

122 E. 42nd St., LLC v Goidel

2014 NY Slip Op 31715(U)

June 26, 2014

Supreme Court, New York County

Docket Number: 153389/2012

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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122 EAST 42ND STREET, LLC,

Plaintiff,

Index No. 153389/2012

-against-

Motion Sequence Nos.: 001

JONATHAN GOIDEL and ANDREW SIEGEL,

Defendants.

DECISION/ORDER

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Hon. Shlomo S. Hagler, J.S.C.:

Plaintiff 122 East 42nd Street, LLC (“Landlord” or “plaintiff”) moves for an order pursuant to CPLR §§ 3211(a)(4),(5) and (7) dismissing each of the counterclaims asserted in the Answer, Affirmative Defenses and Counterclaims, dated June 13, 2012 (“Answer”). Defendants Jonathan Goidel and Andrew Siegel (“Guarantors” or “defendants”) oppose the motion and cross-moves for an order as follows: (1) pursuant to CPLR §§ 3025 and 3211, granting them leave to amend the answer to assert an affirmative defense based on *res judicata*, (2) pursuant to CPLR §§ 3211(a)(5) and (7) dismissing this action based on the grounds of *res judicata* and for failure to state a cause of action, and in the alternative (3) pursuant to CPLR § 3124 compelling plaintiff to comply with outstanding discovery demands. Plaintiff opposes the cross-motion. Both the motion and cross-motion are consolidated herein for disposition.

BACKGROUND

Plaintiff is a landlord which entered into an Agreement of Lease dated March 30, 2004 (“Lease”) with non-party Goidel & Siegel, LLP (“Tenant”) to rent suite 4500 located at 122 East 42nd Street, New York, New York (“subject premises”). (Exhibit “A” to the Affidavit of Richard F. Czaja, sworn to on July 12, 2012, in support of the motion). In addition, the individual defendants, who are partners in Goidel & Siegel, LLP, executed an Agreement of Guarantee on the

same date to guarantee the payment of Tenant's monetary obligations under the Lease ("Guarantee"). (*Id.* at Exhibit "B").

The Lease contains two relevant provisions concerning the payment of late fees (Article 37[C][6]) and electricity charges (Article 38) which were both denominated as additional rent. In the event the tenant fails to pay rent or additional rent for more than ten business days after it becomes due, Article 37(C)(6) requires the tenant to pay "four (4) cents for each dollar" or 4% of said amount as late charges. In Article 38, the parties agreed to a complicated formula for the payment of electricity charges.

In the third paragraph of the Guarantee, defendants also agreed that its "obligations hereunder . . . shall not be subject to any defense or set-off, counterclaim . . . by reason of the invalidity, illegality or unenforceability of any of [defendants'] obligations hereunder or otherwise."

In their Answer, defendants allege six (6) counterclaims as follows: First Counterclaim for late fees and electrical charge provisions in the Lease are unenforceable which allegedly necessitates the Lease and Guarantee to be declared void; Second Counterclaim is a demand for an accounting; Third Counterclaim is the same as First Counterclaim except that defendants seek rescission of the Lease and Guarantee; Fourth Counterclaim (incorrectly denominated as Fifth Counterclaim) that plaintiff committed fraud by allegedly misrepresenting or incorrectly applying various payments; Fifth Counterclaim is a reiteration of the First and/or Third Counterclaims; and Sixth Counterclaim (incorrectly denominated as Fifth Counterclaim) is for prima facie tort.

In a prior action in Supreme Court, New York County, under Index No. 101979/2011 ("Prior Supreme Court Action"), Tenant moved pursuant to CPLR §§ 602, 901, 2201, and 8502, for an order (1) removing a non-payment proceeding commenced in Civil Court, New York County entitled *122 East 42nd Street, LLC v Goidel & Siegel, LLP*, Index No. 67694/10, ("the Non-Payment

Proceeding”) and joining it with this action for trial, (2) staying the Non-Payment Proceeding pending the determination of this motion, (3) staying further proceedings pending the posting of security for costs, and (4) determining whether this action may proceed as a class action. Landlord opposed the motion and cross-moved for an order pursuant to CPLR § 3212 granting it summary judgment dismissing this action. In a second round of motion practice, Tenant moved for an order pursuant to CPLR § 3025, granting it leave to amend the complaint. Landlord opposed the motion and cross-moved for an order pursuant to 22 NYCRR § 130-1.1 imposing sanctions against plaintiff and awarding defendant its reasonable attorney’s fees and disbursements.

By decision and order dated December 27, 2012 (“Prior Order”), this Court denied Tenant’s motion for an order pursuant to CPLR §§ 602, 901, 2201, and 8502 staying the Non-Payment Proceeding pending the determination of this motion, removing the Non-Payment Proceeding and joining it with this action for trial, and staying further proceedings pending the posting of security for costs; granted Landlord’s cross-motion for summary judgment dismissing the action as it pertained to Tenant’s allegation that the late fees provision was unlawful and an inappropriate penalty and Tenant was not entitled to an accounting because Landlord owed no fiduciary duty to Tenant; granted Tenant’s motion for leave to amend the complaint to only replead allegations of overcharges on the electricity charges; and denied Landlord’s cross-motion for sanctions and an award of reasonable attorney’s fees.

DISCUSSION

Motion to Dismiss

In determining a motion to dismiss a pleading for failure to state a cause of action, the court must “accept the facts as alleged in the Complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable

legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Nonnon v City of New York*, 9 NY3d 825 [2007].)

Waiver of Counterclaims

It is well settled that a waiver of the right to assert counterclaims is generally enforceable. (*Federal Deposit Ins. Corp. v. Frank L. Marino Corp.*, 74 AD2d 620 [2d Dept 1980]; *Bank of New York v. Cariello*, 69 AD2d 805 [2d Dept 1979]). As such, the parties to a guarantee may negotiate that the guarantors are barred from effectively asserting counterclaims in a suit to collect on the guarantee. (*Citibank, N.A. v Plapinger*, 66 NY 2d 90 [1985]; *Bank of India v. Sanghvi*, 224 AD2d 347 [1st Dept 1996]; *Grand Pacific Finance Corp. 97-11 Hales, LLC*, 90 AD3d 534 [1st Dept 2011]).

In this action, in the third paragraph of the Guarantee, defendants waived their right to assert counterclaims and are, therefore, barred from asserting the six (6) counterclaims in their Answer.

Late Fees and Accounting Counterclaims

Moreover, to the extent that defendants assert counterclaims that seek relief based upon the late fees provision of the Lease and a demand for an accounting, those counterclaims, or portions thereof, must be dismissed as the same were previously determined in favor of plaintiff and against non-party Goidel & Siegel, LLP in the Prior Order. As stated above, the remainder of the counterclaims have been asserted by non-party Goidel & Siegel, LLP in the Prior Action.

Defendants’ Cross-Motion for Leave to Amend

Defendants seek leave to amend the Answer to “assert an affirmative defense based on res judicata.” Plaintiff commenced a prior guarantee action against defendants under Index No. 106447/10 in Supreme Court, New York County (“First Guarantee Action”) (Exhibit “F” to the

cross-motion). The First Guarantee Action was resolved pursuant to a so-ordered stipulation of settlement dated October 26, 2010 (“Stipulation”), wherein “(“i”) the First Guarantee Action was discontinued with prejudice; (ii) plaintiff waived any and all legal fees charges to the [Goidel & Siegel,] LLP through October, 2010; and (iii) the October, 2010 stipulation acknowledged that as of its date, i.e., October 26, 2010, any and all rent and additional rent was paid in full through July, 2010.” (Affidavit of Andrew B. Siegel, sworn to on August 2, 2012, in opposition to the motion for summary judgment and in support of the cross-motion, at ¶ 103.) Essentially, defendants argue that the Stipulation settling the First Guarantee Action precludes the current guarantee action under the doctrine of *res judicata*.

It is well settled law that “leave to amend pleadings is to be freely given, absent a showing of prejudice or surprise.” (*Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585 [1st Dept 2009].) Nevertheless, an examination of the underlying merit of the proposed amendment is required, and “leave will be denied where the proposed pleading fails to state a claim or is palpably insufficient as a matter of law.” (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005].)

Here, there is neither a showing by the plaintiff of prejudice nor surprise resulting from defendants’ delay in seeking to amend the Answer. However, there is no basis to grant defendants’ cross-motion to amend the Answer to assert an affirmative defense based on *res judicata* since the plaintiff alleges in the complaint herein that it seeks to only collect rent and additional rent subsequent to October 26, 2010. Specifically, the plaintiff is seeking to recover the “amount of unpaid base rent and additional rent for the period from November 1, 2010 through April 30, 2012 total[ing] \$258,543.22.” (Complaint at ¶ 34). Moreover, there is no basis to dismiss the complaint for failure to state a cause of action.

Discovery

Defendants also seek to compel plaintiff to comply with outstanding discovery demands. The branch of the cross-motion is granted to the extent of scheduling a conference as set forth below to resolve all outstanding discovery demands of all parties.

CONCLUSION

Accordingly, it is hereby:

ORDERED, that plaintiff's motion for an order pursuant to CPLR §§ 3211(a)(4),(5) and (7) dismissing each of the counterclaims asserted in the Answer is granted to the extent of dismissing without prejudice all six (6) counterclaims in the Answer; and it is further

ORDERED, that the branch of defendants' cross-motion for an order pursuant to CPLR §§ 3025 and 3211, granting them leave to amend the answer to assert an affirmative defense based on *res judicata*, and pursuant to CPLR §§ 3211(a)(5) and (7) dismissing this action based on the grounds of *res judicata* and for failure to state a cause of action is denied; and it is further

ORDERED, that the branch of defendants' cross-motion pursuant to CPLR § 3124 compelling plaintiff to comply with outstanding discovery demands is granted to the extent of scheduling a conference on July 28, 2014, at 2:15 P.M., in Part 17 of this Court, 60 Centre Street, Room 335, New York, New York, to resolve all outstanding discovery demands of all parties.

ORDERED, that the Clerk shall enter judgment accordingly.

The foregoing constitutes the decision and order of this Court.

ENTER :



Hon. Shlomo S. Hagler, J.S.C.

Dated: June 26, 2014
New York, New York