133 Second Ave., LLC v Roastown Coffee St. Marks, Inc.
2014 NY Slip Op 31683(U)
June 27, 2014
Sup Ct, New York County
Docket Number: 158162/2012
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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133 SECOND AVENUE, LLC,

Plaintiff,

- v -

ROASTOWN COFFEE ST. MARKS, INC., and
KIE S. LEE, Individually,

Defendants.

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Index No. 158162/2012

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff 133 Second Avenue, LLC ("Plaintiff") brings this action to recover rent and additional rent allegedly owed under a fifteen-year commercial lease agreement dated May 29, 2010, (the "Lease Agreement") between Plaintiff, as landlord, and defendant-assignee, Roastown Coffee St. Marks, Inc. ("Roastown"), as tenant, for use of the ground floor retail store space located at 133 Second Avenue, Store #1 (the "Premises"). Plaintiff claims that Roastown assumed the Lease Agreement from non-party Pizzanini, Inc. on August 26, 2010, and that Roastown defaulted on its obligations thereunder in February 2013. Plaintiff further claims that Roastown's president, individual defendant Kie S. Lee ("Lee") (and together with Roastown, collectively, "Defendants"), executed a "good guy guarantee" (the "Good Guy Guarantee") for all unpaid rent, additional rent, and legal fees incurred before Roastown surrendered and vacated the Premises, in April 2013.

Plaintiff now moves for an Order, pursuant to CPLR § 3212, granting summary judgment or partial summary judgment for Plaintiff.

CPLR § 3212 provides, in relevant part, "Any party may move for summary judgment in any action, after issue has been joined" (CPLR § 3212[a]).

Defendant Lee interposed an answer, asserting various affirmative defenses, including that the amount of damages claimed in Plaintiff's complaint is improper and incorrect, and opposes Plaintiff's motion for summary judgment.

Defendant Roastown has not answered or otherwise responded to the Plaintiff's complaint, and does not submit any opposition to the instant motion. Accordingly, issue has not been joined as to defendant Roastown, and therefore Plaintiff's motion for summary judgment against Roastown is premature.

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 Moniger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Dev. Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." (*City of New York v. Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dep't, 1998]).

Plaintiff submits a copy of the Lease Agreement, the assumption and assignment of lease to Roastown ("Assignment of Lease"), the Good Guy Guarantee, Plaintiff's tenant rent ledger ("Tenant Ledger"), and a statement of account dated August 20, 2013, addressed to Lee, in the amount of $80,873.76, purporting to represent the aggregate sum of outstanding rent and additional rent due through August 1, 2013, not including legal fees.

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Paragraph 41(A) of the Lease Agreement provides, "Subject to the provisions hereof, the "Commencement Date" of this Lease shall be the date that this Lease is mutually executed and delivered and the Expiration Date shall be the (sic) October 31, 2021." Paragraph 41(B) of the Lease Agreement further provides:

> (i) The Fixed Annual Rent which Tenant agrees to pay Landlord throughout the term hereof shall be as follows:
>
> Commencement Date to October31, 2006 (such period is hereinafter referred to as the "First Rent Year" and each ensuing twelve-month period is described as a "Rent Year") . . . Seventh Rent Year through the Sixteenth Rent Year as described in B(ii) and (iii) below . . . (iii) The Fixed Annual Rent for the Seventh Year shall be the higher of (a) $180,557.00 or (b) the aggregate of $128,000.00 plus the Percentage of Change calculated for the last month of the Sixth Rent Year multiplied by $128,000.00. The Fixed Annual Rent in each of the Eighth Rent Year through the Thirteenth Rent Year shall then be calculated by multiplying the Fixed Annual Rent for the previous Rent year by 103.5%.

As far as additional rent is concerned, paragraph 29 of the Lease Agreement provides, "Tenant shall pay to Owner as additional rent the sum of $75.00 on the first day of each month during the term of this lease, as Tenant's portion of the contract price for sprinkler supervisory service."

Paragraph 42 of the Lease Agreement further provides, "Tenant shall pay and hereby covenatns to pay Landlord as additional rent annually during the termof this Lease thirteen point seven (13.7%) percent of any increase in Real Estate Taxes (as such term is hereinafter defined) above those for the fiscal year 2001/2002."

The Good Guy Guarantee provides, in relevant part:

> Under all circumstances, including Tenant's default, and in addition to the security deposit posted under this Lease, Guarantor guarantees to Landlord the payment and performance of Tenant's obligations under and in accordance with the Lease, including without limitation, the payment of Fixed and Additional Rent which accure under the Lease up to and including the date Tenant vacates the entire Demised Premises (the "Obligations"). If the Tenant defaults under the Lease, Landlord may, at its option, proceed against Guarantor under this Agreement without commencing any suit or proceeding of any kind against Tenant, or without having obtained any judgment against Tenant.

Plaintiff claims that Roastown is in the eighth year of the Lease Agreement, and that the annual rent for that year is $186,876.48 or $15,573.04 per month. Plaintiff claims that, as of August 1, 2013, Roastown owed $138,423.23 in rent and additional rent under the Lease Agreement, not including legal fees which Plaintiff incurred to collect such unpaid rent and additional rent, or accruing interest.

Plaintiff claims that Lee is liable for the sum of $80,873.76, which represents the amount of unpaid rent and additional rent allegedly owed through the date that Roastown vacated the Premises.

Lee, in turn, argues that Plaintiff improperly seeks to charge Lee for real estate taxes for two months after Roastown vacated the Premises, resulting in an overcharge for real estate taxes in the amount of $2,986.57. Lee also argues that Plaintiff's calculations are improper because Plaintiff now seeks to recover rent and additional rent in the amount of $16,099.66 for the month of January 2013. Lee claims that Roastown paid rent and additional rent for the month of January 2013 on January 14, 2013, that such payment is reflected in Plaintiff's Tenant Ledger, and that this amount should therefore be deducted from the total amount due.

Additionally, Lee argues that Roastown attempted to negotiate a sale of its business to a third party in late 2011 and early 2012, and that Plaintiff breached the

Lease Agreement by delaying and unreasonably withholding consent and failing to timely consent to an assignment of lease to the proposed third party buyer. Lee also argues that Plaintiff breached the Lease Agreement by failing to provide an accounting of the tax allocation for 2011 and 2012.

"There is a long-established doctrine which holds that 'a guarantor when sued alone by the creditor cannot avail himself of an independent cause of action existing in favor of his principal as a defense or counterclaim.'" (*General Motors Acceptance Corp. v. Kalkstein*, 101 A.D.2d 102, 107 [1st Dep't 1984] [citations omitted]). Here, Lee's contentions "sounding in breach of contract are premised on allegations of misconduct by [P]laintiff *vis-a-vis* [Roastown] alone and therefore belong to and may be asserted by [Roastown] alone." (*Hotel 71 Mezz Lender LLC v. Mitchell*, 63 A.D.3d 447, 448 [1st Dep't 2009]). In any event, Lee fails to submit evidence to support these contentions, and the affirmations of Lee and his attorney are insufficient to raise a triable issue of fact in this regard.

Plaintiff sets forth evidence of a binding Lease Agreement between Plaintiff and Roastown, and it is undisputed that Roastown vacated the Premises in April 2013, prior to the end date of the lease agreement, and that certain rent and additional rent payments remain outstanding. Plaintiff also sets forth evidence of a binding Good Guy Guarantee between Plaintiff and Lee for unpaid rent and additional rent through the date that Roastown vacated the Premises. Accordingly, Plaintiff meets its burden of demonstrating a prima facie entitlement to judgment for unpaid rent and additional rent as a matter of law.

However, Lee raises issues of fact as to the amount of damages owed pursuant to the Good Guy Guarantee.

Wherefore it is hereby,

ORDERED that Plaintiff's motion for summary judgment is granted only on the issue of liability as against defendant Kie S. Lee; and it is further

ORDERED that an assessment of damages against defendant Kie S. Lee is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed.

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

Dated: June 27, 2014

Eileen A. Rakower, J.S.C.