

Cinfiors, Ltd. v Ancient Weave, Inc.

2015 NY Slip Op 30350(U)

March 13, 2015

Supreme Court, New York County

Docket Number: 650112/2012

Judge: Saliann Scarpulla

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COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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CINFIORS, LTD.,

Plaintiff,

Index No.: 650112/2012

-against-

DECISION AND ORDER

ANCIENT WEAVE, INC., ROYAL
INTERCONTINENTAL, INC. and
GYURME SHERPA,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action for breach of a commercial lease, plaintiff Cinfiors, Ltd. (“Cinfiors”) moves for summary judgment as against defendants Ancient Weave, Inc. (“Ancient Weave”), Royal Intercontinental, Inc. (“Royal”), and Gyurme Sherpa (“Sherpa”) (collectively “defendants”), and moves to dismiss all of the defendants’ affirmative defenses.

Background

Cinfiors is the owner of a building located at 243 East 59th Street, New York, New York (“Building”). Sherpa is the owner of both Ancient Weave and Royal. Pursuant to an October 31, 2002 lease, Cinfiors, as landlord, leased to Ancient Weave, as tenant, certain store premises (“Premises”) in the Building, designated as ground floor and basement space (“Lease”).

Pursuant to a first lease modification and extension agreement between Cinfiors and Ancient Weave, made as of May 16, 2007, the term of the Lease was extended to October 31, 2012 (“Lease Extension”). From November 1, 2009 through October 31, 2010, the monthly rent is \$8,363.14; from November 1, 2010 through October 31, 2011, the monthly rent is \$8,614.04; and for the term November 1, 2011 through October 31, 2012, the rent is \$8,872.45 per month. Sherpa signed the Lease Extension on behalf of Ancient Weave, and signed a written guaranty in connection with the Lease Extension.

In August 2010, Cinfiors commenced a summary proceeding against Ancient Weave in the commercial landlord and tenant part of the Civil Court, New York County, Index No.: 080731/2010 (the “summary proceeding”), in which Cinfiors sought unpaid rent in the sum of \$49,470.76, which became due under the Lease Extension through August 2010. The parties entered into a stipulation of settlement, dated November 5, 2010, pursuant to which Ancient Weave agreed, “without prejudice to all Petitioner’s rights under the Lease and Guaranty,” to: (1) entry of a money judgment in the sum of \$49,470.76, representing the amount of rent due through August 2010; (2) surrender the Premises on October 3, 2010; (3) pay \$25,000 to Cinfiors by certified check no later than December 6, 2010, and make payments of \$1,359.99 on or before the 5th day of each month from January 2011 through June 2012, in order to satisfy the judgment. This stipulation was signed by the attorneys for Cinfiors and Ancient Weave, as well as by Sherpa, as the guarantor under the Lease Extension.

The clerk of the court entered a judgment of possession and a money judgment in the amount of \$49,470.76 against Ancient Weave, on November 5, 2010.

Cinfiors submitted the affidavit of its president Julius J. Cinque (“Cinque”), in support of its motion for summary judgment. In his affidavit, Cinque acknowledges that Ancient Weave paid the \$49,470.76 due under the judgment, but did not pay the rent due for September or October 2010, which he states totals \$16,726.28, which Cinfiors now seeks. Cinfiors also seeks unpaid rent from Ancient Weave, from November 1, 2010 to November 30, 2011 in the sum of \$112,240.93.¹

Additionally, Cinque avers that Cinfiors re-let the Premises to another tenant, De Gournay Inc., d/b/a De Gournay, for the term of December 1, 2011 to April 30, 2022, at a monthly rent of \$7,600, and gave De Gournay a rent credit of \$38,000.00 to be applied to its rent for the months of January 2012 through May 2012. Thus, Cinfiors also seeks outstanding rent from Ancient Weave for December 2011 to January 2012, in the sum of \$10,144.90.²

Finally, Cinfiors seeks damages in the amount of \$40,618.71, for the expenses it incurred in re-letting the Premises, including \$6,347.50 in legal fees and \$34,271.21 in

¹ Cinfiors seeks 12 months of rent at \$8,614.04 per month, and one month at \$8,872.45, which equals \$112,240.93.

²This amount represents \$1,272.45 in unpaid rent for December 2011, which is the difference between Ancient Weave’s rent of \$8,872.45 and De Gournay’s rent of \$7,600, plus \$8,872.45, for January 2012. Cinfiors received no rent from De Gournay for that month due to the rent credit.

brokerage commissions. Cinfiors applied the \$20,935.77 it was holding as Ancient Weave's security deposit towards Ancient Weave's unpaid rent, and therefore now seeks a total of \$158,795.05 from Ancient Weave, plus interest thereon at the statutory rate from June 15, 2011.

Cinfiors commenced this action in January 2012, seeking the monies as described above from Ancient Weave, Royal and Sherpa.³ With respect to Royal, which was not a party to the Lease or the Lease Extension, Cinfiors alleged that it is entitled to collect use and occupancy from Royal, as Royal used the address for the Premises as its showroom. Cinfiors also alleged that Royal and Ancient Weave essentially operated as one corporation, and that Royal was effectively the alter ego of Ancient Weave. Cinfiors thus seeks to pierce the corporate veil of Ancient Weave to make Royal liable on this alleged debt.

Cinfiors argues that, when it commenced the summary proceeding in August 2010, rent for September and October 2010 was not yet due. Further, Cinfiors argues that it had no legal duty to mitigate its damages under the Lease Extension. Finally, Cinfiors argues

³ In his affidavit in support of Cinfiors' motion, Cinque states that the damages sought in the second cause of action in the complaint are \$136,297.24, rather than \$142,068.77, the amount set forth in the motion. According to his affidavit, the discrepancy is due to: "(A) classification, for purposes of this motion, of rent due for November 2010 as post-surrender damages rather than pre-surrender rent, and (B) Plaintiff's inadvertent error in the Complaint in computing damages for the entire period based on the rent reserved in ¶ 2(v) of the Lease Extension (\$8,872.45)," and asks the court to conform the pleading to the evidence.

that Sherpa disregarded any distinction between Ancient Weave and Royal, which included Royal using the Premises as its showroom and Ancient Weave paying the rent for the Premises using checks, signed by Sherpa, drawn on Royal's bank account. According to Cinfiors, there is no evidence that Ancient Weave had a separate bank account. Furthermore, Cinfiors argues that when Sherpa signed the Lease on behalf of Ancient Weave, he put down Royal's tax identification number as Ancient Weave's.

In opposition to the motion, defendants submitted the affidavit of Sherpa, which states

Royal Intercontinental, Inc [sic] was not a tenant on the lease and did not utilized [sic] the space yet plaintiff wants money from Royal Intercontinental who paid the rent on behalf of Ancient Weave, Inc., as it had very little money. I did not want to default on the rent so one of my companies lent to the other.

Sherpa also avers that shortly after Ancient Weave vacated the Premises in 2010, he found a new tenant "willing to move into the space and pay the same rent however the plaintiff refuse [sic] to accept same" At his deposition, Sherpa responded to questions concerning the allegedly outstanding rent for September and October 2010, by stating that he thought "all I owed [Cinfiors] was the \$49,470 . . . ," which he paid in full. Sherpa further states that "September, October, I really had no idea. I thought [] \$49,000, that payment arrangement that we made, that was all I owed."

In opposition to the motion, Ancient Weave also argues that

[p]laintiff failed to mitigate its damages by failing to accept the tenant provided by the defendant which would have immediately made the

plaintiff whole. The plaintiff should not be able to sue the defendant in landlord tenant court, be paid all the money owed and then not accept the tenant provided by the defendant so it could try to punish the plaintiff.

Ancient Weave argues that Cinfiors should not be allowed to pierce the corporate veil of Ancient Weave to reach the assets of Royal, because Royal was not the tenant, did not utilize the Premises, and is not an alter ego of Ancient Weave, as Royal was a separate company that filed separate tax returns. Further, according to Sherpa, "Royal Intercontinental committed no wrong or unjust act towards plaintiff."

Cinfiors now seeks summary judgment against Ancient Weave for unpaid rent that accrued: (1) September and October 2010, in the sum of \$16,726.28; (2) from November 2010 to October 2011, at the rate of \$8,614.04/month, in the sum of \$103,368.48; (3) November 2011, in the sum of \$8,872.45; (4) December 2011, at the rate of \$8,872.45/month, minus \$7,600 for rent from the De Gournay, in the sum of \$1,272.45; and (5) due to the De Gournay rent credit, January 2012, in the sum of \$8,872.45. As a result, Cinfiors seeks unpaid rent totaling \$139,112.11.

Further, pursuant to the language of the Lease Extension, Cinfiors seeks additional damages in the form of broker fees in connection with re-letting the Premises, in the sum of \$34,271.21, and legal fees, in connection with the De Gournay lease, in the sum of \$6,347.50. Cinfiors notes that it was holding a security deposit for Ancient Weave in the sum of \$20,935.77, which includes accumulated interest, and deducted this amount from the total owed. Therefore, it seeks a total of \$158,795.05 on its motion.

In addition, Cinfiors seeks summary judgment against Sherpa based upon the guarantee annexed to the Lease for unpaid rent for September and October 2010 in the sum of \$16,726.28.

In support of these damages, Cinfiors annexed the broker's commission invoice to its motion, as well as the breakdown of the legal fees charged in connection with the De Gournay lease. Article 31 of the Lease states that Ancient Weave has provided a security deposit to Cinfiors, and that Cinfiors may use those monies "to the extent required for the payment of any rent and additional rent or any other sum as to which Tenant is in default or any sum which Owner may expend or may be required to expend by reason of Tenant's default in respect of any of the terms . . . , including but not limited to, any damages or deficiency in the re-letting of the premises"

In support of its causes of action alleged against Ancient Weave and Sherpa, Cinfiors offers the deed that establishes its ownership of the Premises, the Lease and the Lease Extension, the guaranty signed by Sherpa, the November 5, 2010 judgment from Civil Court, New York County, and the affidavit from Cinque.

Discussion

It is well understood that summary judgment is a drastic remedy and should be granted only if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 (2012), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

Regardless of the sufficiency of the opposing papers, the “[f]ailure to make such showing requires denial of the motion.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In the event a tenant abandons the premises prior to the expiration of the lease, the law imposes no duty upon the landlord to mitigate its damages. *Holy Properties Ltd. v. Kenneth Cole Prods.*, 87 N.Y.2d 130, 133-134 (1995). “Once the lease is executed, the lessee’s obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages.” *Id.* at 133. Under these circumstances, the landlord is within its rights to “do nothing and collect the full rent due under the lease” *Id.* Further, although the tenant is no longer in possession of the premises, “the parties to a lease are not foreclosed from contracting as they please If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable.” *Id.* at 134.

Here, the lease contains two relevant provisions. Article 31, as cited above, and Article 18, which states in relevant part:

In case of any such default, re-entry, expiration, and/or dispossession by summary proceedings or otherwise, (a) the rent, and additional rent, shall become due thereupon and be paid up to the time of such re-entry, dispossession and/or expiration, (b) Owner may re-let the premises or any part

or parts thereof, either in the name of Owner or otherwise, for a term or terms, which may at Owner's option be less than or exceed the period which would otherwise have constituted the balance of the term of this lease and may grant concessions of free rent or charge a higher rental than that in this lease, and/or (c) 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 this lease . . . In computing such liquidated damages there shall be added to the said deficiency such expenses as the Owner may incur in connection with re-letting, such as legal expenses, reasonable attorneys' fees, brokerage

The clear language of the Lease entitles Cinfiors to seek the outstanding monies on the Lease Extension and guaranty from Ancient Weave and Sherpa. Defendants argue that these matters were resolved in the summary proceeding. However, that proceeding does not preclude Cinfiors from seeking the damages sought herein. In the summary proceeding, Cinfiors sought only unpaid rent through August 2010, and did not seek Cinfiors' expenses, which are sought here. Moreover, that proceeding was settled "without prejudice to all Petitioner's rights under the Lease and Guaranty." Defendants do not argue that Cinfiors engaged in any fraud or misrepresentation. Nor do defendants argue that the attorneys fees sought herein are unreasonable.

Therefore, as against Ancient Weave and Sherpa, Cinfiors establishes the absence of any questions of material fact. In opposition, Ancient Weave and Sherpa failed to produce proof sufficient to establish the existence of material issues of fact which require

a trial. Accordingly, the motions for summary judgment as against Ancient Weave and Sherpa is granted.

However, Cinfiors fails to meet its burden as against Royal. Cinfiors alleges in the complaint that, because Royal used the property, it is indebted to Cinfiors for use and occupancy for the period of September and October 2010. Additionally, in a separate cause of action, Cinfiors seeks to pierce the corporate veil of Ancient Weave to reach the assets of Royal. To establish its right to use and occupancy from Royal, Cinfiors offers a letter sent by Sherpa to Cinfiors on Royal's letterhead, which describes the Premises as Royal's "Manhattan Showroom." Cinfiors also submits an email sent by Sherpa to Cinfiors, which lists Royal's address as the Premises.

However, Ancient Weave, and not Royal, is the named tenant on the Lease and Extended Lease. Nothing submitted establishes that Royal was the tenant or the occupant of the Premises for the purpose of seeking use and occupancy from Royal. *See El Gallo Meat Mkt., Inc. v. Gallo Mkt. Inc.*, 286 A.D.2d 255, 256 (1st Dept 2001) ("[a] landlord-tenant relationship is the *sine qua non* for [the recovery of use and occupancy]").

Similarly, Cinfiors failed to show a basis to pierce the corporate veil. Cinfiors is unable to establish that the finances of Ancient Weave and Royal are integrated, that there was complete domination of one corporation over another with respect to this tenancy, or that such domination was used to commit a fraud or wrong against Cinfiors. *See Campone v. Pisciotto Servs., Inc.*, 87 A.D.3d 1104, 1105 (2d Dept 2011).

Defendants have not cross-moved for summary judgment on behalf of Royal. However, based upon a search of the record, pursuant to CPLR 3212 (b), summary judgment dismissing the third and fourth causes of action set forth in the complaint as against Royal is granted.

In accordance with the foregoing, it is

ORDERED that the portion of plaintiff Cinfiors, Ltd.'s motion for summary judgment seeking judgment against defendant Ancient Weave, Inc. in the sum of \$158,795.05 and against Gyurme Sherpa, in the sum of \$16,726.28, is granted; it is further

ORDERED that the Clerk is directed to enter judgment in favor of Cinfiors and against Ancient Weave, Inc. in the amount of \$158,795.05, together with interest at the statutory rate from the date of July 15, 2012, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, 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 in favor of Cinfiors and against Gyurme Sherpa in the amount of \$16,726.28, together with interest at the statutory rate from the date of October 1, 2010, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, 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 portion of plaintiff's motion seeking summary judgment
against defendant Royal Intercontinental, Inc. is denied; and it is further

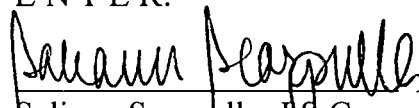
ORDERED that the third and fourth causes of action as set forth in the complaint
as against defendant Royal Intercontinental, Inc. are dismissed, with costs and
disbursements to said defendant as taxed by the Clerk of the Court, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of
defendant Royal Intercontinental, Inc.

This constitutes the decision and order of this Court

Date: New York, New York
March 13, 2015

ENTER:


Saliann Scarpulla, J.S.C.