tenant) relating to this Guaranty or the obligations or liabilities of Guarantor under this Guaranty or otherwise with respect to the Lease...

The procedural history of this case is as follows. The tenant took possession of the Premises, used and occupied the Premises and remained in possession of the Premises until evicted therefrom by a New York City Marshal on August 2, 2011. The eviction followed a summary non-payment proceeding plaintiff commenced in the New York County Civil Court, entitled *Velda Lee v Liebe, Inc., Index No. 054302/11* (the "Non-Payment Proceeding"). Pursuant to a Stipulation of Settlement, judgment in the Non-Payment Proceeding was entered in favor of plaintiff Lee and against defendant Liebe, awarding Lee possession of the Premises and \$34,400 for sums due as of April 14, 2011. A warrant of eviction was issued but was stayed upon the condition that the Tenant made certain payments. The Tenant failed to make the required payments and a Notice of Eviction was served upon the Tenant. Tenant then filed for bankruptcy in Nevada. Any stay as a result of the bankruptcy was lifted on July 6, 2011 and on August 2, 2011, the warrant of eviction was executed upon by a New York City Marshal. Plaintiff states that she found the Premises full of rotting food and other debris and that she incurred costs and expenses in readying the Premises for rental. She then brought this action seeking the amount due under the stipulation, \$34,400, as well as rent from April 15, 2011 through August 31, 2011, water and sewer charges for April 15, 2011 through August 31, 2011, the costs of readying the Premises for rental and the legal and broker's fees associated with re-renting the Premises, for a total of \$80,040.28. Plaintiff also seeks attorneys' fees and costs in connection with pursuing this action.

* 5]

Plaintiff's motion for summary judgment on her first cause of action is granted as to liability only because the Guaranty obligates defendant to pay all amounts due and owing under the Lease and due to any non-compliance with the Lease. The Lease requires Tenant to pay not only base rent and water and sewer charges but also entitles plaintiff to the costs associated with re-renting the Premises. Pursuant to the explicit language of the Guaranty, defendant is therefore liable for the outstanding rent, water and sewer charges, and the expenses incurred in re-renting the Premises. Defendant argues that he is entitled to a set-off of \$21,000, which is the amount of the security deposit he put down, as well as a set-off of \$50,000 for improvements he allegedly made to the Premises. He also contends that plaintiff is in possession of items belonging to him found on the Premises. However, under the Guaranty he explicitly waives any right to a set-off. Therefore, plaintiff's motion for summary judgment is granted as to defendant's liability only and a trial will be held as to the damages.

Plaintiff's motion for summary judgment on her second cause of action seeking attorneys' fees and costs incurred in pursuing this litigation is also granted. The Lease provides for Tenant to pay reasonable attorneys' fees and other costs incurred in pursuing legal action in connection with Tenant's default. The Guaranty obligates the guarantor, defendant, to pay all amounts due under the Lease, including attorneys' fees. Therefore, the Guaranty obligates defendant to also pay reasonable attorneys' fees and costs incurred in pursuing this action. Those fees and costs will be determined at a trial as to damages only.

Plaintiff's motion to dismiss defendant's affirmative defenses is granted for the same reasons her motion for summary judgment is granted. Defendant's first affirmative defense, that plaintiff has no contractual basis for her claims, is clearly without merit as the Lease and the Guaranty provide a contractual basis for plaintiff's claims. Defendant's second affirmative defense, that the complaint fails to state a cause of action, is also without basis. His third

