

Jack Vogel Assoc. v Four Capital Corp.

2014 NY Slip Op 31498(U)

June 10, 2014

Sup Ct, NY County

Docket Number: 159452/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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JACK VOGEL ASSOCIATES,

Index No. 159452/2013

Plaintiff,

-against-

DECISION and ORDER
Mot. Seq. 1

FOUR DIGITAL CORP. AND DAMON
QUINONES,

Defendants.

-----X

HON. EILEEN A. RAKOWER:

In this action, plaintiff Jack Vogel Associates (“Plaintiff” or “Jack Vogel”) is seeking to recover for breach of a lease against defendant Four Digital Corp. (“Four Digital”) and defendant Damon Quinones (“Quinones), as guarantor.

Defendants interposed an answer, asserting that they overpaid Plaintiff.

Plaintiff moves for an Order (a) striking Defendants’ affirmative defenses, granting Plaintiff summary judgment in its favor pursuant to CPLR 3212 and granting judgment in the amount of \$115,708.03, and scheduling this matter for an inquest to determine reasonable legal fees. Defendants oppose.

Plaintiff submits the affidavit of David Vogel, a partner of Jack Vogel, which annexes: the Lease entered into on February 11, 2004 between Jack Vogel and Four Digital for the commercial premises located at 38 West 21st Street, New York, New York, 10010 (entire 5th Floor consisting of 6500 rentable square feet), the Guaranty Agreement entered into by Quinones, copy of real estate taxes, invoices, rent history, and the pleadings.

In opposition, Defendants submit the affidavit of Frank Garozzo, the Chief Financial Officer of Four Digital during the time that Four Digital occupied the Premises from February 17, 2004 to July 31, 2013 under the Lease.

The Lease term for the premises commenced on February 17, 2004, and was not set to expire by its terms until February 16, 2014. On February 11, 2004, Quinones, President of Four Digital, entered into a Guaranty Agreement. The Lease provides that the Tenant has an obligation to pay base rent throughout the tenancy, late fees for payments not timely tendered, additional rent throughout the tenancy, including, but not limited to, real estate taxes, electric charges, and attorneys' fees. Pursuant to paragraphs 18 and 21 of the Lease, Four Digital remains obligated for the rent and the additional rent due and owing under the Lease as it comes due through the term of the Lease notwithstanding any earlier vacatur by Four Digital or early termination of the Lease.

Pursuant to the terms of the Guaranty Agreement, Quinones is liable for any defaults of the Lease attributable to Four Digital, including the unpaid rent and additional rent, as well as legal fees.

Vogel avers that Four Digital and Quinones owe \$115,708.33 through the termination of the Lease on February 16, 2014. Vogel further avers that while Four Digital only occupied the Premises until their premature vacatur on or about September 2013, Four Digital owed money at that time, and continued to owe rent and additional rent through the Lease term. Vogel further states that Jack Vogel continues to hold \$18,534.86 as Jack Vogel's security deposit which has not been applied toward the current outstanding balance pending final adjudication.

Vogel further avers that Jack Vogel has been unable to re-rent the Premises as of yet, and is not under an obligation to mitigate Defendants' damages pursuant to the Lease.

In his affidavit in opposition to Jack Vogel's motion, Garozzo avers that prior to the expiration date of the Lease, Four Digital "voluntarily vacated the Premises with the knowledge that the landlord would not renew our lease based on numerous visits from the landlord's broker, David Rice." Garozzo states, "As far as the early surrender of the Premises on July 31, 2013 [,] the decision by Four Digital to leave early was based entirely upon clear communications from the landlord. The landlord was communicating to Four Digital during the final years of the lease, 2012 and 2013, that we had a valuable 'under market value' lease and it would make financial incentives available to Four Digital to 'buy' out the remainder of the lease if Four Digital agreed to an early termination."

Garozzo further avers, "The Premises were surrendered vacant and broom clean to Jack Vogel that day and the keys were delivered to the landlord's building manager the next morning, August 1, 2013." Annexed to Garozzo's affidavit is a receipt for the keys and photos of the interior of the Premises upon surrender of possession to Jack Vogel on July 31, 2013.

Garozzo further avers Four Digital "overpaid the Plaintiff during the lease term in the amount of \$62,236.94."

Garozzo further avers that under the Good Guy Guaranty signed by Quinones, Quinones is liable for rent until the surrender of the Premises on July 31, 2013.

Vogel submits a reply affidavit. Vogel avers that as per the first page of the rental history of Four Digital, Four Digital was provided a four month in concession in accordance with the terms of the Lease. Vogel further states,

However, the amount prior to Defendant's premature vacatur of the premises had already been resolved in a prior court proceeding due to their failure to tender rent timely. In the summary nonpayment proceeding under Index #8765/2012, captioned Jack Vogel Associates v. 4 Digital Corporation, the Defendant by its attorneys agreed that \$68,101.10 [through January 31, 2013] was due to the Landlord with a stipulation dated January 8, 2013. The landlord-Plaintiff herein generously provided the Tenant a payout schedule, and while the Defendant tendered the amount due therein less \$930.65, it continued to neglect to tender each and every month due. For instance the last payment made was towards May 2013 rent. Accordingly regardless of whether the Defendant vacated August or September as initially stated by Plaintiff, the real estate taxes were not paid as well as June or July rent at the time of Defendant's alleged vacatur, this permitting full enforcement of the full lease term against both defendants.

Vogel further states, "There was never an agreement between the Defendant or the Plaintiff to waive rent due or to permit an early vacatur, waiving the balance due under the Lease."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce

sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). “[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, ‘the facts must be viewed in the light most favorable to the nonmoving party.’” (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

In interpreting a contract, the Court must “enforce a clear and complete written agreement according to the plain meaning of the terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document.” *150 Broadway NY Assocs. L.P. v. Bodner*, 14 A.D. 3d 1, 6 [1st Dept 2004].

Here, Paragraph 20 of the Lease provides, in relevant part:

20. ... All understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between the Owner and Tenant and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

The Rider to the Lease further provides, in relevant part:

68. Survival and Acceleration of Claim Upon Abandonment:

In the even that tenant abandons these premises prior to expiration of the lease without express written consent signed by all parties to this lease, such default shall give rise to an action for monetary damages

for on-going rent as it comes due pursuant to this Lease.

Landlord shall not be required to mitigate damages and Landlord may immediately seek an accelerate judgment for the balance of the rent owed throughout the termination date of the lease.

75. Entire Agreement:

This lease contains the entire and only agreement between the parties, and no oral statements or representations or prior written matter not contained or referred to in this instrument shall have any force or effect. This lease shall not be modified in any way except by a writing subscribed by both parties thereto. The failure of landlord or Tenant to insist upon strict performance by the other or any of the covenants or conditions of this lease in any one or more instances shall not be construed as a waiver or relinquishment for the future of any of such covenants or conditions, but the same shall be and remain in full force and effect. No waiver of any provision of this lease shall be deemed to have been made unless in writing and signed by the party to be charged therewith.

The Guaranty provides, in relevant part:

This Guaranty is an irrevocable, absolute and unconditional payment and performance ... Regardless of anything stated herein, if the Tenant surrenders possession in "broom-clean" condition with all rent paid through the date of vacatur, this Guaranty shall cover only those obligations that were incurred as of such date of surrender or if sublease is terminated.

Jack Vogel has made a prima facie showing of entitlement to judgment as a matter of law against Four Digital based on the terms of the Lease and proof of non-payment. It is undisputed that Four Digital vacated and surrendered the subject premises as of July 31, 2013, prior to the expiration of the Lease. Based on the terms of the Lease, upon vacatur, Four Digital was obligated to pay the rent and additional rent due through the balance of the Lease, and Four Digital has failed to do so. While Garozzo avers that Four Digital voluntarily surrendered the Lease,

that does not relieve Four Digital of its obligation under the Lease. Four Digital offers no written agreement to waive rent or to permit an early vacatur, as required under the Lease.

Additionally, Jack Vogel has made a prima facie showing of entitlement to judgment as a matter of law against Quinones under the terms of the Guaranty and proof of non-payment, and Defendants have failed to raise triable issues of fact in opposition. While the Guaranty limits liability in the event that Four Digital “surrenders possession in ‘broom clean’ condition with all rent paid through the date of vacatur,” Plaintiff has demonstrated that Four Digital owed unpaid rent at the time of its vacatur. Four Digital has provided no evidence of payment for June or July rent at the time of its vacatur.

Wherefore it is hereby

ORDERED that Plaintiff’s motion for summary judgment as against defendants Four Digital Corp. and Damon Quinones is granted; and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff as against defendants Four Digital Corp. and Damon Quinones, in the amount of \$115,708.03, less the security deposit of \$18,534.86, together with interest as prayed for allowable by law until the date of entry of judgment (at the rate of 9% per annum), as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the amount of reasonable attorneys’ fees and costs under the promissory note is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 6/10/14



EILEEN A. RAKOWER, J.S.C.