

250 W. 78th LLC v Pildes of 83rd St., Inc.

2014 NY Slip Op 33490(U)

April 7, 2014

Supreme Court, New York County

Docket Number: 654112/2013

Judge: Geoffrey D. Wright

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JUDGE GEOFFREY D. WRIGHT

PART 47

PRESENT: _____
Justice

Index Number : 654112/2013
250 WEST 78TH LLC
vs
PILDES OF 83RD STREET, INC.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for Dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1

Answering Affidavits — Exhibits _____ No(s) 2

Replying Affidavits _____ No(s) 3, 4

Memorandum,
Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the annexed hereto decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):


GEOFFREY D. WRIGHT
AJSC

Dated: 4/9/14

_____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
250 WEST 78th LLC.,

Plaintiff,

Index # 654112/2013

-against-

DECISION

PILDES OF 83RD STREET, INC., DAN PILDES,

Defendants.

Present:

Hon. Geoffrey D. Wright

-----X Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_____ 1 _____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____ 2 _____
Replying Affidavits.....	_____ 3, 4 _____
Exhibits.....	_____
Other.....memorandum.....	_____ 5,6 _____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

This is an action to recover damages for an alleged breach of lease. Defendants, Pildes of 83rd Street, Inc (“ 83rd”) and Dan Pildes (“Defendant”) (“collectively Defendants”) move for an Order against Plaintiff 250 West 78th LLC., (“250 West”) pursuant to CPLR 3211 (a)(1), 3211 (c) and CPLR 3212 to dismiss the complaint against them. 83rd asserts a counterclaim against 250 West, seeking the return of the security deposit. 250 West moves pursuant to CPLR 3211 for dismissal of the counterclaim. For the reasons discussed below, Defendant’s motion for summary judgment to dismiss the complaint is granted. In addition, the counterclaim by 83rd is dismissed.

On or about November 19, 1996, Pildes of 83rd Street entered into a ten year lease (“the Lease”) commencing on December 1, 1996, ending November 30, 2006, with Receiver, John J. Sheehan, to occupy the ground floor store and basement space at 2193 Broadway, New York, New York. 250 West 78th LLC (“250 West”) purchased the premises located at 2193 Broadway, New York from NRP LLC II on November 12, 1999. Dan Pildes, signed the lease in his

capacity as President of Pildes of 83rd Street, Inc., and in addition, he signed as guarantor.

On or about January 30, 2006, 83rd and 250 West entered into a “revised Lease Renewal” commencing December 1, 2006 through November 30, 2009. This renewal was signed by Defendant in his capacity as President of Pildes of 83rd, and Mark Scharfman, the Manager of 250 West. At the time the agreement was executed, Scharfman was the manager of 250 West however, on the “revised lease renewal” the signature block reflects Scharfman as Manager of Amsterdam Avenue Associates LLC. Plaintiff asserts this was a scrivener’s error that was not noticed until they were preparing opposition papers for the instant case. Defendants point to this as evidence that 250 West does not have standing to bring this case. To the extent that Defendants seeks to use this to argue that Plaintiff does not have standing, this argument fails. First, no other documents and in no other place is Amsterdam Avenue Associates referred to as the Landlord. Clearly, Defendant was not confused as the record shows 83rd continued to make rental payments to 250 West as had previously been done in the five years or more since 250 West had become the owner of the premises. Next, on the first pages of the 2006 and 2009 revised renewal lease above the salutation the agreement refers to the Lease and identifies 250 West 78th, LLC as the Landlord. Lastly, the deed transferring the property to the 250 West clearly transferred “Together with ...all rights of Grantor in and to said premises” and “Subject to such ...agreements, as pertains to the Premises.” In addition the terms of the Guaranty provides that “successors and assigns” of the Lease also have a right to enforce the guaranty, even if the Lease was modified or amended.

It is undisputed that 83rd entered into a ten year lease with 250 West and renewals. It is also undisputed that Defendant Dan Pildes signed as Guarantor on the original ten year lease and that 83rd eventually defaulted on the 2009 renewal by failing to pay rent due from July 1, 2013 onwards. 83rd informed 250 West via letter dated May 30, 2013, they intended to surrender the premises at the end of June 2013, due to economic difficulties. In response, Mark Sharfman, sent a letter stating “we do not acknowledge that you have a right to break the lease and surrender with impunity. We reserve our rights to seek rent and additional rent due now and for the duration of the lease.” At the time 83rd vacated the premises on June 30, 2013, they were obligated to pay rent from July 2013 through November 2014. The major source of disagreement stems from whether the Guaranty signed on the ten year lease carried over to the 2006 and more importantly the 2009 “revised Lease Renewal.”

In their motion to dismiss, Defendants argue that the guaranty signed by Defendant in the initial ten year lease does not provide that the guaranty would remain in effect with respect to renewals, extensions or subsequent leases. They argue that the subsequent renewals were all signed by Defendant in his capacity as President of 83rd and not as guarantor. They contend that the Lease provides for one five year lease renewal option which never exercised as the subsequent agreement was for three years and did not conform to the option referred to in the lease. Specifically the detailed rental calculations referred to were never used in the ensuing agreement.

250 West argues the Guaranty carried over to the subsequent agreements because the Guaranty provided for the continuation even where the Lease were modified, amended or

changed or where the Lease was extended. Further, they argue that the Guaranty paragraph clearly states that they did not have to obtain Defendant's permission to make amendments to the Lease and such changes did not affect the validity of the Guaranty.

It is well established that "[a] guaranty is to be interpreted in the strictest manner" (White Rose Food v Saleh, 99 NY2d 589, 591, 788 NE2d 602, 758 NYS2d 253 [2003]), particularly in favor of a private guarantor (665-75 Eleventh Ave. Realty Corp. v Schlanger, 265 AD2d 270, 271, 697 NYS2d 270 [1999]), and cannot be altered without the guarantor's consent (White Rose Food v Saleh, 99 NY2d at 591). In this regard, a "guarantor should not be bound beyond the express terms of his guarantee" (665-75 Eleventh Ave. Realty Corp., 265 AD2d at 271 [internal quotation marks and citation omitted]).

Interpreting the guaranty in the strictest manner, we agree that the subsequent revised lease renewals were not an extensions of the lease as would permit 250 West to recover from Defendant guarantor. The usual rule is where a guaranty obligates a guarantor as to any "renewal, change or extension of the lease," upon the expiration of the lease, the guaranty lapses and can no longer bind defendant. (Lo-Ho LLC v. Batista, 62 A.D.3d 558 (N.Y. App. Div. 1st Dep't 2009)). The renewal option found in paragraph 69 of the Lease provides for one renewal of five years and sets forth calculations for determining the renewal's rent schedule. The subsequent renewal was for three years and did not follow the rental calculations set forth in the 1996 lease and the 2006 renewal increased the rental obligations. Further, the 2006 agreement makes no reference that the renewal was made pursuant to the renewal option in the 1996 lease. The 2009 renewal was the second renewal, and also included new terms and conditions. Indeed, the rent obligation was increased and the security deposit was significantly increased.

With respect to the counterclaim by 83rd against 250 West for the return of the security deposition in the amount of \$77,210.67, 250 West argues that the security deposit has been subsumed by costs related to the default by 83rd and by the remaining unpaid rent from July 1, 2013 and thereafter. The security deposit, addressed in Paragraph 15 of the Lease agreement states: "[S]aid sum shall be returned to the Tenant at the time fixed as the expiration of the term herein, provided the Tenant has fully and faithfully carried out all of said terms, covenants and conditions on Tenant's part to be performed. Admittedly, 83rd breached the Lease and contrary to their argument the "Good Guy" provision in the Guaranty was not activated when 83rd breached the lease. 250 West is entitled to retain the security deposit to apply towards costs related to the default and for the outstanding rent in arrears. (1407 Broadway Real Estate LLC v. Tsui, 2012 N.Y. Misc. LEXIS 3391 (N.Y. Sup. Ct. June 29, 2012)).

Accordingly, it is hereby ORDERED that Defendant's motion for summary judgment to dismiss is granted and,

It is further ORDERED that the counterclaim by 83rd is dismissed. This constitutes the decision and order of the Court.


GEOFFREY D. WRIGHT
AJSC

Dated: April 7, 2014

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court