

1 Bldg Co., Inc v Hong Mei Cheung

2016 NY Slip Op 31796(U)

September 28, 2016

Supreme Court, New York County

Docket Number: 650226/2014

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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I BLDG CO., INC,

Plaintiff,

DECISION/ORDER
Index No. 650226/2014

-against-

HONG MEI CHEUNG,

Defendant.

-----X
HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action seeking to recover unpaid rents from defendant pursuant to a guaranty signed by defendant in connection with a commercial lease. By a decision and order dated August 14, 2014 (the "Decision"), the court granted plaintiff summary judgment as to liability but directed an inquest as to damages on the ground that the guaranty at issue only obligated defendant to pay unpaid rents that had accrued up to the date the subject tenant was evicted and plaintiff had failed to account for said sum. Plaintiff now moves for an Order pursuant to CPLR § 2221(e) granting it leave to renew its motion for summary judgment on the ground that plaintiff has produced evidence as to the sum owed by defendant as of the date the tenant was evicted. For the reasons set forth below, plaintiff's motion for renewal is granted, and upon renewal, the court awards plaintiff judgment against defendant for a sum certain.

The relevant facts are as follows. In or around October 2004, plaintiff entered into a written lease agreement (the "Lease") with Artisan Spa, Inc. (the "Tenant") to let the ground floor of the building located at 137 Fourth Avenue, New York, NY (the "Premises") for a term of ten years. As an inducement to enter into the Lease, defendant Hong Mei Cheung, Tenant's owner, executed a written guaranty (the "Guaranty"), wherein defendant guaranteed, among other things, "the full performance and observance of all agreements to be performed and observed by Tenant in the Lease." However, the Guaranty further provided that "this

Guaranty shall bind Guarantor only for performance and observance of the agreements to be performed and observed under the Lease that accrue while Tenant is in possession of the premises.”

Thereafter, Tenant defaulted under the terms of the Lease by failing to pay rent and additional rent when due. Accordingly, plaintiff commenced a non-payment summary proceeding against Tenant, wherein it was awarded on default a possessory judgment. On September 22, 2012, Tenant was lawfully evicted by the City Marshal. Plaintiff subsequently obtained a money judgment against Tenant in Supreme Court in the amount of \$359,375.23, which included damages for unpaid rent and additional rent that accrued after Tenant was evicted (the “Prior Action”).

On or about January 23, 2014, plaintiff commenced the instant action to recover the unpaid rent and additional rent due under the Lease from defendant pursuant to the Guaranty. In its motion for summary judgment, plaintiff requested judgment against defendant in the amount of \$359,375.23, the sum awarded to plaintiff against Tenant in the Prior Action, on the ground that defendant’s obligations under the Guaranty were identical to Tenant’s obligations under the Lease and, therefore, that said sum was determinative of plaintiff’s damages under the doctrine of res judicata. Plaintiff did not provide any evidence of the amount of unpaid rent and additional rent due under the Lease as of September 22, 2012, the date Tenant was evicted. The court rejected plaintiff’s argument regarding the proper interpretation of the Guaranty, holding that the Guaranty only obligated defendant to pay the unpaid rent and additional rent that had accrued up to the date Tenant was evicted. Thus, in the Decision, the court granted plaintiff summary judgment as to liability but directed an inquest as to damages.

The court grants plaintiff’s motion for leave to renew its motion for summary judgment and, upon renewal, the court awards plaintiff judgment against defendant for a sum certain. A motion for leave to renew “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)(2)-(3). “Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion..., courts have discretion to relax this

requirement and to grant such a motion in the interest of justice.” *Mejia v. Nanni*, 307 A.D.2d 870, 870 (1st Dept 2003).

In the present case, plaintiff has offered new facts not offered on the prior motion that would change the court’s prior determination. Plaintiff has submitted copies of its “Lease Ledger” and “Profile History List” showing that Tenant owed \$112,706.23 in unpaid rent and additional rent under the Lease as of September 22, 2012, as well as the affidavit of Lira Alvarado, plaintiff’s managing agent, stating that the Lease Ledger and Profile History list are records kept in the ordinary course of plaintiff’s business and explaining how they were created and maintained. These new facts would change the court’s prior determination that plaintiff had not established the amount it was entitled to recover from defendant. Further, plaintiff’s claim that it did not submit these documents on the prior motion because it had advanced an interpretation of the Guaranty that, if adopted by the court, would not have required plaintiff to provide any evidence of the amount of unpaid rent and additional rent due under the Lease as of September 22, 2012 provides a reasonable justification for its failure to present these facts on its prior motion.

Although defendant correctly contends that plaintiff could have offered these facts on its prior motion, the court finds that plaintiff had a reasonable justification for failing to present these facts on its prior motion. Moreover, even if plaintiff had failed to provide a reasonable justification, the court would exercise its discretion to grant plaintiff’s motion to renew in the interest of justice, particularly since awarding judgment for a sum certain rather than directing an inquest will further the court’s interest in efficient resolution of actions.

Accordingly, plaintiff’s motion for leave to renew is granted and, upon renewal, it is hereby


ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$112,706.23, with interest thereon at the statutory rate from September 22, 2009, together with costs and disbursements; and it is further

ORDERED that the portion of plaintiff’s action that seeks the recovery of attorney’s fees is severed and the issue of the amount of reasonable attorney’s fees plaintiff may recover against the defendants is referred to a Special Referee to hear and report unless the parties agree that the Special Referee may hear

and determine. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court.

DATE: 9/28/16



KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.