

Harlington Realty Co. LLC v Cellular Plus Group (Amityville) Inc.
2013 NY Slip Op 33115(U)
December 11, 2013
Supreme Court, New York County
Docket Number: 157103/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART _____

Index Number : 157103/2013
HARLINGTON REALTY CO
vs.
CELLULAR PLUS GROUP
SEQUENCE NUMBER : 001
SUMMARY JUDGEMENT

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

is decided in accordance with the annexed decision.

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

Dated: 12/11/13

CgK, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED
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

CYNTHIA S. KERN
☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
HARLINGTON REALTY CO. LLC,

Plaintiff,

Index No. 157103/2013

-against-

DECISION/ORDER

CELLULAR PLUS GROUP (AMITYVILLE) INC.,
d/b/a CELLULAR PLUS OF AMITYVILLE, INC.,
AKHILESH BALDEWA and ANITA AHUJA,

Defendants.

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

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u> </u>
Cross-Motion and Affidavits Annexed.....	<u> </u>
Answering Affidavits to Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u>2</u>

Plaintiff commenced the instant action seeking to recover from defendants all unpaid rent and additional rent due under a lease agreement and accompanying guarantees. Plaintiff now moves for an order: (a) pursuant to CPLR § 3212 granting plaintiff summary judgment against defendant Anita Ahuja (“Ahuja”); (b) dismissing Ahuja’s counterclaims; (c) imposing sanctions and awarding plaintiff costs including attorneys’ fees against Ahuja’ counsel, Satish K. Bhatia; and (d) severing plaintiff’s causes of action for attorneys’ fees and setting a hearing to determine the amount of fees. For the reasons set forth below, plaintiff’s motion is granted in part and

denied in part.

The relevant facts are as follows. Plaintiff is the owner of the commercial premises located at 215 Broadway, Amityville, New York (the "Premises"). On or about March 15, 2010, plaintiff entered into a written lease agreement (the "Lease") with defendant Cellular Plus Group (Amityville) Inc. ("Cellular") to let the Premises for a term beginning April 21, 2010 and ending March 31, 2020. As further consideration for the Lease, defendant Akhilesh Baldewa ("Baldewa") signed a limited lease guaranty. On or about September 30, 2010, pursuant to an Assignment and Assumption of the Lease ("Assignment of Lease") and without permission from plaintiff, Cellular assigned its rights in the Lease to Meesha Stores, Inc. ("Meesha"). At that same time, defendant Ahuja, who signed the Assignment of Lease on behalf of Meesha executed a written guaranty (the "Guaranty"). The Guaranty explicitly states that Ahuja, as Guarantor:

absolutely, irrevocably and unconditionally, guarantees to Landlord, its successor and assigns (i) the full and prompt payment, performance and observance of all the terms, covenants, conditions and agreements provided in the Lease to be paid, performed and observed by Tenant with the same force and effect as if Guarantor had been a signatory thereto, jointly and severally liable thereunder with Tenant; and (ii) the full and prompt payment of all damages and expenses that may arise in connection with or as a consequence of the non-payment, non-performance or non-observance thereof (including by not limited to attorneys' fees and disbursements).

Thereafter, on or about October 1, 2010, Meesha took possession of the premises and continuously paid rent to plaintiff from October 1, 2010 through January 1, 2012. However, starting in January of 2012, and continuing thereafter, Meesha and Ahuja defaulted under the Lease and accompanying Guaranty by failing to make payments of rent and additional rent when it became due. According to the affidavit of Leora Magier (the "Magier Affidavit"), a member of the plaintiff corporation, Meesha abandoned possession of the premises on or about November 20, 2013. Plaintiff re-let the premises for the month of July 2013, for \$2,000.00.

Plaintiff commenced the instant action to recover the unpaid rent and additional rent that is due under the Lease. Additionally, plaintiff seeks attorneys' fees pursuant to Paragraph 19 of the Lease and the Guaranty. Plaintiff has entered into a stipulation of settlement and discontinuance with defendants Cellular and Baldewa. Plaintiff now makes this motion for summary judgment against Ahuja for all outstanding rent, additional rent and attorneys' fees, an order dismissing Ahuja's counterclaims and an award of sanctions against Ahuja's attorney.

The court first turns to plaintiff's motion for summary judgment. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, plaintiff's motion for summary judgment against Ahuja is granted. As an initial matter, plaintiff has established its *prima facie* right to judgment as a matter of law against Ahuja as it has presented the court with the Lease, the Guaranty executed by Ahuja and the Majier affidavit attesting to Meesha's non-payment of rent and additional rent starting in January of 2012 and continuing thereafter. The Guaranty explicitly states that Ahuja guaranteed "the full and prompt payment, performance and observance of all the terms, covenants, conditions and agreements provided in the Lease to be paid, performed and observed by [Meesha]." The Lease required Meesha, as tenant, to pay base rent, taxes, water and gas as

additional rent. Moreover, pursuant to Paragraph 18 of the Lease, in the case of default under the Lease or vacating the premises prior to the termination of the lease, tenant is responsible for all rent and additional rent up until the time plaintiff re-lets the premises. Thus, Ahuja is liable to plaintiff for all outstanding rent and additional rent from January 2012 to the present time, minus the \$2,000.00 plaintiff received when it re-let the premises in July of 2013.

In opposition, Ahuja has failed to present any evidence in admissible form to raise a material issue of fact. As an initial matter, in her moving papers Ahuja presents only the affidavit of her attorney who does not have personal knowledge of the facts constituting the claim and, as such, the attorney affidavit holds no probative value. Additionally, to the extent her attorney contends that the Guaranty is ineffective and unenforceable as plaintiff never consented to the Assignment of Lease, such contention is without merit. Paragraph 11 of the Lease explicitly provides:

If this lease be assigned . . . Owner may, after default by Tenant, collect rent from the assignee, under tenant or occupant, and apply the net amount collected to the rent herein reserved, but no such assignment . . . shall be deemed a waiver of the covenant, or the acceptance of the assignee, under tenant or occupant as tenant, or a release of Tenant from the further performance by Tenant of covenants on the part of Tenant herein contained.

Accordingly, it is immaterial that plaintiff never consented to the Assignment of Lease as such consent was not needed for the Assignment of Lease and the Guaranty to be enforceable.

Additionally, Ahuja's presents no support or authority for her argument that the settlement reached between plaintiff and Cellular and Baldewa precludes this action against her. Indeed, the Settlement Stipulation between said parties explicitly provides that: "Plaintiff hereby reserves all of its rights against co-defendant Anita Ahuja."

Additionally, plaintiff's motion for an award of attorneys' fees is granted. Pursuant to the

Guaranty, Ahuja explicitly agreed to “the full and prompt payment of all damages and expenses that may arise in connection with or as a consequence of the non-payment, non-performance or non-observance thereof (including but not limited to attorneys’ fees and disbursements).” As this action was commenced as a consequence of the non-payment of rent, plaintiff is entitled to collect attorneys’ fees from Ahuja.

Additionally, plaintiff’s motion to dismiss Ahuja’s counterclaims is granted. Ahuja asserts three unlabeled counterclaims in her answer, which all center on the allegation that plaintiff’s action against her is frivolous. As this court has granted plaintiff’s motion for summary judgment against Ahuja, Ahuja’s alleged counterclaims are clearly without merit.

However, the remainder of plaintiff’s motion seeking sanctions against Ahuja’s attorney, Satish K. Bhatia, is denied as the conduct complained about simply does not rise to the level warranting sanctions.

Based on the forgoing, plaintiff’s motion is granted to the extent that its motion for summary judgment and award of attorneys’ fees is granted and Ahuja’s counterclaims are hereby dismissed. However, the portion of its motion seeking sanctions is hereby denied. The Clerk is directed to enter judgment in favor of plaintiff and against Anita Ahuja in the amount of \$34,769.25, which constitutes the outstanding rent and additional rent due from January 1, 2012 through October 1, 2013, minus legal fees, with interest thereon from January 1, 2012, together with costs and disbursements. The portion of plaintiff’s action that seeks the recovery of attorney’s fees is severed and the issue of the amount of reasonable attorney’s fees plaintiff may recover against defendant Anita Ahuja is referred to a Special Referee to hear and report. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order

with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 199M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court.

Date: 12/11/13

Enter: OK
J.S.C.

CYNTHIA S. KERN
J.S.C.