

Brixmor Holdings 11 SPE LLC v Beyda
2013 NY Slip Op 32799(U)
October 28, 2013
Sup Ct, New York County
Docket Number: 650963/2011
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

BRIXMOR HOLDINGS 11 SPE LLC f/k/a

INDEX NO. 650963/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 001

JACK BEYDA and JEMBRO STORES, INC.,
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, 2

Answering Affidavits- Exhibits _____ 3

Replying Affidavits _____ 4, 5

CROSS-MOTION: _____ YES NO

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

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

Dated: 10/28/13

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

Check one: FINAL DISPOSITION _____ NON-FINAL DISPOSITION

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 58

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BRIXMOR HOLDINGS 11 SPE LLC f/k/a
CENTRO NP HOLDINGS 11 SPE, LLC

Plaintiff,

Index No.: 650963/11

-against-

DECISION AND ORDER

JACK BEYDA and JEMBRO STORES,
INC.,
Defendants.

----- x
MILLS, J.

This is a breach of contract action brought by plaintiff Brixmor Holdings 11 SPE LLC f/k/a Centro NP Holdings 11 SPE LLC ("Brixmor"). Brixmor now moves this Court for an Order pursuant to CPLR §§ 3212 and 3211(a)(1), granting summary judgment in its favor against defendant Jembro Stores, Inc. ("Jembro") and Jack Beyda ("Beyda") (Beyda and Jembro are referred to collectively as the "Defendants"), on all of the causes of action in the Amended Complaint. Defendants in a Memorandum of Law oppose the motion as against Beyda individually.

The following facts are not in dispute. Brixmor was the owner and landlord of the Rockland Plaza Shopping Center in Nanuet, N.Y. Jembro entered into a sublease for commercial space at the Rockland Shopping Center for a term of approximately thirteen years and ten months commencing April 1, 1999 and ending on January 30, 2013. Beyda signed a Guaranty as President and shareholder of Jembro. The Guaranty plainly stated that "...Guarantor shall be bound by each and every ruling, order and judgment obtained by landlord against Tenant in respect of the obligations, whether or not Guarantor is a party to the action or proceeding in which such ruling, order to

judgments issued or rendered.”

During the time period of on or about July 2009 to June 2011, Brixmor and its predecessors instituted four summary non-payment proceedings based upon Jembro's failure and refusal to pay its rent. The first two summary proceedings resulted in So Ordered Stipulations of Settlement that included a payment plan for Jembro to pay off the past due rent. The third non-payment summary proceeding, commenced in January 2011, was dismissed, apparently based upon a service of process issue. The fourth non-payment summary proceeding, commenced in June 2011, sought and received a judgment of possession.

While the third summary non-payment proceeding was progressing, demand was made upon Beyda, as guarantor of Jembro's lease, for payment of the defaulted sums due at that time. Beyda failed to make any payment and Brixmor commenced the within action against him.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006); see Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978).

In support of their motion for summary judgment, Brixmor established through an affidavit from David Vender, a Senior Vice President of Brixmor, along with exhibits, that clearly evidence that the subject sublease had not expired at the time of Jembro's abandonment of the premises, and that Jembro and in turn Beyda, as guarantor, were responsible for not only the defaulted rent, but also accelerated rent under paragraph 18 of the sublease and the Guaranty. Brixmor further established that Jembro and Beyda owed a principal amount of \$767,516.31. "[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." National Westminster Bank USA v Sardi's, Inc., 174 AD2d 470, 471 (1991).

It is quite apparent to the Court that Brixmor has made a prima facie case in support of summary judgment. As cited earlier, the burden now shifts to defendant to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, at 228. However, in opposition to the plaintiff's motion for summary judgment, the defendants have totally failed to produce evidentiary proof in admissible form sufficient to raise a triable issue of fact as to whether the defendants are not responsible for the purported debt. Defendants' memorandum of law in opposition is not evidentiary proof in admissible form to raise a triable issue of fact. Zuckerman v. City of New York, at 562.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk is directed to enter judgment in favor of plaintiff and

against both defendants Jack Beyda and Jembro Stores, Inc. in the amount of \$767,516.31, plus interest at the rate of 9 % per annum from the date of January 1, 2013 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: 10/28/13

ENTER:



DONNA M. MILLS, J.S.C.