University Dev. LLC v Hollywood Brown Derby LLC
2014 NY Slip Op 30875(U)
April 8, 2014
Sup Ct, Albany County
Docket Number: 2164-13
Judge: Joseph C. Teresi

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

UNIVERSITY DEVELOPMENT LLC,
its successors and assigns,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 2164-13
RJI NO. 01-14-112866

HOLLYWOOD BROWN DERBY LLC;
THE MALLOZZI GROUP LLC; JOHN MALLOZZI
and ROBERT MALLOZZI,

Defendants.

Supreme Court Albany County All Purpose Term, April 1, 2014
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Stocki Slevin & Peters, LLP
Mary Elizabeth Slevin, Esq.
Attorneys for Plaintiff
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Albany, New York 12203

Mazzotta, Siegel & Vagianelis, PC
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Attorneys for Defendant
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TERESI, J.:

By Lease Agreement, dated March 29, 2008, as amended on January 31, 2011 (hereinafter collectively "Lease Agreement"), Plaintiff leased 22 Clinton Avenue, Albany, New York (hereinafter "Premises") to Hollywood Brown Derby, LLC (hereinafter "Brown Derby"). Plaintiff commenced this action, in pertinent part, seeking the damages it allegedly sustained from Brown Derby's breach of the Lease Agreement. Issue was joined by all Defendants and

discovery is ongoing. Plaintiff now moves for partial summary judgment: granting its cause of action that alleges Brown Derby breached the Lease Agreement and, upon such finding, a judgment in the amount of $1,008,493.79. Brown Derby opposes the motion. Although Plaintiff established its entitlement to a judgment on Brown Derby's liability for breaching the Lease Agreement, it did not sufficiently demonstrate the amount of its damages.

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (Vega v Restani Const. Corp., 18 NY3d 499, 503 [2012], quoting Ortiz v. Varsity Holdings, LLC, 18 NY3d 335 [2011][internal quotation marks omitted]). First, "the moving party bears the burden of establishing that no material issues of triable fact exist and that it is entitled to judgment as a matter of law." (U.W. Marx, Inc. v Koko Contr., Inc., 97 AD3d 893 [3d Dept 2012]). "Once this burden has been met, it becomes incumbent upon the opponent to come forward with competent, admissible evidence creating a genuine triable issue of fact." (Wells v Ronning, 269 AD2d 690, 691 [3d Dept 2000]).

Plaintiff first demonstrated the Lease Agreement's terms. It unambiguously provides Brown Derby with possession and use of the Premises for a ten year period, in exchange for its paying rent to Plaintiff. Section 3 of the Lease Agreement specified Brown Derby's rental payment obligation, requiring the payment of yearly rent, due in monthly installments. Each monthly payment was "due on or before the first day of each month." In addition, Section 23 expanded on Brown Derby's "Liability For Rent," by stating:

> Notwithstanding anything herein contained to the contrary, the total rent for the whole term hereby demised is payable at the time of making of this Lease and the provisions herein contained for the payment of the rent in installments are for the convenience of [Brown Derby] only, and in default of the payment of the rent installments as therein allowed, then the whole of therein reserved for the whole of the period then remaining

> unpaid, discounted for the present value thereof, shall, at the option of [Plaintiff] at once become due and payable without any notice or demand, and collection of said entire balance for the whole of the period then remaining unpaid may be enforced by means of summary proceedings to recover possession, action to recover rent or other proceedings and [Plaintiff] shall be entitled to a judgment for said entire balance of such summary proceeding action to recover rent or other proceedings. (emphasis added)

Lease Agreement Section 16 then explicitly defined rent non-payment as a default, by stating:

> It is expressly understood and agreed that... if any default be made in the payment of rent or any part thereof as herein specified, and such default continues for a period of five (5) days after written notice to cure by [Plaintiff]... [Plaintiff] may, if [Plaintiff] so elects, at any time thereafter, terminate this Lease and the term hereof on giving to [Brown Derby] five (5) days notice in writing of [Plaintiff's] intention to do so, and this Lease and the term hereof shall expire and come to an end on the date fixed in such notices as if the said date were the date originally fixed in this Lease for the expiration hereof...

It is undisputed that the Lease Agreement was freely entered by the parties, recited their respective obligations, and was fully enforceable at all times relevant herein.

Plaintiff next demonstrated that Brown Derby breached the Lease Agreement. Plaintiff submitted the affidavit of its managing member, Michael Benson (hereinafter "Benson"), whose allegations were made on personal knowledge. Benson alleged that Brown Derby's obligation to pay rent commenced on September 1, 2008, but that Brown Derby failed to make its September 1, 2012 monthly rent payment. Pursuant to Lease Agreement Section 16, on September 10, 2012 Benson provided Brown Derby with a "written notice to cure." He attached such letter to his affidavit, which properly demanded the September 2012 rent installment be paid within five days. Brown Derby failed to cure its default within such five day period, and Benson terminated the lease with a second five day notice letter, dated September 18, 2012. By both his September 18, 2012 letter and his later October 3, 2012 followup letter, Benson specifically identified Brown Derby's Section 23 liability for rent. According to Benson, Brown Derby has made no

rent payment since its September 2012 default. On such proof, Plaintiff demonstrated Brown Derby's liability, as a matter of law, for its breach of the Lease Agreement.

In opposition, Brown Derby offered no proof to raise a triable issue of fact relative to its rent non-payment. Brown Derby offered the affidavit of Defendant Robert Mallozzi (hereinafter "Mallozzi"), whose allegations were made on personal knowledge. He acknowledged that Brown Derby entered the Lease Agreement with Plaintiff, implicitly conceding that the above terms control. Conspicuously absent from Mallozzi's affidavit is any allegation that Brown Derby made its September 2012 rent payment, or any rent payment thereafter. Instead, Mallozzi alleged that Brown Derby "on or about August 30, 2012, surrendered possession of the Leased Premises."

Brown Derby's legal arguments are similarly unavailing. Contrary to Brown Derby's assertion, Sections 23 and 16 of the Lease Agreement do not conflict. As explained above, Section 23 provides for rent acceleration, and Section 16 defines both what constitutes a breach and the process to be employed by Plaintiff in the event of a breach. While Brown Derby correctly notes that Section 16 includes the language "as the rent becomes payable under the terms hereof a sum equivalent to the rent reserved herein" in explaining Plaintiff's process; Section 23 defines when the rent "becomes payable" by stating that "rent for the whole term hereby demised... is payable at the time of making this Lease" if Brown Derby fails to make an installment payment. Read together these sections compliment each other. The accelerated rent simply "becomes payable" upon Brown Derby's failure to make an installment payment. Moreover, because Plaintiff appropriately accelerated the rent in accord with the Lease Agreement's terms and Brown Derby's non-payment of rent constitutes a material breach,

Plaintiff had no legal duty to mitigate its damages. (Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc., 87 NY2d 130 [1995]; New 24 W. 40th St. LLC v XE Capital Mgt., LLC, 104 AD3d 513 [1st Dept 2013]). In addition, Brown Derby offered no proof of "fraud, exploitive overreaching or unconscionable conduct" that would render the acceleration clause unenforceable. (Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc., 46 NY2d 573, 577 [1979]).

On this record, Plaintiff established its entitlement to partial summary judgment on the issue of Brown Derby's liability for its default under the Lease Agreement, and Brown Derby raised no triable issue of fact.

Despite the above, Plaintiff failed to establish the amount of its damages as a matter of law. Without any accompanying explanation for his calculation, Benson states that Brown Derby owes Plaintiff "[t]he entire amount presently secured by the Lease [Agreement]... $1,008,493.79." Although Benson does not provide the rationale that underlies his damage claim, such amount appears to be based primarily upon Lease Agreement Section 23's acceleration[1] clause. Such clause, however, does not allow for a simple aggregation of the remaining rental payments. Rather, its explicit terms entitle Plaintiff to collect only the value of the accelerated rental payments "discounted for the[ir] present value." Because Plaintiff proffered no "present value" analysis, it failed to demonstrate its entitlement to the amount of its judgement.

Moreover, Brown Derby raised triable issues of fact on the issue of Plaintiff's damages. Brown Derby correctly observed that Plaintiff's damages are circumscribed by Lease Agreement Sections 16 and 13. Although Plaintiff has no legal duty to mitigate, Lease Agreement Section

[1] This assumption is confirmed by Plaintiff's other submissions.

16 states that upon Brown Derby's default:

> [Plaintiff] may rent the Rental Premises on behalf of [Brown Derby]... applying any moneys collected first to the expense of resuming or obtaining possession, second to restoring the Rental Premises to a rentable condition and then to the payment of the rent and all other charges due and to grow due to [Plaintiff] any surplus to be paid to [Brown Derby], who shall remain liable for any deficiency.

While this negotiated mitigation provision is not mandatory, if employed it would greatly reduce Plaintiff's damages. (*see* Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc., supra [explaining a landlord's three options, with the above Section 16 language tracking closely the third option the Court mentioned]). In addition, Brown Derby may have compelled Plaintiff to mitigate, in light of Lease Agreement Section 13's assignment clause. To assign the Lease Agreement, Section 13 required Brown Derby to obtain "[Plaintiff's] prior written consent, which shall not be unreasonably withheld, conditioned or delayed." Here, viewing Mallozzi's allegations in a light most favorable, Brown Derby raised a triable issue of fact relative to the reasonableness of Plaintiff's rejection of the two tenants it proposed in August 2012. Although Plaintiff explained each rejection, it offered no proof from the proposed tenants to establish that its rejection was reasonable as a matter of law.

Lastly, to the extent Brown Derby seeks to avoid paying any damages under a "surrender by operation of law" theory, it neither moved for such relief nor demonstrated its entitlement to judgment as a matter of law on such theory.

Accordingly, Plaintiff's motion for partial summary judgment confirming Brown Derby's default is granted and its motion for partial summary judgment in the amount of $1,008,493.79 is denied.

This Decision and Order is being returned to the attorney for the Defendants. A copy of

this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 8, 2014
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated February 24, 2014; Affirmation of Mary Elizabeth Slevin, dated February 24, 2014; Affidavit of Michael Benson, dated February 24, 2014, with attached Exhibits A-E.
2. Affidavit of Jeffrey Siegel, dated March 25, 2014; Affidavit of Robert Mallozzi, dated March 25, 2014, with attached Exhibits 1-4.
3. Affirmation of Mary Elizabeth Slevin, dated March 31, 2014; Affidavit of Michael Benson, dated March 31, 2014.