

I BLDG Co., Inc. v Hong Mei Cheung

2014 NY Slip Op 32231(U)

August 14, 2014

Supreme Court, New York County

Docket Number: 650226/2014

Judge: Cynthia S. Kern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----x
I BLDG CO., INC.,

Plaintiff,

Index No. 650226/2014

-against-

DECISION/ORDER

HONG MEI CHEUNG,

Defendant.

-----x
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	3

Plaintiff commenced the instant action seeking to recover, among other things, unpaid rents from defendant pursuant to a guaranty signed by defendant in connection with a commercial lease. Plaintiff now moves for an Order pursuant to CPLR §§ 3212 and 3211 granting summary judgment in its favor and striking defendant’s affirmative defenses and counterclaims. For the reasons set forth below, plaintiff’s motion is granted to the extent stated herein.

The relevant facts are as follows. In or around October 2004, plaintiff entered into a written lease agreement (the “Lease”) with Artisan Spa, Inc. (the “Tenant”) to let the ground floor of the building located at 137 Fourth Avenue, New York, NY (the “Premises”) for a term of

ten years. As an inducement to enter into the Lease, defendant Hong Mei Cheung (“Cheung”), owner of Tenant, executed a written guaranty (the “Guaranty”), wherein defendant guaranteed, among other things, “the full performance and observance of all agreements to be performed and observed by Tenant in the Lease.” However, the Guaranty further provided that “this Guaranty shall bind Guarantor only for performance and observance of the agreements to be performed and observed under the Lease that accrue while Tenant is in possession of the premises.”

At some point after the Lease was entered into, Tenant defaulted under the terms of the Lease by failing to pay rent and additional rent when due. Accordingly, plaintiff commenced a non-payment summary proceeding against Tenant, wherein it was awarded on default a possessory judgment. It appears from the papers that plaintiff subsequently obtained a money judgment against the corporate Tenant in Supreme Court for \$359,375.23 but it is entirely unclear from reviewing the papers what the money judgment consisted or what period of rent is covered by the money judgment. On September 22, 2012, Tenant was lawfully evicted by the City Marshal.

On or about January 23, 2014, plaintiff commenced the instant action to recover the unpaid rent and additional rent due under the Lease from defendant pursuant to the Guaranty. On or about February 28, 2014, defendant answered and asserted three affirmative defenses and two counterclaims. Defendant’s first affirmative defense is based on the ground that the Guaranty was not unlimited. The remaining affirmative defenses and counterclaims assert that plaintiff violated the Lease by unreasonably withholding its consent to the assignment of the Lease. Plaintiff now moves for an order granting summary judgment and awarding plaintiff the full amount of the money judgment rendered against Tenant in the prior Supreme Court proceeding

as well as attorneys' fees that were incurred in this action. Plaintiff also seeks an order dismissing defendants' affirmative defenses and counterclaims.

The court first turns to plaintiff's motion for summary judgment. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, plaintiff's motion for summary judgment is granted as to liability only as plaintiff has demonstrated its entitlement to judgment against defendant under the Guaranty as a matter of law but has not established the amount it is entitled to recover. The duly executed Guaranty signed by defendant explicitly states as follows:

The undersigned Guarantor . . . guarantees to Landlord, Landlord's successor and assigns, the full performance and observance of all agreements to be performed and observed by Tenant in the Lease . . . Notwithstanding the foregoing, this Guaranty shall bind Guarantor only for performance and observance of the agreement to be performed and observed under the Lease that accrue while Tenant is in possession of the premises. This Guaranty shall not apply to any performance or observance after Tenant surrenders possession of its premises in the condition required by the terms of the Lease. . . . The Guarantor shall also pay any and all cost and expenses, including attorney's fees that Landlord may incur in enforcing this Guaranty.

Under these clear terms, defendant is liable to plaintiff for all unpaid rent and additional rent that accrued prior to September 22, 2009, when Tenant was evicted and no longer was in possession of the premises and any attorney's fees incurred in this action. To the extent plaintiff seeks any

amounts due under the Lease which accrued after Tenant was evicted, such relief is denied as defendant did not guarantee payment of said amounts. Contrary to plaintiff's assertion, it is immaterial that the Tenant was evicted and did not surrender possession according to the terms of the Lease. While the Guaranty does provide that it "shall not apply to any performance or observance after Tenant surrenders possession of its premises in the condition required by terms of the Lease," it also states that it does not bind defendant for any performance accruing after Tenant is no longer in possession. Thus, as it is undisputed that Tenant was no longer in possession after September 22, 2009, it is not liable for any amounts due under the Lease that accrued after this date. However, the court cannot determine whether the money judgment awarded against the Tenant in the prior Supreme Court action consisted of rent up to the time that the tenant was evicted or also included rent due after the eviction. Moreover, plaintiff has not provided the court with any breakdown of the rent that was due and owing at the time of eviction. Therefore, the plaintiff is not entitled to summary judgment with respect to the amount of damages.

The court now turns to the remainder of plaintiff's motion seeking the dismissal of defendant's affirmative defenses and counterclaims. As an initial matter, defendant's first affirmative defense that the Guaranty was limited to amounts due under Lease until Tenant was evicted is dismissed as it is not a proper affirmative defense and was already discussed in relation to plaintiff's summary judgment motion. Similarly, defendant's remaining affirmative defenses and counterclaims, which all arise out of defendant's assertion that plaintiff unreasonably withheld consent to assign the Lease must be dismissed as they are also not proper. Defendant cannot assert such defenses or counterclaims in this action as it was not in privity with plaintiff under the Lease. Such defenses and/or counterclaims are only available to the Tenant and should

