

Roza 14W LLC v ATB Holding Co., LLC
2014 NY Slip Op 32162(U)
August 6, 2014
Supreme Court, New York County
Docket Number: 653232/2013
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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ROZA 14W LLC,

Plaintiff,

-against-

Index No. 653232/2013
Subm. Date: June 18, 2014
Mot. Seq. No.: 001
DECISION & ORDER

ATB HOLDING COMPANY LLC d/b/a
JOHN THOMAS FINANCIL
and ANASTASIOS BELESIS,

Defendants.
-----X

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Papers considered in review of the motion and cross-motion:

Papers	Numbered
Summons & Complaint.....	1
Notice of Appearance.....	2
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ELLEN COIN, J.:

In this action for breach of contract, plaintiff Roza 14W LLC (Landlord) seeks payment of outstanding rent from defendants ATB Holding Company LLC, d/b/a John Thomas Financial (Tenant), and Anastasios Belesis (Guarantor), late fees and interest, as well as replenishment of

Tenant's security deposit. In addition, Landlord seeks payment of its attorneys' fees as against Tenant and Guarantor.

Tenant cross-moves pursuant to CPLR §§3216 and 3124 to compel Landlord to reply to its discovery demands and pursuant to CPLR §3212(f) to strike the motion for summary judgment as premature in the absence of discovery.

BACKGROUND

Landlord alleges that Tenant failed to properly surrender the leased premises and has failed to pay base rent and additional rent since June 2013 in the sum of \$952,762.32. Further, Landlord seeks replenishment of the full amount of the \$500,000 security deposit, which Landlord withdrew and applied to cure Tenant's default.

On May 28, 2013, Tenant and Guarantor sent a letter (the "Notice") to Landlord, stating Tenant's intent to vacate and surrender the premises. In response, Landlord sent a letter to Tenant, dated June 4, 2013, rejecting the Notice as "facially defective" and invalid due to Tenant's already existing default for non-payment of rent (the "Rejection Letter"). On June 12, 2013, Tenant reaffirmed in writing its intention to vacate the premises.

Landlord contends that Tenant violated the Lease by not properly surrendering the premises in two ways: (1) by unilaterally vacating and abandoning the premises in breach of Article 30 of the Lease, which states that "no agreement to accept a surrender of this Lease shall be valid unless in writing signed by the Landlord" (Exhibit A to the Affirmation of Steven Plotnick, dated March 24, 2014), and (2) by not leaving the premises in "broom clean" condition, as required by Article 26 of the Lease. Landlord asserts that Tenant left behind some of its property. Accordingly, Landlord seeks to accelerate rent through the expiration of the Lease term.

Landlord also asserts that Guarantor is liable for Tenant's defaults. Landlord argues that the failure of Tenant to effectuate a valid surrender triggered Guarantor's liability for the unpaid amounts. Article 37 of the Lease contains a "good guy" guaranty, stating in relevant part:

Guarantor's liability pursuant to this Article...shall be limited to:

(i) the performance of those obligations and the payment of such Fixed Annual Rent, additional rent and other charges, including without limitation charges, if any, for use and occupancy, as accrue up to the date that Tenant vacates and surrenders the demised premises in the condition required under this Lease, free of claims of occupancy by third parties, and removes its property therefrom, delivers the key to Landlord and gives ninety (90) days prior written notice, executed by Tenant, to Landlord that it is surrendering possession of the demised premises...

In opposition, Guarantor argues that the language of Article 37.01 does not support the claim that Guarantor's liability extends to Tenant's alleged defaults, as it states that liability only extends to "written notice, executed by Tenant" and not a "writing signed by the Landlord" in Article 30.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon profer of evidence establishing a prima facie case by the movant, "... the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Where there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Court grants plaintiff's motion for summary judgment on its first cause of action for unpaid rent and additional fees. It is clear from the terms of the Lease that Tenant could not unilaterally surrender the premises without Landlord's consent. Therefore, when Tenant attempted to vacate the premises after receiving the Rejection Letter, Tenant violated the terms of the Lease and was in default.

Landlord re-entered the premises, but is not deemed to have accepted Tenant's surrender by re-entering the property based on Article 16 of the Lease.¹ When it is expressly agreed by the parties that the landlord can re-enter and re-let the premises as an authorized agent of the tenant, no surrender as a matter of law will result from the landlord's authorized re-entering or re-letting. (See *Schnee v Jonas Equities*, 109 Misc 2d 221, 223 [App Term 2d Dept 1981]). Landlord would also be "within its rights under New York law to do nothing and collect the full rent due under the lease." (*Holy Props. Ltd., L.P. v Kenneth Cole Prods., Inc.*, 87 NY2d 130, 134 [1995]).

Nonetheless, Landlord still has an obligation to respond to Tenant's discovery demands that relate to the calculation of damages. Therefore, Tenant's cross-motion to compel Landlord to comply and respond to the disclosure demands must be granted.

As to the second cause of action for attorneys' fees, the summary judgment motion must be denied, as no provision of the main Lease provides for Landlord's recovery of attorneys' fees

¹ Article 16 reads:

[I]n the event of the termination of this Lease, or of re-entry, by or under any summary dispossession or other proceeding or action or any provision of law by reason of default hereunder on the part of the Tenant, Tenant shall pay to Landlord as damages at the election of Landlord either: (a) a sum which at the time of such termination of this Lease or at the time of any such re-entry by Landlord... of the Fixed Annual Rent and the additional rent payable hereunder which would have been payable by Tenant... for the period commencing with such earlier termination of this Lease or the date of any such re-entry... and ending with the Expiration Date... provided, however that if Landlord shall re-let the Demised Premises during such period Landlord shall credit Tenant with net rents received by Landlord for such re-letting.

in a legal action or any other collection effort. The only reference to recovery of attorneys' fees is contained in Article 37 of Guaranty, which does not apply to Tenant. Absent an affirmative provision entitling a contracting party to recovery of attorneys' fees in the event of a breach of the agreement, there is no common law right to such relief. (*214 Wall St. Assoc., L.L.C. v Medical Arts Huntington Realty*, 99 AD3d 988, 990 [2d Dept 2012]).

As to the third and fourth causes of action against Guarantor for unpaid rent and reasonable attorney's fees, the motion is denied. "[A] consideration in interpreting the guaranty is the reasonable expectations of the parties and the business purposes to be served by their contract." (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 8 [1st Dept], *aff'd* 8 NY3d 59 [2006]).

Article 37.01 plainly states that Guarantor is liable for unpaid rent and additional fees prior to Tenant's vacancy. When Tenant gave the 90-day notice of intent to vacate the premises, Guarantor's obligations ceased at the expiration of that time period. Although Landlord argues that invalid surrender exposed Guarantor to liability for unpaid rents through the rental period, the language of the Guaranty does not support plaintiff's reading. The language of Article 30 that "no agreement to accept a surrender of this Lease shall be valid unless in writing signed by the Landlord" does not mirror the language of the Guaranty, Article 37.01, which only requires a 90-day notice executed by Tenant.

Ambiguity in a written agreement exists "if the provisions in controversy are reasonably or fairly susceptible to different interpretations or may have two or more different meanings" (*1407 Broadway Real Estate LLC v Sicari*, 2009 NY Slip Op 30603(4) *18 [Sup Ct, NY County 2009], quoting *Feldman v Natl. Westminster Bank*, 303 AD2d 271 [1st Dept 2003]). When there is ambiguity, "the terms of the guaranty... are to be strictly construed in favor of [the] private

guarantor.” (665-75 Eleventh Ave. Realty Corp. v Schlanger, 265 AD2d 270, 271 [1st Dept 1999]). “[A] ‘guarantor should not be bound beyond the express terms of his guarantee’...” (*Id.*, quoting *Wesselman v Engel Co*, 309 NY 27, 30 [1995]) and is only required to “substantially [comply]” with the terms of the lease. (*150 Broadway N.Y. Assoc., L.P. v Shandell*, 27 Misc 3d 1234 *8 [Sup Ct, New York County], *aff’d* 90 AD3d 998 [1st Dept 2010]).

Here, construing the Guaranty in favor of Guarantor, Guarantor substantially complied with the terms of the lease upon Tenant’s giving 90-day notice to the Landlord. Therefore, Guarantor’s liability for unpaid rent and additional fees ended after ninety days. The fact that Tenant was obligated to receive written approval from Landlord should not extend to Guarantor.

However, because Guarantor does not deny Landlord’s allegation that “some property was left behind” by Tenant (Verified Complaint ¶ 34),² there remains a factual dispute over whether the premises were left in “broom clean” condition, as required in Article 26. This precludes the Court from searching the record and dismissing the action as against Guarantor.

Based on the foregoing, it is hereby

ORDERED that so much of plaintiff’s motion as seeks summary judgment against defendant ATB Holding Company, LLC d/b/a/ John Thomas Financial on the First Cause of Action is granted as to liability only, and the amount of recoverable damages shall be determined at the time of inquest held after completion of all discovery; and it is further

ORDERED that the balance of the motion for summary judgment as against ATB Holding Company, LLC d/b/a/ John Thomas Financial on the Second Cause of Action and as

² “A verified pleading is the equivalent of a responsive affidavit for purposes of a motion for summary judgment.” (*Travis v Allstate Ins. Co.*, 280 AD2d 394, 394-95 [1st Dept 2001], quoting *Hladczuk v Epstein*, 98 AD2d 990, 990 [4th Dept 1983]).

against defendant Anastasios Belesis with respect to the Third and Fourth Causes of Action is denied; and it is further

ORDERED that defendants' cross-motion to compel plaintiff to comply and respond in full to defendants' Disclosure Demands is granted, and plaintiff shall respond to the requested discovery on or before September 5, 2014.

This constitutes the decision and order of the Court.

DATED: 8/6/14

ENTER:



Ellen M. Coin, A.J.S.C.