

IG Second Generation Partners, L.P. v Rodeo Bar & Grill, Inc.

2016 NY Slip Op 30197(U)

February 2, 2016

Supreme Court, New York County

Docket Number: 651854/2012

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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IG SECOND GENERATION PARTNERS, L.P., and
I BLDG CO., INC.,

Plaintiffs,

DECISION AND
ORDER

-against-

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RODEO BAR & GRILL, INC., and
GERARDO AYALA, as GUARANTOR

Defendants.

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HON. ANIL C. SINGH, J.:

Plaintiffs move pursuant to CPLR 4403 and 22 NYCRR 202.44(b) for an order: a) confirming the report of Special Referee Ira Gammerman entered on July 15, 2014, and b) directing the entry of Judgment in this matter.

Background

Plaintiffs IG Second Generation Partners, L.P., (“IG Second”) and I BLDG Co., Inc., (“BLDG”), (collectively, “the joint lessors”) commenced the action against defendants, Rodeo Bar & Grill, Inc., (“Rodeo”), a corporation doing business at 3428 Broadway and Gerardo Ayala, guarantor of the lease obligations of Rodeo, pursuant to a written lease modification agreement dated September 1, 2006.

The joint lessors commenced this action on May 15, 2012 to recover rent based upon the written lease. By decision and order, on June 4, 2013, this court granted a default judgment in favor of the Plaintiffs and this court referred the matter to a special referee to hear and report with respect to Plaintiffs' claim of damages. On February 5, 2014, a hearing was held before Special Referee Ira Gammerman to assess damages pursuant to the order of this court. At the hearing, Plaintiff waived legal fees and offered testimony that Defendant, Rodeo, failed to pay rent from June 1, 2008 through June 30, 2011, at the rate of \$5,463.64 per month. Special Referee Gammerman recommended \$47,364.06 against defendants, the tenant and the guarantor, jointly and severally. (Transcript of Hearing before Referee Gammerman dated November 26, 2013)

According to CPLR 4403 and 22 NYCRR 202.44(b), a motion to confirm Special Referee Gammerman's recommendations must be made within 15 days after the filing of the report of the referee. More than 15 days have elapsed since Special Referee Gammerman's recommendation notice.

On December 22, 2015, Plaintiffs filed the motion for an order confirming the report of the Referee to the extent the Referee awarded \$47,364.06. Plaintiffs are seeking to direct the Clerk to enter a money judgment. Plaintiff failed to comply with the CPLR 4403 requirement to file a motion within 15 days of the

Special Referee's recommendations, but it is within the court's discretion to consider the motion (Civil Practice Law and Rules Rule 4403).

CPLR 4403 provides that this Court has the power to confirm, in whole or in part, the report of a referee to report. Although court is entitled to reject referee's report and make new findings, referee's report and recommendations should be confirmed if his or her findings are supported by record (Galasso, Langione & Botter, LLP v Galasso, 89 AD3d 897 [2d Dept 2011]).

A referee's report is not binding, but is intended "merely to inform the conscience of the court" (Matter of Gehr v. Board of Education of City of Yonkers, 304 N.Y. 436, 440 [1952] (internal quotation marks and citation omitted)). However, "[i]t is well settled that a special referee's findings of fact and credibility will generally not be disturbed where substantially supported by the record" (RC 27th Avenue Realty Corporation v. New York City Housing Authority, 305 A.D.2d 135, 135 [1st Dept 2003; see also Spodek v. Feibusch, 55 A.D.3d 903, 903 [2d Dept., 2008]; Sichel v. Polak, 36 A.D.3d 416 [1st Dept., 2007]; Kardanis v. Velis, 90 A.D.2d 727 [1st Dept 1982]).

Plaintiff consented to the award of \$47,364.06 when the actual amount of the rent owed, from June 1, 2008 through June 30, 2011, at the rate of \$5,463.64 per month is \$196,689.96. Therefore, the award is substantially supported by the

record.

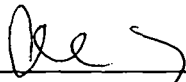
Plaintiff failed to move for a confirmation of the referee report within the 15 days after notice of filing. Such delay did not deprive this Court the inherent power to act on a referee's recommendation (Gould v Venus Bridal Gown and Accessories Corp., 148 Misc 2d 589, 589 [Sup Ct 1990]). Therefore, plaintiff's motion to confirm the report of the Special Referee regarding the issue of damages is granted. However, plaintiff's request for interest to run from June 1, 2008 is denied as plaintiff has failed to prosecute this action in a timely manner.

Accordingly, it is

ORDERED that the motion to confirm the report of the Special Referee is granted; it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants jointly and severally in the amount of \$47,364.06 together with statutory interest to run from the date of this judgment.

Date: February 2, 2016
New York, New York



Anil C. Singh