

78-14 Roosevelt LLC v MAS Music, Inc.
2017 NY Slip Op 30061(U)
January 11, 2017
Supreme Court, New York County
Docket Number: 153342/2014
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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78-14 ROOSEVELT LLC,

Plaintiff,

Index No. 153342/2014

- against-

MAS MUSIC, INC. d/b/a/ RINCON MUSICAL
and AMALIO SANTOS,

DECISION AND ORDER

Mot. Seq. 001

Defendants.
----- X

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (A), OF THE PAPERS
CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
Notice of Motion and Affidavit annexed	10-11 (Exs. A-H)
Memorandum of Law in Support	20
Affidavit in Opposition of Lawrence Garvey	25
Affidavit in Support of Amelio Santos	26
Affidavit in Reply of Charles E. Boulbol	28

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER IS AS
FOLLOWS:

In this action seeking unpaid rent, additional rent, and attorneys' fees under a commercial lease ("the lease"), plaintiff landlord 78-14 Roosevelt LLC moves for summary judgment, pursuant to CPLR 3212, seeking a money judgment of \$367,104.71, plus interest, against defendant Amelio Santos, the owner and president of the corporate tenant, defendant Mas Music, Inc., d/b/a Rincon Musical ("MAS"), as well as against MAS.

The demised premises are described on the January 25, 2005 Lease as "Store B, 78-14 Roosevelt Avenue, Jackson Heights,

Queens, N.Y." Exhibit C to Cohen Aff. The lease contains a personal guaranty clause that is left blank. It is a standard Bloomberg form filled in by hand. The entry for "tenant" reads "MAS MUSIC, INC., dba Rincon Musical." on the first line, with its address on the second line. A handwritten slash after "dba Rincon Musical." sets off the name "Amalio Santos. [periods in original]" with two handwritten telephone numbers written underneath. This handwritten entry is within the space on the form in which the tenant was named. The lease stated, underneath the handwritten entries for tenant: "hereinafter jointly, severally, and collectively referred to as TENANT" (Exhibit C to Cohen Aff.). The lease was executed by "Amalio Santos, Pres."

The lease was amended by agreement dated October 31, 2005 ("the Amendment Agreement", Exhibit C to Cohen Aff.), which set the expiration date as February 28, 2015. Santos executed the Amendment Agreement as President of MAS. Id.

Santos, as President of MAS and individually as "tenant", subsequently executed a lease modification agreement with MAS dated "this ____ day of November, 2009" ("the Modification Agreement"). Exhibit C to Cohen Aff. The Modification Agreement specifically referenced the lease and Amendment Agreement and acknowledged that tenant owed plaintiff \$97,650.27 in arrears as of November 30, 2009. Id. It also provided that, upon signing of the Modification Agreement, tenant would pay plaintiff \$16,000,

representing \$11,000 in base annual rent for November of 2009 as well as \$5,000 in arrears. Id.

The first and second causes of action in the complaint each seek \$367,104.71. Jack Cohen, a member of plaintiff, submits an affidavit in support of the motion to which he annexes documentation substantiating the monies owed. Cohen Aff., at pars. 17-18; Exhibits G and H to Cohen Aff. The first cause of action demands that sum on the ground that defendants failed to pay rent and additional rent as required under the Lease. The second cause of action demands the same amount for "base rent and additional rent." The third cause of action seeks costs and attorneys' fees.

According to an October 11, 2011 notice of default (Exhibit D to Cohen Aff.), MAS owed \$137,699.68 in unpaid rent and real estate taxes under the lease as of that date. The notice of default did not name Santos as a tenant.

Plaintiff subsequently commenced a summary proceeding in the Civil Court of the City of New York, Queens County ("the summary proceeding"), with the same caption as in this action, naming Santos, without any limitation to his representative capacity as president of MAS, as a "respondent-tenant." Paragraph 3 of the verified petition in the summary proceeding alleged that Santos was a tenant (Exhibit E to Cohen Aff.).

A one-page February 1, 2012 decision and judgment of the

Civil Court of the City of New York, Queens County (Exhibit H to Cohen Aff.), with the same caption as here, awarded possession of the premises to plaintiff, on default, but did not award any money damages.

This action seeks the damages that the Civil Court did not award, which exceed the jurisdictional amount of that court, as well as damages for the period between October 11, 2011, and the expiration of the lease on February 28, 2015.

Plaintiff now moves for summary judgment on its complaint.

In opposition to the motion, Santos asserts in his affidavit that he did not sign the lease in his personal capacity, and that his name and telephone numbers appear:

"at the top right hand corner of the first page of the lease for the purpose of providing my contact information at the request of my landlord at that time, Mr. Kwong Pong"

(Santos Aff, ¶¶ 5, 6).

Defendants do not contest the amounts claimed under the lease, and only challenge the sufficiency of the basis of knowledge of the moving affiant. This challenge is unavailing given that Cohen, who is a member of plaintiff, submits rent ledgers and explains precisely why they demonstrate plaintiff is owed the amount claimed. Cohen Aff., at pars. 17-18; Exhibits G and H to Cohen Aff.

Although Santos argues that he is not personally liable for the debt, this contention disregards the Modification Agreement,

which listed him as "tenant" in his individual capacity as well as President of MAS. Exhibit C to Cohen Aff. Since the Modification Agreement requires Santos to make payments in his personal capacity beginning in November of 2009, and the ledgers submitted by Cohen reflect that the monies owed did not accrue until after the date of execution of the Modification Agreement, it is clear that both MAS and Santos were responsible, as tenants, to make those payments.

Thus, plaintiff has demonstrated its entitlement to judgment as a matter of law for the amounts due under the lease. In opposition, defendants have failed to demonstrate the existence of a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Finally, plaintiff has demonstrated its entitlement to attorneys' fees under the terms of the lease. See *REP A8 LLC v Aventura Technologies, Inc.*, 68 AD3d 1087, 1090 (2d Dept 2009).

Accordingly, it is:

ORDERED that the motion by plaintiff 78-14 Roosevelt, LLC for summary judgment is granted, to the extent of awarding it judgment on the complaint, as against defendants; and it is further,

ORDERED that plaintiff 78-14 Roosevelt, LLC, having an address c/o Comjem Associates, 1430 Broadway, Suite 1505, New York, New York 10018, shall have judgment against MAS Music, Inc., d/b/a Rincon Musical, and Amalio Santos, both having an address at 14 Garfield Place, Roslyn Heights, New York 11577, jointly and severally, in the amount of \$367,104.71, plus interest from the date of commencement of the action, April 8, 2014, costs and disbursements, as taxed by the Clerk of the Court, upon presentment of an appropriate bill of costs; and it is further,

ORDERED that the issue of the amount of plaintiff's reasonable attorneys' fees is severed and is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further,

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or the receipt of the report of the Special Referee or the designated referee; and it is further,

ORDERED that this motion for attorneys' fees is held in abeyance, along with the claim for damages, pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further,

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further,

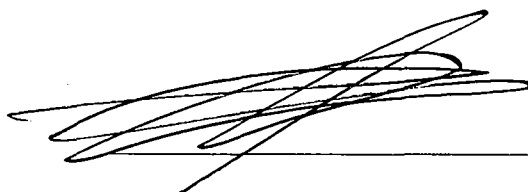
ORDERED that the Clerk shall enter judgment accordingly; and it is further,

¹ Copies are available in Rm. 119 at 60 Centre Street and on the Court's website.

ORDERED that this constitutes the decision and order of
the court.

Dated: January 11, 2017

ENTER:

A handwritten signature in black ink, consisting of several overlapping, stylized loops and strokes, positioned above a horizontal line.

KATHRYN E. FREED, J. S. C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**