New York City Indus. Dev. Agency v Anastasios Realty LLC
2016 NY Slip Op 30565(U)
April 4, 2016
Supreme Court, New York County
Docket Number: 450733/15
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 5

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY

INDEX NO. 450733/15

MOT. DATE

- v -

MOT. SEQ. NO. 001

ANASTASIOS REALTY LLC, et al.

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	No(s). 1
Notice of Cross-Motion/Answering Affidavits — Exhibits	No(s). 2
Replying Affidavits	No(s). 3

Plaintiff New York City Industrial Development Agency ("NYCIDA") is an industrial development agency created pursuant to the New York State Industrial Development Agency Act also known as GML § 850 *et seq.* (the "Act"). Plaintiff administers, *inter alia*, a Small Industry Incentive Program whereby it provides financial assistance by means of tax exemptions to qualifying industrial and commercial projects in order to encourage businesses to move or to remain in the City of New York.

Defendants Anastasios Realty LLC ("Anastasios Realty") and Razvan Realty LLC ("Razvan Realty" and collectively the "Lessee") obtained tax subsidies from plaintiff but allegedly breached conditions of those subsidies. According to the complaint, the Lessee, along with defendant 4 Over 4 .com Inc. ("Sublessee") entered into agreements with plaintiff to receive financial assistance and in return agreed to acquire, renovate and equip an industrial facility in Astoria, New York and construct an addition so that the premises could be used for a commercial printing business. The Lessee, Sublessee and defendants Cyan Press Inc. (the "corporate guarantor"), Anastasios Panagiotopoulos and Razvan Cristescu (collectively the "individual guarantors") joint and severally guaranteed to plaintiff all payments obligations, covenants and agreements in connection with the subject agreements.

Plaintiff now moves for an order granting it summary judgment on its claims, dismissing defendants' counterclaims and affirmative defenses, and for a money judgment against all defendants joint and severally and an inquest to determine plaintiff's reasonable costs and attorneys fees. Defendants oppose the motion, arguing that it is premature and otherwise disputing whether they are in default or failed to comply with the applicable cure provisions. Issue has been joined and note of issue has not yet been filed. The court's decision follows.

Dated: April 4, 2016

HON. LYNN R. KOTLER, 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**

On or about December 21, 2007, plaintiff entered into a "straight-lease transaction" whereby it acquired a leasehold interest in the land and improvements located at 19-41 46th Street, Astoria, New York, 10015 (alternatively the "building" and/or "premises") to plaintiff pursuant to a Company Lease. In turn, plaintiff subleased the building back to the Lessee under a Lease Agreement. Under the Lease Agreement, the Lessee was to make certain payments in lieu of real estate taxes ("Pilot payments") with respect to the premises for thirty-five and a half years. Pursuant to a Sublease, the Lessee sub-subleased the building to the Sublessee.

The Lease Agreement further memorialized the following:

WITNESSETH:

...

> **WHEREAS**, ... [Plaintiff] has entered into negotiations with the Lessee and Sublessee for an industrial "project" within the meaning of the Act within the territorial boundaries of The City of New York ...
>
> **WHEREAS**, the project will consist of the acquisition, renovation, construction and equipping of an industrial facility (the "Facility"), consisting of the acquisition, renovation and equipping of an approximately 14,820 square foot facility located on the Land, and the construction on the Land of an approximately 9,000 square foot addition to such existing building, all for use by the Sublessee as a full service commercial printing (the "Project")...

Section 2.2(a) of the Lease Agreement provides in pertinent part as follows:

> ... The Lessee unconditionally represents, warrants, covenants and agrees that it will complete the Project, or cause the Project to be completed by December 1, 2009, in a first class workmanlike manner... provided, however, the Lessee may revise the scope of the Project, upon written notice to the Agency.

Section 2.4(b) of the Lease Agreement reiterates the scope and nature of the project, requiring that the Lessee include in "each contract, agreement, invoice, bill or purchase order entered into by it the following:

> This [contract, agreement, invoice, bill or purchase order] is being entered into by [the Lessee] and/or by [the Sublessee], as agent for and on behalf of [plaintiff] in connection with a certain project of [plaintiff] for the [Lessee and/or Sublessee] consisting of the acquisition, renovation, construction and equipping of an industrial facility (the "Facility), consisting of the acquisition, renovation, construction and equipping of an approximately 14,820 square foot facility located on an approximately 24,000 square foot parcel of land located at 19-41 46th Street, Astoria, New York 11105, and the construction on such 24,000 square foot parcel of land of an approximately 9,000 square foot addition to such existing building, all for use as a full service commercial printing business (the "Project"). ...

Under Section 7.1, which lists events of default, part (c) provides:

> Failure of the Lessee to observe and perform any covenant, condition or agreement hereunder on its part to be performed... and (i) continuance of such failure

> for a period of thirty (30) days after receipt by the Lessee of written notice specifying the nature of such default form [plaintiff], or (ii) if by reason of the nature of such default the same can be remedied, but not within the said thirty (30) days, the Lessee fails to proceed with reasonable diligence after receipt of said notice to cure the same or fails to continue with reasonable diligence its efforts to cure the same.

Section 8.5 of the Lease Agreement provides for plaintiff's "recapture" of all real estate tax benefits and miscellaneous benefits derived from plaintiff's participation in the straight-lease transaction together with interest.

Plaintiff has provided the Affidavit of Agnes Stec, Vice President of the New York City Economic Development Corporation ("NYCEDC") and plaintiff's compliance officer. Ms. Stec oversees the NYCEDC's Compliance Division, which is responsible for monitoring post-closing compliance of entities involved in financing transactions with plaintiff. Ms Stec states that on December 9, 2010, three members of NYCEDC's Compliance Division visiting the building and "determined that the Lessee had failed to construct the 9,000 square foot addition required under the Lease." It is undisputed that the defendants did not construct the addition on or before that date. By letter dated February 24, 2011 (the "Notice of Default"), plaintiff notified the Lessee that they were in default of Section 2.2 of the Lease which constituted a defaulted under Section 7.1(c) of the Lease. The Notice of Default demanded that the Lessee cure the default within 30 days.

On or about April 7, 2011, plaintiff sent the Lessee a Notice of Event of Default informing it that the 30-day cure period had expired, that the Lessee remained in default, that an Event of Default had occurred and as a consequence plaintiff "intends to terminate any, and all 'financial assistance' ... thereunder and that the Lessee is now, or soon will be, required to pay full real estate taxes in connection with the premises to the New York City Department of Finance." The Notice of Event of Default further advised the Lessee that the underlying event of default constituted a recapture event under Section 8.5 of the Lease Agreement and therefore plaintiff demanded repayment of the benefits Lessee received as defined in the lease (the "recapture amount"). As of April 7, 2011, the Notice of Event Default informed the Lessee that the recpature amount was $207,930.97. A calculation of the recapture amount that plaintiff seeks to recover in this action has been provided to the court.

Defendant Anastasios Panagiotopoulos has provided an affidavit in opposition to the motion. Mr. Panagiotopoulos is a member of Anastasios Realty and an owner and principal in the Sublesseee and the corporate guarantor. Mr. Panagiotopoulos explains that the defendants were acting in good faith, to wit, they "spent millions to acquire and hundreds of thousands of dollars to renovate, and equip the building... where we operate our commercial printing business..." Mr. Panagiotopoulos claims that plaintiff "unfairly and improperly terminated the lease without giving defendants the appropriate and reasonable opportunity to cure a purported lease defaulted related to the construction of an 'approximately 9000 square foot addition."

Mr. Panagiotopoulos explains the work the defendants performed in connection with the project:

> After we entered in the Lease [Agreement]... and working in conjunction with able architects and contractors, we promptly began and completed a total renovation of the premises. We removed and replaced walls, floors and ceilings and created new offices, conference space, work areas and showrooms. We replaced bathrooms and kitchens. We upgraded the electrical system, improved the HVAC system and performed environmental remediation.

Mr. Panagiotopoulos states that the defendants spent approximately $400,000 to $450,000 on the renovations, and in addition, spent at least $967,404 on new printing equipment. Mr. Panagiotopoulos states claims that the Sublessee still operates at the premises, "has been able to survive in the highly competitive commercial printing space" and employs 21 people.

Mr. Panagiotopoulos claims that at the time the defendants were negotiating the underlying agreements, he was advised by his then-lawyer, Samuel Freed, Esq., that language would be added to give defendants the "option – not the obligation – to build on the lot so that if [defendants] elected to build something, it too would be afforded NYCIDA benefits." Mr. Panagiotopoulos points out that the project cost budget attached to the Lease Agreement as Exhibit "C" is inconsistent with plaintiff's position that building the addition was required. The Project Cost Budget is as follows:

USES OF FUNDS	
Land and Building Acquisition	$5,055,000
Renovations	$ 100,000
Expansion	$ 300,000
Closing Costs	$ 110,000
	$5,565,000

Mr. Panagiotopoulos was present at the December 9, 2010 inspection. He claims that the inspection was conducted in response to defendants' request for approval to build a new building on the premises. Mr. Panagiotopoulos has provided a copy of an email sent by Joseph Gill, a Project Manager for NYCEDC, on November 29, 2010 about a planned visit "due to [Mr. Panagiotopoulos's] recent request for [plaintiff's] consent in order to build a new building, sublease it out and apportion the new building into a new tax lot."

Mr. Panagiotopoulos further claims that at that meeting, "[w]hile a representative asked during the visit where the addition was and where the proposed new building would go, [he did] not recall anyone saying during the visit that [the Lessee was] in default of [its] obligations under the Lease [Agreement] because of 9,000 square foot addition had not been built." Mr. Panagiotopoulos's also claims that at two prior visits by plaintiff's representatives, no one raised any concerns about the fact that the addition had not been built.

Mr. Panagiotopoulos further claims that defendants received plaintiff's Notice of Event of Default without plaintiff having conducted "any investigation to see what defendants had done to cure the claimed default." Mr. Panagiotopoulos states that after defendants received the Notice of Default, they reached out to Attorney Freed, who in turn contacted plaintiff and scheduled a meeting. On or about April 12, 2011, Attorney Freed, Razvan Cristescu and Mr. Panagiotopoulos met with plaintiff "about the purported default and how to address the issue." Mr. Panagiotopoulos claims that during that meeting, plaintiff "agreed to consider a written submission... regarding amounts spent in connection with the Project, the state of the printing business in general and plans for the construction of an addition." Defendants sent a letter to plaintiff on April 19, 2011 to that effect and have provided a copy of it to the court.

Plaintiff sent a letter dated January 12, 2012 to the Lessee which states in pertinent part:

In response to the Notice of an Event of Default dated April 7, 2011 issued on behalf of [plaintiff] due to [defendants'] failure to complete the Project... [Defendants] expressed an interest in continuing NYCIDA benefits. Accordingly, and without prejudice to [plaintiff's] right to pursue remedies pursuant to the terms of the Lease Agreement, [plaintiff] has developed the following proposal:

- PILOT reinstatement retroactively to the date of the Notice of Event of Default, or April 7, 2011
- Amendment to the Project documents to no longer require the 9,000 square foot building addition
- A reduced land tax abatement by 38% going forward
- A repayment of 38% of all benefits received to date, or $100,229.41

According to Mr. Panagiotopoulos, defendants and plaintiff continued to negotiate the terms of this proposal over the next several months before they sent a letter on August 8, 2012 "accepting all of their terms but asking if it would be possible for the vacant land portion of the premises to be removed from the ... PILOT program..." On or about September 14, 2012, plaintiff sent defendants a letter wherein it "deemed" the August 8, 2012 letter to be a "counterproposal" which they rejected and, to defendant's "shock and without any prior notice or warning", plaintiff withdrew the January 12, 2012 offer.

On or about January 31, 2013, plaintiff filed a Lease Termination Agreement (the "Lease Termination") and requested that the premises be returned to the real estate tax rolls by the Department of Finance. Plaintiff commenced this action, asserting the following causes of action: [1] against Anastasios Realty and Razvan Realty for the recapture amount (first COA); [2] against 4 Over 4 for the recapture amount (second COA); [3] against the guarantors for the recapture amount (third COA). In their answer, defendants deny the allegations and assert counterclaims for: [1] declaratory judgment; [2] rescission of the Lease Termination; [3] breach of contract; [4] breach of the covenant of good faith and fair dealing; and [5] unjust enrichment. Defendants seek declarations that there was no event of default under the Lease Agreement, that plaintiff was not entitled to terminate the lease, that the Lease Termination is null and void, reinstatement of the Lease Agreement and that defendants are entitled to a reasonable period of time to cure the default of failing to construct the addition.

Arguments of the parties

Defendants first argue that plaintiff's motion is premature because no discovery has been exchanged and/or conducted. They claim that "[d]iscovery is needed to see how and when language regarding the addition was added to the Lease [A]greement and what communications were had about whether construction of the addition was mandatory or option." Defendants also claim that they are entitled to copies of reports from the two field visits prior to the December 9, 2010 visit along with the opportunity to depose plaintiff's representatives about the underlying agreements and project. Defendants claim that these records and testimony "might show that [plaintiff] knew or should have known that the addition was not completed and yet it took no action." Finally, defendants seek discovery on the issue of what steps, if any, plaintiff took to investigate whether defendants, with reasonable diligence, made efforts to cure the claimed default before issuing the Notice of Event of Default. Finally, defendants seek discovery regarding plaintiff's "abrupt and unreasonable termination" of the January 12, 2012 proposal.

Defendants further claim that there are triable issues sufficient to defeat plaintiff's motion because there is no line item for the addition on Exhibit "C", the term "Expansion" as used in Exhibit "C" is am-

biguous, and defendants spent more than the total cost expected for the project. Defendants also argue that when they were confronted with the Notice of Default, that they proceeded with reasonable diligence to cure the default.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue *(Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, the court rejects defendants' contention that the motion is premature. A motion for summary judgment is premature only where discovery would lead to facts which could permit the opponent of the motion to defeat the motion (CPLR § 3212[f]; *Vanzo Wholesale Food Equipment, Inc. v. 28 McEwan Street, LLC*, 132 AD3d 754 [2d Dept 2015]). Here, defendants call for certain documents or depositions, however, they have not provided any proof that should be within their purview which would render the discovery defendants seek material and relevant (*id.*). Specifically, defendants seek discovery about when the language regarding the addition was added to the Lease Agreement. However, they do not dispute that they signed the Lease Agreement, nor have they come forward with any proof which would call into question the meaning or applicability of the addition construction requirement. Defendants signed the Lease Agreement in the context of an arms length transaction. Defendants do not claim that they signed a different agreement, and the addition construction requirement is not ambiguous. Therefore, such discovery would not defeat plaintiff's motion on this point.

Nor have the defendants come forward with any proof which would show that plaintiff ratified defendants' failure to build the addition, thereby warranting discovery as to when plaintiff "knew or should have known that the addition was not completed and yet it took no action." Finally, as to plaintiff's investigation of defendants' attempts to cure, defendants have not themselves come forward with any proof that they did in fact attempt to cure the alleged default.

Here, plaintiff has demonstrated that the Lessee and Sublessee materially breached the Lease Agreement by failing to construct the addition on or before the project completion date. This breach was an Event of Default thereunder. Since there is no dispute that the defendants did not even attempt to cure the default within the applicable time period, plaintiff properly terminated the Lease Agreement, and is entitled to the recapture amount. Defendants' counterclaims do not warrant a different result. The fact that there were other site visits made by plaintiff to the building did not serve to vitiate defendants' obligation to construct the addition. Nor did the negotiations which the parties engaged in after the Notice of Event of Default serve to modify plaintiff's right to declare defendants in default of the Lease Agreement.

Since the default occurred within the first six years after the parties entered into the Lease Agreement, under Section 8.5(ii)(a), plaintiff is entitled to 100% of the benefits it had received, together with interest. The Lease Agreement defines those benefits as the difference between the real estate taxes that the Lessee would have been required to pay, if not for plaintiff's leasehold interest, and the PILOT pay-

ments it made, and all miscellaneous benefits derived from plaintiff's participation in the transaction, including the exemption from mortgage recording taxes, sales or use taxes, and filing and recording fees.

Plaintiff has further shown that the Lessee has realized the following amounts as benefits under the Lease Agreement: $186,922.55 as the principal of the recapture amount, consisting of $74,992.55 in PILOT benefits and $112,000 in mortgage recording taxes. Further, $211,420.18 has accrued as interest as of September 29, 2015. Accordingly, plaintiff is entitled to a money judgment against Anasasios Realty and Razvan Realty for $398,417.73, as well as 4 Over 4 and the guarantors for that amount based upon the guaranty.

Accordingly, plaintiff's motion for summary judgment is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment is granted in its entirety; and it is further

ORDERED that the clerk is directed to enter a money judgment in favor of plaintiff and against defendants Anastasios Realty LLC, Razvan Realty LLC, 4 Over 4 .com Inc., Cyan Press Inc., Anastasios Panagiotopouos, Individually, and Razvan Cristescu, Individually, joint and severally, for $398,417.73; and it is further

ORDERED that plaintiff is directed to file with the court, upon notice, an affirmation attesting to the legal expenses and fees it has incurred within sixty days from the date of this decision/order with notice of entry.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: April 4, 2016
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.