Locon Realty Corp. v Vermar Mgt. LLC
2014 NY Slip Op 32554(U)
September 30, 2014
Supreme Court, Kings County
Docket Number: 503587/2013
Judge: Debra Silber
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9

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of September, 2014.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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LOCON REALTY CORP.,

Plaintiff,

- against -

VERMAR MANAGEMENT LLC, MICHAEL LEVITIS, MARINA LEVITIS, EVA LEVITIS and LEV SOKOLOVSKY,

Defendants.

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VERMAR MANAGEMENT LLC,

Third-Party Plaintiff,

- against -

MGM GROUP INC. d/b/a ROMANOFF,

Thid-Party Defendant.

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DECISION/ORDER/JUDGMENT

Index No. 503587/13

Mot. Seq. #1

The following papers numbered 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Answer/Opposing Affidavits (Affirmations)	4-5
Reply Affidavit (Affirmation)	6
Other Papers	

Upon the foregoing papers in this action, plaintiff, Locon Realty Corp. (Locon) moves for an order: (1) pursuant to CPLR 3212, granting it partial summary judgment on the first,

second, fourth and fifth causes of action in the complaint and (2) pursuant to CPLR 3211 (b) and/or CPLR 3212, dismissing defendant's affirmative defenses and counterclaims.

Background

Locon owns the real property at 2670 Coney Island Avenue in Brooklyn (Premises). Locon, as landlord, and defendant, Vermar Management LLC (Vermar), as tenant, entered into a commercial lease for the Premises on or about November 10, 2006. Vermar operated a supper club at the Premises called "Rasputin."

Vermar subsequently fell behind on its rental payments.

The L&T Summary Eviction Proceeding

Locon, in 2010, commenced a summary eviction proceeding against Vermar in the commercial landlord/tenant part of the New York City Civil Court entitled *Locon Realty Corp. v Vermar Mgt. LLC d/b/a Rasputin*, Index No. 59573/10 (2010 L&T Proceeding). Vermar was alleged to have failed to comply with its payment obligations under the commercial lease.

The Stipulations Of Settlement

The parties entered into a June 14, 2010 so-ordered stipulation of settlement in the 2010 L&T Proceeding (2010 Stipulation), pursuant to which Locon was awarded a warrant of eviction, but it would not be executed if Vermar complied with the provisions therein.

In the 2010 Stipulation, the parties agreed that Vermar owed $103,510.77, as of June 14, 2010, and established a payment plan under which Vermar agreed to pay the arrears. As additional consideration and security, Michael Levitis executed a "good guy guarantee" for all payments due under the lease and the 2010 Stipulation.

The parties thereafter entered into a series of stipulations extending Vermar's time within which to pay its mounting arrears,[1] the last of which was executed on February 12, 2013 (2013 Stipulation). In the 2013 Stipulation, Vermar agreed that it owed Locon $76,680.22 consisting of: (1) $46,050.22 for unpaid rent and additional rent through January 31, 2013; (2) $21,630.00 in base rent for February 2013; and (3) $9,000.00 in attorneys' fees. Michael Levitis personally guaranteed Vermar's payment obligations under the 2013 Stipulation and the renewal lease.[2]

When Vermar failed to pay the rent arrears in accordance with the 2013 Stipulation, the New York City Marshall evicted Vermar from the Premises on or about May 17, 2013. Vermar, following its eviction, failed to remove its property and fixtures from the Premises.

The Instant Action

Locon commenced this action on June 27, 2013. The complaint alleges that Vermar failed to comply with its obligations under the lease, "including but not limited to the timely payment of all rent and additional rent" (Complaint ¶ 13). In addition to rent arrears (Complaint ¶¶ 23-28), Locon seeks payment of the rent under the renewal lease through January 31, 2022, the end of the ten-year lease term (Complaint ¶¶ 30-37); and costs associated with the removal and storage of Vermar's property (Complaint ¶¶ 38-42).

Locon has asserted six causes of action in its complaint, the first five of which are against Vermar and Michael Levitis, seeking: (1) an $84,825.25 judgment for rent arrears

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[1] The parties executed stipulations on May 16, 2011, March 28, 2012, May 3, 2012 and February 12, 2013.

[2] In conjunction with the March 28, 2012 stipulation, the parties executed a new commercial lease.

and additional accrued rent (first cause of action); (2) a $2,550,341.76 judgment for the rent that is/will be "due for the remainder of the lease term" (second cause of action); (3) $15,000.00 for damages allegedly incurred for "removing and storing" Vermar's property (third cause of action); (4) a declaration that Vermar abandoned the furniture, fixtures and other property that Vermar left at the Premises after its eviction (fourth cause of action); and (5) a $20,000.00 award of attorneys' fees incurred by Locon (fifth cause of action).

Locon asserted a final cause of action against all defendants (sixth cause of action), seeking to pierce Vermar's corporate veil so that Locon can hold the individual defendants liable, jointly and severally, for Vermar's alleged breaches under the leases and stipulations.

Defendants served a verified answer to the complaint on or about September 16, 2013, denying the material allegations therein and asserting nineteen affirmative defenses[3] and three counterclaims against Locon for conversion of Vermar's equipment and furnishings at the Premises (first counterclaim), breach of contract (second counterclaim) and unjust enrichment (third counterclaim).

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[3] Vermar's affirmative defenses are: (1) failure to state a cause of action; (2) that it did not voluntarily relinquish control over commercial or personal property; (3) that Locon failed to perform its obligations under the lease; (4) that Locon's complaint is not premised on the whole agreement between the parties; (5) that the lease requires arbitration; (6) Locon's damages were not caused by defendants; (7) Locon's damages were caused by its own actions; (8) unclean hands; (9) Locon has a duty to mitigate any alleged damages; (10) collateral estoppel; (11) equitable estoppel; (12) the complaint is barred by public policy; (13) that defamatory statements made during litigation are privileged; (14) that Vermar was in "complete performance of the subject lease at the time it was terminated"; (15) that Vermar was prevented from performing its "obligations under the contract by the United States government"; (16) failure to join necessary parties; (17) that Locon has "improperly asserted causes of action against the named individuals without asserting a cause of action to pierce the corporate veil of Vermar . . ."; (18) defendants complied with the "good guy" clause under the subject lease; and (19) that Lev Sokolovsky is not a member of Vermar.

Vermar thereafter commenced a third-party action against MGM Group, Inc. d/b/a Romanoff (MGM), the successor tenant at the Premises, on or about December 26, 2013, asserting causes of action for conversion of its property (first cause of action), breach of contract (second cause of action) and unjust enrichment (third cause of action).

Locon's Partial Summary Judgment Motion

Locon now seeks an order, pursuant to CPLR 3212, granting it summary judgment on its first, second, fourth and fifth causes of action and dismissing Vermar's affirmative defenses and counterclaims.

Judgment Against Vermar

Regarding the first cause of action, Locon contends that Vermar owes it $68,706.30 in unpaid rent, additional rent and late fees under the lease and the 2013 Stipulation. Specifically, Locon argues that Vermar owed a total of $135,046.30 in rent and additional rent as of the date of its May 17, 2013 eviction, of which $66,340.00 was paid, leaving an unpaid balance of $68,706.30.

Locon, regarding the second cause of action, seeks $106,056.78 in liquidated damages for the base rent that accrued after Vermar's May 17, 2013 eviction through October 15, 2013, the date when Locon began collecting rent from the new tenant at the Premises, MGM. Locon relies upon paragraph 18 of the lease, which provides in relevant part:

> "In case of any such default, re-entry, expiration and/or dispossess by summary proceeding or otherwise . . . (c) Tenant or the legal representatives of Tenant shall also pay Owner, as liquidated damages, for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or

> leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of the lease."

Locon contends that the "survival clause" in paragraph 18 of the lease is legally enforceable.

Locon notes that it already has a money judgment against Vermar from the 2010 L&T Proceeding for $26,641.77, which should be credited towards any judgment that is awarded. Locon thus seeks a money judgment against Vermar on its first and second causes of action in the amount of $148,121.31 [($68,706.30 + $106,056.78) - $26,641.77 = $148,121.31].

Judgment Against Michael Levitis As Guarantor

Locon also seeks a money judgment of $174,763.08 against Michael Levitis based on the above figures (without a credit for the money judgment in the L&T Proceeding) because he guaranteed Vermar's payment obligations under the 2013 Stipulation and the lease.

Declaratory Judgment Regarding Abandoned Property

Locon also moves for summary judgment on its fourth cause of action, seeking a declaratory judgment that the kitchen equipment and appliances that were installed at the Premises in 1993 by a prior tenant are Locon's property. Locon produced documentation reflecting that the installation of the kitchen equipment and fixtures pre-dated Vermar's tenancy and paragraph 3 of the lease provides, in relevant part, that:

> "all fixtures and all paneling, partitions, railings and like installations, installed in the premises at any time, either by Tenant or by Owner on Tenant's behalf shall, upon information, become the property of Owner and shall remain upon and be surrendered with the demised premises . . ."

Locon also seeks a declaratory judgment that Vermar's trade fixtures and personal property remaining in the Premises following Vermar's eviction was abandoned under the terms of the lease. Paragraphs 3 of the lease provides, in relevant part:

> "All property permitted or required to be removed by Tenant at the end of the term remaining in the demised premises after Tenant's removal *shall be deemed abandoned* and may, at the election of Owner, either be retained as Owner's property or may be removed from the demised premises by Owner at Tenant's expense" (emphasis added).

Paragraph 21 of the lease required Vermar to surrender the Premises in "broom-clean" condition and provides that "Tenant shall remove all of its property." Paragraph 14 of the lease rider provides, in relevant part:

> "upon the expiration of this lease, or sooner termination . . . or Tenant abandons or is dispossessed and fails to remove any trade fixtures of [sic] other property within 15 days then in that event, the said fixtures and property shall be deemed abandoned by said Tenant and shall become the property of the Landlord."

According to the City Marshall's inventory sheet, Vermar failed to remove personal property from the Premises after it was evicted, including, but not limited to, tables and chairs, costumes, cabinets, alcohol, linens, kitchenware, cleaning products and HVAC equipment.

Dismissal Of Vermar's Counterclaims

Locon contends that Vermar's counterclaims for conversion, breach of contract and unjust enrichment – which relate to Vermar's property left at the Premises – are subject to dismissal because such property was deemed abandoned under the terms of the lease.

Dismissal Of Vermar's Affirmative Defenses

Locon contends that Vermar's nineteen affirmative defenses are meritless and should be stricken because they lack any factual basis and/or they directly conflict with the terms of the parties' lease and stipulations.

Vermar's Opposition Papers

Vermar, in opposition, submits the affirmation of its counsel, Flora Rainer, Esq. who contends that "there are many questions of law and fact" warranting denial of Locon's summary judgment motion, the "greatest" of which is the issue of abandonment of property remaining in the Premises following Vermar's eviction. Vermar argues that this issue must be "resolved by a trier of facts to determine whether there was an abandonment . . ." and "whether the amounts of money from these goods wrongfully taken by the Plaintiff is an offset to any and all arrears owed for the rent."[4]

Rainer opposes Locon's summary judgment motion by identifying two potential witnesses for trial who were interested in purchasing Vermar's restaurant, including the kitchen equipment and other fixtures that were left at the Premises when Vermar was evicted. Rainer contends that Locon "deprived the Defendants and Third Party Plaintiff from the sale of the restaurant and its property and caused the Defendant Michael Levitis to be unable to mitigate his own personal guarantees under the lease" (Rainer Opposition Affirmation ¶ 18).

Discussion

Summary Judgment is a drastic remedy that should only be granted when no triable issues of fact exist (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The moving party bears the initial burden of establishing its prima facie entitlement to summary judgment, as a matter of law, with admissible evidence demonstrating the absence of material facts (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Failing to

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[4] *See* the June 5, 2014 affirmation in opposition of Flora Rainer, Esq. (Rainer Opposition Affirmation) at ¶¶ 6 and 15.

make that showing requires denying the motion regardless of the adequacy of the opposition (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

Considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega*, 18 NY3d at 503). Nevertheless, "mere conclusions, expressions of hope or unsubstantiated allegations are insufficient" to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]). Thus, issue-finding and not issue-determination is key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]).

Here, Locon has demonstrated its entitlement to summary judgment on its first and second causes of action against Vermar and Michael Levitis, both of which are unopposed.

Vermar has failed to raise any issues of fact that warrant a trial with respect to the fourth cause of action, which seeks a declaratory judgment regarding the abandoned property at the Premises and is the only issue that Vermar raises in opposition to Locon's instant motion. The lease provisions relied upon by Locon plainly define any property left at the Premises at the end of 15 days after Vermar's eviction as abandoned and does not provide for an offset, as sought by Vermar. There is no need for a trial regarding the

issue of abandonment, since Vermar concedes that it did not remove its property from the Premises, as was required under the terms of the lease. Vermar has also failed to demonstrate that it tried to preserve its interest in the personal property by timely contacting Locon.

Further, Locon has sufficiently demonstrated that Vermar's affirmative defenses and counterclaims – the majority of which have no relevance to the facts here – are meritless, inapplicable and/or are inconsistent with the terms of the parties' lease and stipulations.

The branch of the motion which seeks summary judgment on Locon's fifth cause of action for attorneys' fees must be denied with leave to renew, as Locon has failed to include any affirmation of services in its papers. It is also unclear if the fees are all for prior services rendered, or if they include fees for prosecuting this action, which has not yet concluded. Accordingly, it is

ORDERED AND ADJUDGED that the branch of Locon's motion which seeks summary judgment on its first and second causes of action against Vermar is granted, and Locon is awarded a money judgment against Vermar in the amount of $148,121.31; and it is further

ORDERED AND ADJUDGED that the branch of Locon's motion which seeks summary judgment on its first and second causes of action against Michael Levitis is granted, and Locon is awarded a judgment against Michael Levitis in the amount of $174,763.08; and it is further

ORDERED, ADJUDGED AND DECLARED that the branch of Locon's motion which seeks summary judgment on its fourth cause of action is granted and: (1) all kitchen equipment installed in the Premises prior to Vermar's tenancy are determined to be Locon's property and (2) all trade fixtures and personal property that Vermar failed to remove from the Premises within fifteen days of its eviction is deemed abandoned under the terms of the lease; and it is further

ORDERED that the branch of Locon's motion which seeks summary judgment on its fifth cause of action for $20,000.00 in attorneys fees is denied without prejudice to renewal; and it is further

ORDERED AND ADJUDGED that the branch of Locon's motion which seeks summary judgment dismissing Vermar's affirmative defenses and counterclaims is granted.

This shall constitute the decision, order and judgment of the court.

E N T E R,

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court

COUNTY CLERK
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