

1471 Second Corp. v NAT of NY Corp.

2016 NY Slip Op 32458(U)

December 12, 2016

Supreme Court, New York County

Docket Number: 652594/2013

Judge: Cynthia S. Kern

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

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1471 SECOND CORP.,

Plaintiff,

-against-

DECISION/ORDER
Index No. 652594/2013

NAT OF NY CORP. and NANDO GHORCHIAN
a/k/a NASSER GHORCHIAN,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff 1471 Second Corp. commenced the instant action to recover unpaid rents allegedly due from defendants NAT of NY Corp. ("NAT") and Nando Ghorchian a/k/a Nasser Ghorchian ("Ghorchian") pursuant to a lease agreement and a guaranty. By a decision and order dated June 20, 2016, the court granted defendants' motion for summary judgment dismissing the complaint as against Ghorchian. Plaintiff now moves for an Order pursuant to CPLR § 2221 for leave to renew and reargue the motion and, upon renewal or reargument, denying Ghorchian's motion for summary judgment dismissing the complaint and pursuant to CPLR § 3025(b) granting it leave to serve an Amended Verified Complaint. For the reasons set forth below, plaintiff's motion is granted in part and denied in part.

The relevant facts are as follows. On or about October 12, 2005, plaintiff, as landlord, and NAT, as tenant, entered into a written lease agreement for premises located at 1471 Second Avenue, New York, New York (the "Original Lease"). On or about November 23, 2005, Ghorchian, an officer of NAT, executed a written guaranty of a lease for the premises located at 1471 Second Avenue, New York, New York between plaintiff, as landlord, and Ghorchian, as tenant (the "Guaranty"). The Guaranty stated that Ghorchian guaranteed the tenant's performance under the lease that "Landlord and Nando Ghorchian ('Tenant') [were entering] concurrently with the execution and delivery of this Guaranty." Thereafter, by written agreement dated May 4, 2007, plaintiff and NAT modified the Original Lease to allow NAT to lease additional kitchen space in exchange for an increase in the rent (the "Lease Modification"). The Lease Modification was

signed by Ghorchian on behalf of NAT and provides that “[a]ll rules and regulations of the original lease concerning personal guaranties for the lease it [sic] will also apply for this addition of Space/Leased [sic].”

Plaintiff claims that, beginning in or around September 2010 and continuing thereafter, NAT failed to pay plaintiff base rent and additional rent when it became due and owing. Plaintiff commenced the instant action to recover the allegedly unpaid base rent and additional rent. By a decision and order dated June 20, 2016, the court granted Ghorchian’s motion for summary judgment dismissing plaintiff’s complaint as against him on the ground that the Guaranty did not obligate him to pay the base rent and additional rent owed by NAT because the Guaranty only obligated Ghorchian to guarantee his own performance under the lease that “Landlord and Nando Ghorchian (‘Tenant’)” [were entering] concurrently with the execution and delivery of this Guaranty.”

Plaintiff moves for leave to renew based upon its submission of a new affidavit from Nastasi Agostino (“Agostino”), a managing partner of NAT, stating that the Guaranty was actually intended to guarantee NAT’s performance pursuant to its lease with plaintiff. 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).

In the present case, plaintiff has failed to establish its entitlement to a renewal of Ghorchian’s summary judgment motion based upon Agostino’s affidavit as this new fact would not change the court’s prior determination. A court must enforce an unambiguous written contract according to its plain meaning “without looking to extrinsic evidence to create ambiguities not present on the face of the document.” *See 150 Broadway N.Y. Associates, L.P. v. Bodner*, 14 A.D.3d 1, 3 (1st Dept 2004). The test for ambiguity is whether the language of a contract is susceptible of more than one reasonable interpretation. *See Lend Lease (U.S.) Const. LMB Inc. v. Zurich American Ins. Co.*, 136 A.D.3d 52, 56 (1st Dept 2015). As the Guaranty, which clearly obligates Ghorchian to pay rent under a lease between plaintiff and Ghorchian in the event of Ghorchian’s default rather than under the Original Lease or Lease Modification between

plaintiff and NAT in the event of NAT's default, is not ambiguous on its face, the court cannot consider the extrinsic evidence of Agostino's affidavit regarding the parties' intentions.

Plaintiff's motion for leave to reargue is also denied. On a motion for leave to reargue, the movant must show that the court overlooked or misapprehended matters of fact or law. *See* CPLR § 2221(d)(2). In the present case, plaintiff has failed to establish its entitlement to a reargument of Ghorchian's summary judgment motion as plaintiff has failed to show that the court overlooked or misapprehended matters of fact or law. In support of its motion for leave to reargue, plaintiff makes the same arguments the court rejected in its decision and order dated June 20, 2016 except for one new argument. The new argument is that the court overlooked the fact that the Original Lease and the Guaranty were part of the same transaction and therefore must be read and interpreted together. However, this argument is without merit. Separate contracts "executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument." *See BWA Corp. v. Alltrans Exp. U.S.A., Inc.*, 112 A.D.2d 850, 852 (1st Dept 1985). Here, the court did not err in declining to read and interpret the Original Lease and the Guaranty together as the Original Lease and the Guaranty were not executed at or near the same time. The Original Lease was executed on October 12, 2005 and the Guaranty was not executed until November 23, 2005, despite the fact that the first paragraph of the Guaranty states that it was made on October 12, 2005.

Plaintiff's motion for leave to serve an Amended Verified Complaint is granted. Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). On a motion for leave to amend, "the court should examine the sufficiency of the merits of the proposed amendment when considering such motions." *Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20, 25 (1st Dept 2003).

In the present case, plaintiff's motion for leave to serve an Amended Verified Complaint asserting a cause of action for reformation of the Guaranty is granted as plaintiff has shown that no prejudice or

surprise would result from the proposed amendment as discovery is ongoing and depositions have not yet been conducted. Further, plaintiff has shown that the proposed cause of action for reformation is not palpably insufficient or patently devoid of merit as plaintiff alleges in the Amended Verified Complaint that the Guaranty does not set forth the actual agreement of plaintiff and Ghorchian due to a mutual mistake and that the parties actually intended for Ghorchian to guarantee NAT's performance pursuant to its lease with plaintiff.

Defendants' argument that the court should not grant plaintiff leave to amend its complaint to assert a cause of action for reformation because plaintiff could have moved to amend its complaint earlier and defendants would be prejudiced by this late amendment is without merit. "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side." *Detrinca v. De Fillippo*, 165 A.D.2d 505, 508 (1st Dept 1991). In the present case, defendants have failed to identify any prejudice that they would suffer as a result of the amendment.

Further, defendants' argument that the court should not grant plaintiff leave to amend its complaint to assert a cause of action for reformation on the ground that plaintiff cannot and will not be able to meet the high standard of proof required to succeed on a reformation claim is without merit. The standard for whether to grant a motion to amend a pleading to add a claim is whether the proposed claim is palpably insufficient or patently devoid of merit, not whether the movant will ultimately be successful on the proposed claim. *See Daniels v. Empire-Orr, Inc.*, 151 A.D.2d 370, 371 (1st Dept 1989).

Defendants' argument that the court should not grant plaintiff leave to amend its complaint to assert a cause of action for reformation on the ground Ghorchian states in his affidavit that the Guaranty was forged is also without merit as the court cannot determine this factual issue on a motion to amend.

Based on the foregoing, the portions of plaintiff's motion for leave to renew and reargue Ghorchian's motion for summary judgment dismissing the complaint as against him and, upon renewal or reargument, denying Ghorchian's motion for summary judgment dismissing the complaint are denied. The portion of plaintiff's motion for leave to serve an Amended Verified Complaint asserting a cause of action for reformation is granted. Accordingly, it is hereby ORDERED that the Amended Verified Complaint, in

the form attached to plaintiff's moving papers, shall be deemed filed *nunc pro tunc*. This constitutes the decision and order of the court.

DATE: 12/12/16

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