

Ambro Realty, LLC v Landis

2012 NY Slip Op 32595(U)

October 9, 2012

Supreme Court, New York County

Docket Number: 100520/2012

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 100520/2012
AMBRO REALTY, LLC
vs.
LANDIS, DAVID
SEQUENCE NUMBER : 001
SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. _____
MOTION DATE 6/7/12
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 decided in accordance with the annexed Memorandum Decision & Order.

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

FILED

OCT 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 9, 2012

[Signature], 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 11

-----X
AMBRO REALTY, LLC,

Index No. 100520/12

Plaintiff,

-against-

DAVID LANDIS,

Defendant.

-----X
JOAN A. MADDEN, J.

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Ambro Realty, LLC ("Ambro") moves for summary judgment in lieu of a complaint pursuant to CPLR 3213 against defendant David Landis ("Landis") who signed a personal guaranty of the obligations due and owing under a commercial lease. Landis opposes the motion, which is denied for the reasons below.

On December 16, 2002, Ambro and David Landis Corp. a/k/a David Landis Inc. d/b/a Quintessentials ("Quintessentials") entered into a lease for stores 6, 7, 8, and 9 in the building located at 200 W. 86th St. (a/k/a 532 Amsterdam), New York, NY for the period from March 1, 2003 to February 28, 2008, with option to renew for an additional five year period ("the Lease"). At that time, Landis, a principal and officer of Quintessentials, signed a guaranty agreement under which he "unconditionally guarantee[d]" to Ambro, *inter alia* "the full, complete and timely payment of rent ...[and the] timely performance of [Quintessential's] obligations under the lease." Guaranty at ¶3. Quintessentials exercised its option to renew the lease with the new lease term to expire February 28, 2013.

Quintessentials filed for bankruptcy on July 13, 2010. The bankruptcy court released Quintessentials from the Lease and gave Ambro the right of reentry and the right to relet the premises. Ambro then began to seek a new tenant and hired a real estate broker for same purpose. Ambro found a new tenant for the premises in June 2011, with rent to be paid starting September 21, 2011. No rent is sought for the period after September 21, 2011.

In 2010, Ambro filed in this court a summons and a notice of motion for summary judgment in lieu of complaint against Landis seeking rent due and owing under the Lease, for rent for July 2010, real estate tax escalation charges as per a lease rider, and late payment fees of 10%. See Ambro Realty, LLC v. Landis; Index No. 10699/10. By decision and order dated May 10, 2011, Justice Milton A. Tingling granted the motion and awarded Ambro the sum of \$69,636.61, plus interest, and severed the claim for attorneys' fees for a hearing. No broker fees were sought in connection with this prior action.

Ambro commenced the instant action by filing a summons and notice of motion for summary judgment in lieu of complaint on January 17, 2012.

Ambro now moves for summary judgment in lieu of complaint and seeks to recover \$437,310.76, which includes \$249,166.71 for past due rent for the period of August 1, 2010 to August 31, 2011, \$12,614.67 for the period of September 1, 2011 to September 20, 2011 (the base price of rent for that month per the rider less the rent received from the new tenant for the period of September 21, 2011 to September 30, 2011), \$6,630.31 for real estate taxes, \$129,143.55 for broker fees, and \$39,755.52 for a 10% late payment penalty fee.

In support of this motion, Ambro submits a copy of the Lease, the guaranty, the lease rider, lease modification agreements and the payment schedule to establish the obligation for rent, real estate taxes, and the late fees associated with the real estate taxes and rent. To establish the obligation for broker fees and the associate late fees, Ambro has also included the brokerage agreement between Ambro and Ripco Real Estate, Ripco Real Estate's commission rate schedule, Ambro's lease agreement and rider with its new tenant, and a calculation to determine the total broker fees due for this transaction.

In opposition, Landis argues, *inter alia*, that the Guaranty and the Lease do not qualify as instruments for the payment of money only and therefore summary judgment in lieu of

complaint cannot be granted. Landis also argues that summary judgment in lieu of complaint is inappropriate in this case as the calculation of broker fees is not contained within the Lease.

In reply, Ambro argues, *inter alia*, the presence of additional provisions in a guaranty does not immediately disqualify it as an instrument for the payment of money only.

CPLR 3213 states that a motion for summary judgment in lieu of a complaint may be served by the plaintiff “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment.” The purpose of this motion is to provide “an effective means of obtaining an accelerated judgment where a defendant’s liability for a certain sum of money is clearly established by the instrument, coupled with proof of nonpayment.” Wagner v. Cornblum, 36 A.D.2d 427, 428 (4th Dept. 1971); see also, Holmes v. Allstate Ins. Co., 33 A.D.2d 96, 98 (1st Dept. 1969).

“A plaintiff makes out a prima facie case for summary judgment in lieu of complaint by proof of an instrument and the defendant’s failure to make payment according to its terms.” Seaman-Andwall Corp. v. Wright Mach. Corp., 31 A.D.2d 136 (1st Dept. 1968), aff’d 29 N.Y.2d 617 (1971); see also, DDS Partners, LLC v. Celenza, 6 A.D.3d 347 (1st Dept 2004). The device of summary judgment in lieu of a complaint is unavailable “where there are other issues and considerations presented by the writing.” Kerin v. Kaufman, 296 A.D.2d 336, 337 (1st Dept 2002). Thus, 3213 treatment is “foreclosed if the liabilities and obligations can only be ascertained by resort to evidence outside the instrument, or if more than simple proof of nonpayment or a *de minimis* deviation from the face of the document is involved.” Id. (quoting Weissman v. Sinorm Deli, Inc., 88 N.Y.2d 437, 444 (1996)).

Under this standard, in this case, the Guaranty of the obligations under the Lease does not qualify for 3213 treatment as the amount due thereunder cannot be determined without resort to evidence outside the Guaranty. See Associates Capital Servs. Corp. of New Jersey v. Lichtenstein, 96 A.D.2d 1089 (2d Dept. 1983) (holding a guaranty “of all the covenants and

conditions to be performed” under a lease is not an instrument for the payment money only); Big K Kosher Dairy Restaurant, Inc. v. Gross, 198 A.D.2d 205 (2d Dept. 1993) (“a lease is not an instrument for the payment of money only within the contemplation of CPLR 3213”) (quoting Midda Realty Corp. v. Ci-Tex, Inc., 50 A.D.2d 600 (2d Dept. 1975)).

In addition, here, not only is Ambro seeking rent due under the Lease but also broker fees, which clearly require proof outside the instrument to establish the amount due and owing, including the brokerage agreement between Ambro and Ripco Real Estate, Ripco Real Estate’s commission rate schedule, and the rent to be paid by the new tenant for the premises.

As the Guaranty requires more than a *de minimis* deviation from the face of the document to establish the relief sought, the procedural remedy of CPLR § 3213 is not available.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint by plaintiff Ambro Realty, LLC is denied; and it is further

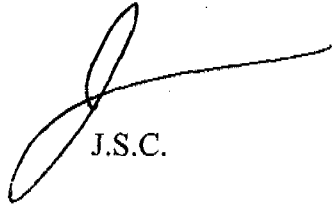
ORDERED that plaintiff Ambro Realty, LLC shall serve a formal complaint upon the attorney for defendant David Landis within 30 days of the date of this decision and order, a copy of which is being provided by my chambers to counsel for the parties; and it is further

ORDERED that a preliminary conference shall be held on December 13, 2012 at 9:30 AM in Part 11, room 351, 60 Centre St., New York, NY.

Dated: October 9, 2012

FILED

OCT 15 2012


J.S.C.

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