Daval 37 Assoc. LLC v Namdar
2015 NY Slip Op 30493(U)
April 2, 2015
Sup Ct, New York County
Docket Number: 157359/14
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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DAVAL 37 ASSOCIATES LLC,

Plaintiff,

-against-

MICHAEL NAMDAR a/k/a
KOUROSH MICHAEL NAMDAR,

Defendant.

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DECISION AND ORDER

Index No. 157359/14

HON. ANIL C. SINGH, J.:

Plaintiff Daval 37 Associates, LLC moves for: a) summary judgment on the first and second causes of action set forth in plaintiff's verified complaint, and (i) entering judgment against defendant in the amount of $304,221.21 through December 31, 2014, plus any additional rent, additional rent and interest that accrues thereafter until the date that a judgment is entered, and (ii) awarding plaintiff its attorneys' fees, costs and expenses upon the submission of affidavit(s)/affirmation(s) and billing statements or, alternatively, setting this matter down for an immediate hearing to determine the amount thereof; and b) pursuant to CPLR 3212 and/or 3211(b) dismissing defendant's twelve affirmative defenses and sole counterclaim. Defendant Michael Namdar opposes and cross-

moves for summary judgment dismissing the complaint and, in the event summary judgment is not granted, then granting defendant partial summary judgment.

Plaintiff/landlord commenced this action seeking to enforce a guaranty entered into by Namdar. The first cause of action seeks damages based on the tenant Madonna II, Inc.'s failure to pay rent and additional rent pursuant to a lease. The second cause of action is for attorneys' fees incurred by the landlord.

Namdar's first through tenth affirmative defenses allege that the guaranty is not enforceable.

The eleventh affirmative defense and first counterclaim allege that plaintiff failed to notify defendant pursuant to General Obligations Law 7-103, in writing of the name and address of the banking organization in which defendant's security had been deposited nor the amount of the deposit; failed to deposit the security in a separate account; commingled the security deposit with other funds; and forfeited its right to the deposit, which offsets the claims. Accordingly, defendant asserts that he is entitled to a refund of the security and is entitled to a preliminary and permanent injunction for the refund of the security.

The twelfth affirmative defense alleges that the complaint should be dismissed on the grounds that an executed copy of the alleged modification and extension of the lease agreement was never delivered to the tenant.

By sworn affidavit, Alan Helman, a manager of plaintiff Daval 37 Associates LLC, states that the tenant Madonna II, Inc., entered into a five-year lease on May 1, 2008. He asserts further that, pursuant to the Modification and Extension of Lease Agreement made as of September 30, 2014, landlord and tenant agreed that:

> a. The lease, except as modified by the extension shall "remain in full force and effect according to its terms without any modifications whatsoever" (paragraph 1);
>
> b. The term of the lease "is extended to and including October 31, 2018" (paragraph 3);
>
> c. The monthly base rent due from November 1, 2014, through and including October 31, 2015, is $16,250 (paragraph 4(i)); and
>
> d. "Tenant shall cause its principal, Michael Namdar to enter into the Guaranty attached hereto and made a part hereof" (paragraph 8).

It is undisputed that the tenant failed to pay rent and additional rent due under the commercial lease extension. The landlord commenced a summary nonpayment proceeding against the tenant in the Civil Court of the City of New York, County of New York, captioned Daval 37 Associates LLC v. Madonna II, Inc., L&T Index No. 66229/14 (the "NP Proceeding").

After the trial, landlord was awarded a final judgment of possession against tenant in the amount of $272,637.12 for all rent and additional rent due through

November 2014 with costs, and the issue of attorneys' fees was preserved to be addressed in a plenary proceeding.

The counterclaim of the tenant relating to the security deposit was dismissed without prejudice as premature as the tenant was still in possession.

Helman alleges that, through the month of December 2014, the tenant owes the principal amount of $288,967.12. Additionally, plaintiff seeks pre-judgment interest pursuant to CPLR 5001(b) at the per annum rate of 9% on the amount of $288,967.12 from the midway point between July 1, 2013, and December 31, 2014, which totals $19,253.09. Defendant is entitled to an offset of $4,000 for use and occupancy for the month of December 2014, paid by a subtenant. Plaintiff seeks a judgment in the sum of $304,221.12, plus the rent, additional rent and interest that accrues from January 1, 2015. In addition, as the prevailing party, pursuant to paragraphs 19 and 53 of the lease, the landlord contends that it is entitled to attorneys' fees, costs and expenses incurred in connection with the breach of the lease and this action.

Namdar opposes and cross-moves for summary judgment. He contends that the landlord failed to deliver to him the guaranty and an extension of lease with guaranty attached.

Namdar acknowledges that, prior to the expiration of the lease, he went to

the offices of Walter & Samuels, plaintiff's agent, signed a Modification and Extension of Lease Agreement, and left the signed copies.

At the Civil Court trial, Hellman testified that he executed the extension and delivered it to plaintiff's superintendent, Mike, at the building. Mike was directed to deliver the extension to Namdar. Although Mike was still an employee at the building, he did not testify at the Civil Court trial.

Namdar maintains that Mike would be expected to provide testimony favorable to the plaintiff regarding delivery of the extension. Counsel argues that a negative inference should be drawn that the lease was never delivered based on the failure of the landlord to call Mike to testify. Accordingly, plaintiff's failure to deliver a signed guaranty and an extension with a guaranty attached renders the guaranty void.

While the Civil Court made no findings regarding the actual delivery of the guaranty, the Civil Court held that the tenant's argument that the extension is unenforceable because there was no proof of its delivery was without merit. The Court stated:

> Nothing in the extension, which modified the lease to extend its term, explicitly required that it be delivered to be effective. In fact, the lease, which remains in full force and effect, expressly provides that modifications are binding provided that they are "in writing and signed by the party against whom enforcement" is sought. It is

undisputed that Madonna II, Inc., signed the extension.

The cases that the tenant relies upon, which highlight the importance of delivery of a lease agreement, are readily distinguishable. The tenant never actually took possession in any of those cases. Significantly, here, there was a conveyance of possession long before the extension. It is undisputed, moreover, that Madonna II has remained in possession of the premises and that it was billed consistent with the extension's terms. (at pp. 2-3, Daval 37 Associates LLC v. Madonna II, Inc., Index No. 066229/14).

Namdar is collaterally estopped from arguing here that the non-delivery of the extension makes it unenforceable.

Namdar admits to signing the guaranty. The guaranty was an inducement for the landlord to enter the extension agreement which the Civil Court found to be enforceable, irrespective of delivery. His argument that the failure to deliver a signed extension agreement with the guaranty rendering it unenforceable is without merit.

Moreover, as observed by the Civil Court, while the lease required delivery, the extension, which simply modified the lease, did not require delivery. By its terms, the guaranty does not require delivery. Furthermore, it is part and parcel of the enforceable extension agreement, which recites in paragraph 8 that the tenant's principal "shall ... enter into the guaranty attached hereto."

Accordingly, the guaranty is enforceable, irrespective of whether or not it was delivered.

Next, Namdar argues that the guaranty does not cover any debt incurred prior to the extension, as a "guarantor should not be bound beyond the express terms of his guarantee" (see Wesselman v. Engel Co., 309 N.Y. 27, 30 [1955]). See also Trump Management v. Tuberman, 163 Misc.2d 921 [Kings Co., Civ. Ct., 1995]). Namdar contends that the portion of the rent arrears which predates the guaranty was incurred under the 2008 lease, which ran through October 31, 2013, and should be dismissed.

This argument is unavailing because the broad terms of the guaranty provide that

> the undersigned Guarantor hereby guarantees to Landlord under the annexed Lease, its successors and assign, the timely and complete performance by Tenant of the obligations of Tenant to which reference is herein made. The following are the obligations to which reference is made (all capitalized terms shall have the meaning ascribed to them pursuant to the Lease):
>
> Under all circumstances, including Tenant's default, and in addition to the security deposit posted under this Lease, Guarantor guarantees to Landlord the payment and performance of Tenant's obligations under and in accordance with the Lease, including, without limitation, (i) the payment of Fixed and Additional Rent which accrue under the Lease up to and including the date Tenant and any party claiming under Tenant vacate the entire Demised Premises....

A guaranty may have retroactive effect where it expressly or implicitly includes past obligations (Kleet Lumber Co., Inc. v. Quail Homes of Long Island,

Inc., 129 A.D.2d 564 [2d Dept., 1987]). Here, the guaranty by its terms applies to all amounts due under the lease and not just rents under the extension.

Next, Namdar argues that a condition precedent to commencement of this action is a notice under the guaranty. The provision of the guaranty in question provides that:

> The performance and payments called for hereunder shall become due and payable to Landlord immediately upon delivery to Gurantor of Landlord's written notice by registered mail, return receipt requested, or nationally recognized overnight courier, that any of the obligations described above have not been satisfactorily performed.

The notice provision is not a condition precedent to commencement of a lawsuit. Rather, it is a notice that sums are due under the guaranty. Therefore, the complaint is an adequate substitute for the notice.

Next, Namdar contends that the plaintiff waived its right to collect attorneys' fees in the summary proceeding on the record and, therefore, may not seek those fees here.

Daval 37 Associates contends that the Civil Court expressly preserved the landlord's right to seek attorneys' fees by severing the claim. Therefore, the landlord as the prevailing party is entitled to attorneys' fees.

I disagree. While the Court severed the attorneys' fee claim, plaintiff would first have to seek attorneys' fees against the tenant. The tenant is not a party to

this litigation. Therefore, this Court lacks jurisdiction to order a hearing on the reasonable value of the attorneys' fees incurred by the landlord in connection with the tenant's breach of the lease.

Based on the Court's finding that the guaranty is enforceable, Namdar's first through tenth affirmative defenses are dismissed with prejudice.

The eleventh affirmative defense is dismissed without prejudice as the security deposit belongs to the corporate tenant and not the guarantor.

The twelfth affirmative defense alleging non-delivery of the modification and extension of the lease is dismissed with prejudice as Namdar is collaterally estopped from raising this defense based on the Civil Court' finding that delivery of the modification was not necessary for there to have been an enforceable agreement.

Plaintiff is granted summary judgment in the sum of $288,967.12, less an offset for the amount of the security deposit held by the landlord. The $288,967.12 sum reflects base rent and additional rent from July 2013 through and including November 2014 in the amount of $272,637.12 per the judgment of the Civil Court, together with December 2014 rent ($16,250) and additional rent ($80).

Interest in the sum of $19,253.09 is denied as the Civil Court judgment did

not award interest. However, plaintiff is entitled to pre-judgment interest on its first cause of action based on the guaranty. Plaintiff is awarded interest at the statutory rate from December 3, 2014, the date of the Civil Court judgment.

The cross-motion by defendant is denied. .

Settle judgment on notice.

Date: 4/2/15
New York, New York

Anil C. Singh