

40 West 25th St. Owner LLC v Nandi

2014 NY Slip Op 31740(U)

July 1, 2014

Sup Ct, New York County

Docket Number: 653636/2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

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40 WEST 25th STREET OWNER LLC,

Plaintiff,

Index No.:

653636/2013

Decision and Order

- against -

Mot. Seq.: 01

DUPAK NANDI and HANIF M. DAHYA a/k/a
WALLY DAHYA,

Defendants.

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

This is an action to recover monies from defendants, Dupak Nandi (“Nandi”) and Hanif M. Dahya a/k/a Wally Dahya (“Dahya”), pursuant to their individual written guaranty of lease obligations as a result of the failure of tenants, Triborough Healthcare Management, Inc., and Customer First Call Centers, Inc. (collectively, “Tenants”) to pay base rent and additional rent in the amount of \$185,252.40.

Dahya interposed an Answer and Cross-Claim against Nandi. Nandi has failed to answer or otherwise appear.

Plaintiff now moves for summary judgment against Dahya and a default judgment against Nandi in the amount of \$185,252.40, plus attorneys’ fees, and interest from February 22, 2013. Dahya submits opposition. Nandi does not oppose.

Plaintiff submits the affidavit of Michael Esquenazi, a Managing Agent for Jack Resnick & Sons, Inc., agent for Plaintiff, which annexes: the pleadings; Lease

entered between 40 West 25th Street Associates, LP (“40 West”), as landlord and former owner of the Building, and the Tenants, dated September 1, 2003 for the entire sixth floor of the building located at 50 West 25th Street, New York, New York (“the Premises”), for a term commencing September 1, 2003 and expiring August 21, 2013 (“Lease”); and the Guaranty of the Lease obligations, including to pay rent, additional rent, and attorneys’ fees executed by Defendants (“Guaranty”).

Esquenazi avers that on November 21, 2012, 40 West 25th Street AE LLC (“40 AE”) “succeeded to the interests of 40 West in the Building” and that on February 22, 2013, Plaintiff “succeeded to the interest of 40 AE in the Building. At that time, all of the leases in the Building, including but not limited to the Lease were assigned to Plaintiff.”

Esquenazi further avers that the Tenants failed to pay rent and additional rent to Plaintiff in the sum of \$185,252.40 through August 31, 2013, as set forth in an exhibit to Esquenazi’s affidavit. On or about August 31, 2013, the Tenants vacated the Premises.

In opposition, Dahya’s counsel submits a memorandum of law, arguing that the motion is premature because discovery has not taken place and that Plaintiff has not yet responded to Dahya’s discovery propounded after Plaintiff’s motion was filed.

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]).

“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 Dept., 1998])

Here, Plaintiff has established its prima facie entitlement to summary judgment through the submission of a sworn affidavit of the Managing Agent for the Plaintiff and proof of the Guaranty and Dahya’s non-payment. In opposition, Dahya fails to raise issues of fact which would preclude a granting of summary judgment. Dahya has failed to submit a factual affidavit that refutes Plaintiff’s claim. Furthermore, “the mere hope” that a party “might be able to uncover some evidence during the discovery process” is insufficient to deny summary judgment pursuant to CPLR 3212(f). (*Pow v. Black*, 182 AD2d 484, 485 [1st Dept. 1992]).

In addition, Plaintiff has demonstrated its entitlement to default judgment as against Nandi. Plaintiff submits an affidavit of service attesting to service of the Summons and Complaint on Nandi on October 31, 2013 pursuant to CPLR 308(2), as well as proof of additional mailing.

Wherefore it is hereby

ORDERED that Plaintiff’s motion for summary judgment as against defendant, Hanif M. Dahya a/k/a Wally Dahya, is granted; and it is further

ORDERED that Plaintiff’s motion for default judgment against defendant, Dupak Nandi, is granted without opposition; and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff as against defendants Hanif M. Dahya a/k/a Wally Dahya and Dupak Nandi, in the amount of \$185,252.40, together with interest as prayed for allowable by law until the date of entry of judgment (at the rate of 9% per annum from February 22, 2013), 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 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; and it is further

ORDERED that Defendant, Hanif Dahya's cross claim interposed against Nandi is severed and shall proceed.

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

Dated: ^{July 1} ~~JUNE~~ __, 2014



EILEEN A. RAKOWER, J.S.C.