

Integral Dev. Corp. v Buckler

2014 NY Slip Op 30873(U)

April 2, 2014

Sup Ct, New York County

Docket Number: 652979/12

Judge: Joan M. Kenney

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 8

-----X

INTEGRAL DEVELOPMENT CORP.,

Plaintiff,

Index # 652979/12

-against-

DECISION & ORDER

ANDREW BUCKLER,

Defendant.

-----X

KENNEY, JOAN, M., J.S.C.

For Plaintiff:
Borah, Goldstein, Altshuler, Nahins & Goidel
377 Broadway,
New York, New York 10013
(212) 431-1300

For Defendant:
The Kurland Group
350 Broadway, Suite 1700
New York, New York 10013
(212) 253-6911

Papers considered in review of this motion seeking an Order dismissing the complaint:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits and Memorandum of Law	1-18
Notice of Cross-Motion, Affirmation in support and in opposition, Exhibits and Memorandum of Law	19-25
Reply Memorandum of Law	26
Reply Memorandum of Law	27
Reply Affidavit and Exhibit	28-29

Plaintiff, Integral Development Corp. (Integral or landlord), seeks an Order pursuant to CPLR 3212 granting judgment against defendant, Andrew Buckler (Buckler or tenant). Buckler cross-moves for an Order pursuant to, *inter alia*, CPLR 3211(a)(7) and 3212 dismissing plaintiff's complaint.

FACTUAL BACKGROUND

This litigation emanates from a former landlord/tenant relationship between the parties. Beginning May 10, 2007, Buckler as CEO of QBlue Corp., rented a commercial premises that included the ground floor and basement of 93 Grand Street, New York, New

York (the premises). The premises was approximately 1,300 square feet. The parties entered into a written 10 year lease (the lease) that commenced May 10, 2007. For almost four years Buckler's business operated out of the demised premises. In the fourth year of the lease the monthly base rent for the premises was approximately \$15,500.00.

On or about March 26, 2011, Buckler gave the landlord written notice that QBlue Corp. intended to surrender the premises back to the landlord, pursuant to the terms of the lease. Neither Buckler nor QBlue Corp. could afford to continue to rent the premises.

A personal guaranty (the guaranty) was executed by Buckler and was incorporated by reference into the lease. The language of the guaranty is boilerplate, and the term of art in the industry for such an agreement, is referred to as a "good guy guaranty." The guaranty is limited as follows:

Notwithstanding any contrary or inconsistent provisions hereof, provided that Tenant gives Landlord forty-five (45) days written notice of its intention to surrender vacant possession of the Demised Premises, Guarantor's maximum legal obligation herein shall be limited to the sums of (a) the rent and additional rent accruing under the Lease prior to the date Tenant surrenders vacant possession of the Demised Premises to Landlord free and clear of any subtenancies or other occupants, without giving effect to any acceleration of rent, (it being acknowledged that nothing contained in this Lease Guaranty

shall be deemed a consent by the Landlord to any such surrender) plus (b) any attorney's fees, costs and disbursements incurred by Landlord or its successors or assigns in connection with the enforcement of this Guaranty.

In or about May 2011, Buckler retained a real estate broker to find a new tenant for the premises. According to Buckler, the real estate broker identified two qualified prospective tenants for the premises, but Integral rejected both applicants. On or about May 27, 2011, the parties executed a surrender agreement (the surrender agreement), wherein the parties agreed that the tenant would vacate the premises on or before July 1, 2011.

Albeit, there is no obligation under the lease for the landlord to mitigate its damages by re-letting the premises as soon as possible, it is clear from the language of the guaranty and surrender agreement, that Buckler was not to be held personally liable for the accelerated rent. However, the surrender agreement stated that the tenant and Buckler, as guarantor, would be liable for the accelerated rent if he and/or QBlue Corp. did not surrender vacant possession of the premises, in broom clean condition, on or before July 1, 2011. It is undisputed that defendants vacated the premises on or before July 1, 2011.

Buckler contends that he and QBlue Corp. were (1) induced into signing the surrender agreement; (2) forced to sign the surrender agreement because he and QBlue, Corp. were insolvent; (3) pressured

by Integral to resolve the situation.

Integral argues that it is entitled to judgment against the tenant and Buckler in the amount of \$48,115.50¹ pursuant to the terms of the lease, guaranty and surrender agreement.

The surrender agreement states:

“. . . [T]his Agreement is the product of negotiation between parties represented by counsel. In the event of any litigation concerning this Agreement, the Court shall presume that the parties equally drafted this Agreement, and there shall be no presumption as to the drafting by a particular party.”

According to Buckler's affidavit in opposition, he “was not represented by separate counsel during either the negotiation of the [s]urrender [a]greement, nor at its signing.” The language of the surrender agreement and the content of Buckler's affidavit, cannot be reconciled on the papers before the Court. Additionally, it is not disputed that the surrender agreement also stated: “That on or before June 1, 2012, [t]enant pays landlord three months rent (\$48,115.50).” Clearly, it appears that a scrivener's error may have occurred, because the surrender agreement states that the tenant did not have to pay the three months of rent until 2012. Notably, Buckler states that on the vacate date, July 1, 2011,

¹Plaintiff also seeks “post-vacatur rent . . . totaling \$32,077.00 . . . and \$55,508.57 re-letting expenses . . . and attorneys' fees.”

"QBlue Corp. had paid to [Integral] the total amount of all the rent due and owing on the premises."

"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. Med. Ctr.*, 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).

Both the motion-in-chief and the cross motion must be denied as premature because key depositions have not yet taken place (see *Cannon v New York City Police Dept.*, 104 AD3d 454 [1st Dept 2013]). Moreover, in opposition to plaintiff's documentary evidence showing that the surrender agreement was the result of an arm's length negotiation, the tenant has submitted Buckler's sworn written statement, stating otherwise. This raises a triable issue of fact regarding enforcement of the surrender agreement. Furthermore, according to Buckler, Integral continues to retain QBlue, Corp.'s security deposit in the amount of \$99,750.00.

Consequently, the motion-in-chief and the cross motion seeking

dispositive relief are denied. Plaintiff's application seeking to amend the complaint is denied without prejudice to renew before the trial court, or at the conclusion of the trial by moving to conform the pleadings to the proof.

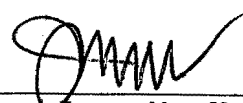
Accordingly, it is

ORDERED that the motions are denied for the reasons set forth herein, and it is further

ORDERED that the parties appear for a preliminary conference on May 29, 2014 at 9:30 AM.

Dated: April 2, 2014

E N T E R:



Hon. Joan M. Kenney
J.S.C.