

**Blue Water Realty, LLC v The Salon Mgt. of Great Neck, Corp.**

2016 NY Slip Op 30483(U)

March 22, 2016

Supreme Court, New York County

Docket Number: 156925/2013

Judge: Manuel J. Mendez

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

**PRESENT: MANUEL J. MENDEZ**

**PART 13**

*Justice*

BLUE WATER REALTY, LLC  
Plaintiff,  
-against-

INDEX NO. 156925/2013  
MOTION DATE 02-03-2016  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

THE SALON MANAGEMENT OF GREAT NECK,  
CORP. a/k/a THE SALON MANAGEMENT OF  
GREAT NECK, INC. and PAULINE JANNELLI  
Defendants.

The following papers, numbered 1 to 9, were read on this motion for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1-4</u>
Answering Affidavits – Exhibits _____	<u>5-6</u>
Replying Affidavits _____	<u>7-9</u>

**Cross-Motion:**  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff’s motion for summary judgment is denied.

Defendant The Salon Management of Great Neck (herein “The Salon” or “Tenant”) leased a commercial premises located at 1 South Mid Road, Great Neck, New York (herein “The Premises”), subject to the terms of a Lease and Rider (herein “the Lease”), through Wychwood Associates for a fourteen year term beginning November 6, 1998 and ending October 31, 2012. (see Mot. Exh. C). In further consideration of the Lease, Defendant Pauline Jannelli (herein “Jannelli”), executed a personal Guaranty of Lease on or about November 5, 1998, holding Jannelli jointly and severally liable under the terms of the Lease between Wychwood and Defendant The Salon. (see Mot. Exh. D). The Lease and Guaranty were assigned to Plaintiff Blue Water Realty, LLC (herein “Plaintiff”) on November 5, 2004. (see Mot. Exh. J).

The Lease states that the Tenant shall maintain and repair the Premises, with the Landlord making “all structural repairs to and provide the maintenance for all public areas and facilities, (including the roof)...” (see Mot. Exhs. C and D). Further, the Lease provides that with any damage to the Premises “by fire or other casualty, Tenant shall give immediate notice thereof to Owner...” (See Mot. Exh. C P. 2 § 9(a)). This section also states that, if the Premises is

partially damaged or rendered partially unusable by fire or other casualty, the damages thereto shall be repaired by and at the expense of Owner and the rent and other items of additional rent, until such repair shall be substantially completed, shall be apportioned from the day following the casualty

according to the part of the premises which is usable.  
(Id. at § 9(b)).

The Lease states that for the term December 1998 through October 2002, the base rent would be \$113,160.00 per year, payable in equal monthly installments. (See Mot. Exh. C). For the term November 2002 through October 2012, the base rent would be \$135,720.00 per year, payable in equal monthly installments. (Id.). In addition to the base rent, additional Rent was to be paid for changes in the Consumer Price Index, property tax increases, and utilities such as electricity, gas and water. (Id.) Additionally, Tenant would be liable under the lease for attorney's fees incurred by Landlord as a result of Tenant's default. (Id. at P. 3). Per the Lease terms, the Landlord computed increases in the annual additional rent and sent notification of these increases to the Tenant on a yearly basis. (see Reply Aff. Exh. K).

The Guaranty states that ... "Guarantor hereby personally, unconditionally and absolutely agree to guarantee all of the obligations of Tenant to Landlord..." with "the liability of the Guarantor...limited to payment of all Rent, additional Rent and other charges and fees due and accrued through the date two months following the first day of the next month from the date of surrender to Landlord..." (see Mot. Exh. D).

Plaintiff brought a separate action in 2009 in the First District, Nassau County, Blue Water Realty LLC v. The Salon Management of Great Neck Corp. And Pauline Jannelli, Index No. SP 1048/09. This separate action was brought as a result of Defendants' default under the Lease for failing to pay rent and additional rents. The parties entered into a Settlement Stipulation, (see Mot. Exh. E), providing that Plaintiff would stay enforcement of a warrant of eviction, in return for Defendants retaining possession of the Premises. In addition, the Plaintiff agreed to accept a reduced monthly rent of \$7,500.00 for the period of May 1, 2009 through October 31, 2009, to provide Defendants the opportunity to pay the rent arrears. The Stipulation states that after this reduction period, it was within Petitioner's sole discretion to reevaluate Defendants' "financial position to determine the necessity of continuing this arrangement." (see Stipulation, Mot. Exh. E). The Stipulation also provided that Defendants consented to an entry of Judgment in the amount of \$110,595.39 for rent arrears owed to Plaintiff. Judgment was entered for \$110,595.39 on September 25, 2009. (see Mot. Exh. F). Defendants remitted payment in satisfaction of the arrears Judgment in February 2013. (see Mot. Exh. H).

By letter dated February 29, 2012, an attorney representing Defendant Jannelli in connection with the Salon advised Plaintiff that the Defendants had surrendered possession of the Premises and the keys to the Premises were enclosed with the letter. (see Reply Aff. Exh. L).

Plaintiff commenced this action by summons and complaint dated July 30, 2013, alleging that Defendants defaulted under the Lease and sought judgment in the amount of \$829,774.34, plus interest, attorney's fees, and the costs and disbursements of the action against Defendant the Salon and Defendant Jannelli jointly and severally. (see Mot. Exh. A).

(Let it be noted that the amount due for arrears stated in Plaintiff's Complaint is \$829,774.34. However, the amounts due vary throughout Plaintiff's motion papers between \$824,834.28 and \$829,774.34.)

Defendants made a motion under Motion Number 001 to extend Defendants' time to answer the complaint, which was granted by this Court on April 1, 2014. Defendants later served an answer on April 28, 2014, denying the allegations set forth in the complaint and asserting various affirmative defenses including that the "Plaintiff was in material breach of any agreement or contract or lease for failing to maintain the premises..." (see Mot. Exh. B).

According to Plaintiff's Complaint, Defendants, having made the required reduced rent payments per the Stipulation through October 31, 2009, failed to pay the Lease rent in full starting as of November 1, 2009 and continuing thereafter. (see Ledger attached as Mot. Exh. G).

Plaintiff now moves for summary judgment in its favor. In support, Plaintiff specifically annexes the Lease, the Guaranty, and the Ledger showing rent charges under the Lease and rent payments made for the period of April 2009 through October 1, 2012, with what appears to be a cease in charges as of January 3, 2012. Plaintiff contends that this motion and its exhibits attached thereto eliminate all material issues of fact. Plaintiff argues that any defense by Defendant regarding the condition of the Premises due to flooding in 2007 "was waived as a matter of law when defendants failed to litigate this issue..." in the previous Landlord/Tenant action. (see Aff. In Supp. P. 5), and further that defendants' explicitly waived this defense by entering into the Stipulation in the Landlord/Tenant action. Plaintiff cites the matter of The Gallery at Fulton Street LLC v. Wendew LLC, 30 A.D.3d 221 (1<sup>st</sup> Dep't 2006), which found that a defendant in an action for breach of a commercial lease could not raise the defense of constructive eviction after being "given the opportunity to litigate this claim in the prior summary proceeding but failed to do so."

In contrast, Defendants contend that not only did Defendants not waive any and all defenses as to the condition of the Premises, these new incidents of flooding in 2010 entitled Defendants to a reduction in rent. Even more specifically, Defendants claim that Plaintiff informed Defendant Jannelli that she could continue paying the \$7,500.00 per month reduced rent "after learning of the roof and foundation flooding in 2010." (see Aff. In Opp. P. 4 and Aff. In Opp. Exh. C-

Jannelli Aff. P. 2).

Defendants' also argue under the terms of the Guaranty that Jannelli's personal liability is limited to "the next two calendar months following vacatur of the premises." (see Aff. In Opp. P. 5). Plaintiff concedes this limitation of Jannelli's limited liability. (see Repy Aff. In further Supp. P. 7 ¶16).

Any defenses as to flooding regarding the arrears prior to entering the stipulation would have been waived since they were not raised in that summary proceeding. However, any episodes of flooding occurring in 2010, after the Stipulation was entered into, are not subject to waiver. Therefore, there are issues of fact as to whether the alleged new flooding which affected the roof and foundation entitled Defendants to a reduction in rent.

Defendants oppose Plaintiff's motion on the basis that there are issues of fact pertaining to Plaintiff's "erroneous interpretation of its Lease", and that under the plain terms of the Lease any damage caused by "fire or other casualty" would result in the rent and other items of additional rent being apportioned. (see Aff. In Opp. PP. 1-2 and Exh. A attached thereto).

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

Summary judgment is improper. The Lease does not entitle Plaintiff to judgment as a matter of law. Defendants raise an issue of fact as to the terms of the Lease, and the circumstances surrounding Defendants' entitlement to apportioned rent under the Lease.

**"Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court, to be determined without resort to extrinsic evidence (*West, Weir & Bartel v. Mary Carter Paint Co.*, 25 N.Y.2d 535, 540, 307 N.Y.S.2d 449, 255 N.E.2d 709 [1969] ). Thus, where the application of a contract provision is disputed, the issue is normally resolved by reference to the contract itself (*Slamow v. Del Col*, 79 N.Y.2d 1016, 1018, 584 N.Y.S.2d 424, 594 N.E.2d 918 [1992], affg. on op. below 174 A.D.2d 725, 571 N.Y.S.2d 335 [1991] )." *Banc of America Securities LLC v. Solow Bldg. Co. II, L.L.C.*, 47 A.D.3d 239 (1<sup>st</sup> Dep't. 2007).**

