

469 Holdings, LLC v Pie Face 469 LLC

2016 NY Slip Op 31384(U)

July 19, 2016

Supreme Court, New York County

Docket Number: 160342/2014

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZPART 13*Justice*

469 HOLDINGS, LLC.,
 Plaintiffs,
 -against-

INDEX NO. 160342/2014
 MOTION DATE 06/08/2016
 MOTION SEQ. NO. 004
 MOTION CAL. NO. _____

PIE FACE 469 LLC d/b/a PIE FACE,
 PIE FACE HOLDINGS, INC., and
 PIE FACE HOLDINGS PTY LTD.,

Defendants.

The following papers, numbered 1 to _ were read on this motion for leave to renew and reargue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1 - 3

Answering Affidavits — Exhibits _____

4 - 5

Replying Affidavits _____

6

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion to renew and reargue, is denied.

Plaintiff commenced this action to recover from the Defendants for damages for breach of a commercial lease agreement and "Good-Guy Guarantee." Plaintiff is the owner of a building located at 469 7th Avenue, New York, New York (herein "Building"). Defendant Pie Face 469 LLC d/b/a Pie Face (herein "Tenant") is a former tenant of portions of the ground floor and basement in the Building (herein "Premises"). On April 24, 2012, the parties entered into a commercial lease (herein "Lease") for the Premises. The lease was for a period of 15 years expiring in 2027. On April 6, 2012, prior to entering into the Lease, defendants Pie Face Holdings, Inc. and Pie Face Holdings Pty Ltd. (collectively herein "Guarantors") ("Tenants" and "Guarantors" collectively herein "Defendants") executed a Good Guy Guaranty (herein "Guaranty"), guaranteeing payment on the lease for the first two (2) full years of its term.

Plaintiff alleges that on September 10, 2014, Tenant vacated and abandoned the Premises prior to the expiration of the Lease. Plaintiff re-let the Premises to another tenant and entered into a lease commencing on December 1, 2014. The new lease provided for a rent concession through March 31, 2015. The Complaint alleges that the Tenant and the Guarantors are jointly and severally liable for liquidated damages pursuant to the Lease and Guaranty equal to the monthly rent and additional rent due through March 2015.

Plaintiff previously moved under Motion Sequence No. 003 for summary judgment against the Defendants seeking a judgment (i) against the Tenant for \$589,349.18 representing base rent and additional rent totaling \$211, 967.60 for the period from September 2014 through March 2015, and \$377, 381.58 representing Plaintiff's costs incurred in having to re-let the Premises; (ii) against the Tenant and Guarantors, jointly and severally, for \$492,737.19 representing rent and additional rent of \$115,355.61 for the period September 2014 through December 2014, and \$377,381.58 representing Plaintiff's costs incurred in having to re-let the Premises; and (iii) against the Tenant and Guarantors, jointly and severally, for all costs, disbursements and reasonable attorneys' fees incurred by Plaintiff as a result of the Defendants' defaults under the Lease and Guaranty. (Mot. Exhs. A-B, & E-F).

Plaintiff argued that under the Guaranty, the Guarantor's were liable for at least up to ninety days after the Tenant vacated and abandoned the Premises, i.e. up until December 31, 2014. That it re-let the Premises, and gave the new tenant rent concessions through March 31, 2015, therefore the Tenant remained liable for liquidated damages equal to the monthly rent and additional rent due through the end of March 2015. Plaintiff contends that pursuant to paragraph 18 of the Lease, Tenant remained liable to Plaintiff for liquidated damages, the cost of re-letting the Premises, plus the rent and additional rent from (1) the date Plaintiff obtained vacant possession of the Premises through the scheduled expiration of the Lease, or (2) until the Plaintiff re-let the Premises for a monthly rent equal to or in excess of the monthly rent and additional rent payable by the Tenant.

Defendants opposed the motion alleging it was premature because discovery was not complete and there remained issues of fact. Defendants alleged they were not in default because they surrendered the premises, and Plaintiff had not given any notice or shown any proof of its right to collect the amounts sought.

In an Order dated March 22, 2016, this Court denied Plaintiff's motion for summary judgment finding that the Tenant surrendered the Premises, Plaintiff accepted the Tenant's September 10, 2014 surrender of the Premises, and Plaintiff subsequently re-let the premises to another tenant at a higher rent on November 21, 2014. Further, this Court found that the contract between the parties, under paragraph 17 of the lease, was unambiguous as to what constituted a default under the lease, and the required notice to be given to the tenant in the event of a default. However, this Court also found that the contract was silent as to the rights and obligations of the parties in the event of a surrender. Further, if the Tenant's abandonment of the Premises constituted a default, entitling the Plaintiff to liquidated damages, Plaintiff's moving papers failed to contain proof that the required notice provisions of paragraph 17 in the lease had been complied with. In sum, it was held that the Plaintiff failed to make a prima facie case entitling it to summary judgment.

Plaintiff now moves under Motion Sequence No. 004 for an Order granting Plaintiff leave to renew and reargue its motion under Motion Sequence No. 003 for summary judgment, and upon such renewal and reargument, granting summary

judgment in its favor. Defendants oppose the motion.

Plaintiff argues it should be granted leave to reargue because this Court's denial of Plaintiff's motion for summary judgment was based on a finding that the Tenant's premature vacatur could have required the Plaintiff to first serve a notice to cure (pursuant to paragraph 17 of the Lease) prior to being entitled to damages. That this court read a requirement into the Lease that does not exist. Plaintiff contends it is entitled to damages pursuant to paragraph 18 of the Lease, without such damages being conditioned upon service of a notice to cure upon Tenant's premature vacatur. Though the Tenant's premature vacatur could be considered a default under paragraph 17, Paragraph 18 provides Plaintiff entitlement to liquidated damages upon the Plaintiff's re-entry onto the Premises after Tenant prematurely vacates. Therefore, the notice requirements under paragraph 17 do not apply. Plaintiff also argues that neither the Plaintiff nor the Defendants argued that the notice provision under paragraph 17 applied to the circumstances of this case, therefore the Court basing its decision on paragraph 17 *sua sponte* was improper. For these reasons, Plaintiff should be granted reargument, and upon reargument, summary judgment.

In opposition, Defendants argue that leave to reargue should be denied because Plaintiff attempts to distinguish between its obligations under paragraphs 17 and 18 of the Lease by claiming entitlement to liquidated damages by virtue of its re-entry, as opposed to a default under the Lease that requires service of prior notices. Plaintiff's right to re-enter, as well as its right to recover liquidated damages based upon this re-entry, are governed by paragraph 17 which requires service of prior notices to the Tenant. Plaintiff omits paragraph 17(2), which addresses Plaintiff's right to re-enter. It is under the express language of paragraph 17(2) that governs Plaintiff's re-entry and procedures of re-entry, that notices must be served. Both paragraphs 17(1) and 17(2) require notices to be served by the Plaintiff upon the Tenant's default, as well as prior to Plaintiff's re-entry.

CPLR § 2221(d) states that a motion for leave to Reargue (1) shall be identified specifically as such, (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion, and (3) shall be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry.

The Court has discretion to grant a motion to reargue upon a showing that it, "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law "(Kent v. 534 East 11th Street, 80 A.D. 3d 106, 912 N.Y.S. 2d 2 [1st Dept., 2010] citing to Foley v. Roche, 68 A.D. 2d 558, 418 N.Y.S. 2d 588 [N.Y.A.D. 1st Dept., 1979]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. The movant cannot merely restate previous arguments (Kent v. 534 East 11th Street, 80 A.D. 3d 106, supra and Ul Haque v. Daddazio, 84 A.D. 3d 940, 922 N.Y.S. 2d 548 [N.Y.A.D. 2nd Dept., 2011]).

Upon a review of paragraphs 17(1) and (2), and paragraph 18, this Court finds it did not overlook or misapprehend the relevant facts. (Mot. Exh. A). Plaintiff's remedies under paragraph 18 cannot be said to be separate and distinct from those of paragraphs 17(1) and (2). These remedies are clearly in conjunction with the Plaintiff's right to damages upon Tenant's default (under paragraph 17(1)), and upon the Plaintiff's right to re-enter (under paragraph 17(2)). The right to re-enter under paragraph 17(2) can be done without notice to the Tenant, only after the initial five days have passed from Tenant's failure to pay under Plaintiff's notice to cure. Both sections of paragraph 17 require notice for either default, or re-entry. Further, these paragraphs fail to state what the parties' obligations would be in the event the Tenant surrenders the Premises. Therefore, Plaintiff's motion for leave to reargue is denied.

Plaintiff also argues it should be granted leave to renew because there are new facts not offered on its motion for summary judgment that would change this Court's prior determination. Plaintiff contends that this Court held that the Tenant surrendered the Premises, with the Plaintiff accepting that surrender, and because the Lease was silent as to the rights and obligations of each party in such a situation, the terms were too ambiguous to grant summary judgment. Plaintiff contends that it never accepted a surrender of the Premises. In fact, this refusal to accept the surrender is evidenced by a September 30, 2014 letter to the Tenant stating that the Tenant's vacatur, and the Plaintiff's re-entry, did not constitute an acceptance of the surrender of the balance of the leasehold interest, and that the Defendants would remain liable. (Mot. Exh. H). Plaintiff contends that had this letter been submitted on its prior motion, this Court would have been provided with the requisite evidence that no surrender was accepted. However, this proof was not submitted prior because this surrender argument was not made in either the moving papers, or the Defendants' opposition, so Plaintiff never had a chance to either respond to or provide such evidence. The issue of surrender was never in dispute until this Court raised said issue in its March 22, 2016 Order.

In Opposition, Defendants argue that leave to renew should be denied because annexed to its opposition to the motion for summary judgment, was an Affidavit by Mr. Thompson (Defendants' Chairman) that set forth the manner in which the Tenant complied with the terms of the Guaranty and surrendered the Premises. (Aff. In Opp. Exh. B). Plaintiff failed to respond to or dispute this Affidavit's recitation of Tenant's surrender, and Plaintiff's acceptance, of the Premises. It is only now in the motion for leave to renew that Plaintiff first attempts to challenge the Tenant's surrender, and the Plaintiff's acceptance. Defendant argues that Plaintiff's letter of September 30, 2014 to the Tenant does not constitute new or additional evidence which was not known to Plaintiff at the time of its summary judgment motion. Therefore, because Plaintiff has failed to offer new evidence or an excuse for its failure to include the September 30, 2014 letter in its previous motion, the motion to renew must be denied.

Plaintiff argues that nowhere within the Thompson Affidavit did it state that the Plaintiff accepted Tenant's surrender. There is only a statement that the Tenant gave notice of its intention to vacate and that the Plaintiff subsequently re-let the Premises. Since, the Tenant never claimed the Landlord accepted Tenant's surrender, this issue

was never raised and thus the Plaintiff did not need to annex the September 30, 2014 letter rejecting the surrender.

A motion for leave to renew “shall be identified specifically as such; shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR § 2221[e]).

A motion for leave to renew is addressed to the sound discretion of the court (Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp., 64 A.D.3d 85, 878 N.Y.S.2d 97 [2nd Dept., 2009]), and “is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (Renna v. Gullo, 19 A.D.3d 472, 472, 797 N.Y.S.2d 115 [2nd Dept., 2005]). Renewal applies to the submission of new evidence not available at the time the original motion was submitted (Laura Vazquez v. JRG Realty Corp., 81 A.D. 3d 555, 917 N.Y.S. 2d 562 [1st Dept., 2011]). Failure to offer a reasonable justification for failure to present the facts sought to be asserted at renewal in the original motion results in denial of renewal. Renewal is not available to parties that seek a “second chance” because of failure to exercise due diligence (Chelsea Piers Management v. Forrest Electric Corporation, 281 A.D. 2d 252, 722 N.Y.S. 2d 29 [1st Dept., 2001]).

Mr. Thompson’s Affidavit refers to Tenant’s two letters: (1) dated July 11, 2014 that informed Plaintiff of its intention to vacate the Premises on September 10, 2014; and (2) dated September 9, 2014 advising that the Tenant has vacated and surrendered the Premises. (See Exhs. Attached to Thompson Affidavit, Mot. Exh. C). Also attached to Thompson’s Affidavit is Plaintiff’s initial response to Tenant’s July 11, 2014 letter acknowledging Tenant’s intention to vacate, and stating that this was not an acceptance of said premature surrender. Notably, the copy of Mr. Thompson’s Affidavit provided by the Plaintiff fails to include pages 4 and 5 which refers to the timeline of Tenant’s notice to Plaintiff, and Plaintiff’s initial response. (See Aff. In Opp. Exh. B). Further, page 2, paragraph 4 of the Affidavit states that Plaintiff is seeking to recover rent and additional rents after the Tenant surrendered the Premises. (Id.)

The Plaintiff’s argument that the Court raised this argument sua sponte is unavailing. It cannot be said that this “surrender” argument constitutes new facts not offered prior to the instant motion. The Tenant’s letters which provided notice of its intent to vacate, and the Plaintiff’s response thereto, clearly show a back and forth between the parties regarding vacatur/surrender of the Premises. An inference can be made that upon the Plaintiff’s failure to serve notice upon the Tenant of its default, re-entering the Premises, taking possession, and subsequently re-letting it constituted an acceptance of the vacatur. This brings the Court back to its prior determination of whether or not the Tenant defaulted or surrendered, and whether or not notice was required and/or given by Plaintiff prior to re-entry. This raises issues of fact that cannot be determined upon a motion for summary judgment. Further, the Plaintiff’s letter of September 30, 2014 that refused to accept the Tenant’s vacatur of the Premises as a surrender, does not constitute new evidence not available at the time

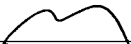
of its prior motion. Therefore, the Plaintiff has failed to state a basis upon which renewal should be granted.

Accordingly, it is ORDERED that Plaintiff's motion for leave to renew and reargue this Court's March 22, 2016 Order denying Plaintiff's motion for summary judgment is denied, and it is further,

ORDERED, that the parties appear for a Compliance Conference on September 28, 2016 in IAS Part 13 located at 71 Thomas Street, Room 210, New York, New York, at 9:30 A.M.

ENTER:

Dated: July 19, 2016



MANUEL J. MENDEZ

J.S.C.

MANUEL J. MENDEZ

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE