

Aspenly Co., LLC v Pirgousis
2017 NY Slip Op 32912(U)
July 28, 2017
Supreme Court, New York County
Docket Number: 153141/2014
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon
Justice

PART 42

ASPENLY CO., LLC

INDEX NO. 153141/2014

- v -

MOTION DATE 002

NICKOLAS PIRGOUSIS, ANDREW S.
PIRGOUSIS, and ANNA E. PIRGOUSIS

MOTION SEQ. NO. 3/29/2017

The following papers were read on this motion and cross motion for summary judgment

Table with 2 columns: Document Type and No(s). Rows include: Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law (1), Notice of Cross Motion--Answering Affirmation(s) — Affidavit(s) — Exhibits (2, 3), Replying Affirmation — Affidavit(s) — Exhibits (4, 5).

In this action to recover under a personal guaranty of a lease, this court, by order dated June 15, 2016, denied the plaintiff's motion for summary judgment, without prejudice to renewal after completion of discovery and upon submission of proper papers. Discovery is complete, and the plaintiff now renews its motion pursuant to CPLR 3212 for summary judgment on the complaint. The defendant opposes the motion and cross-moves for summary judgment dismissing the complaint. The renewed motion is granted and the cross motion is denied.

On June 15, 2013, the plaintiff landlord (landlord) leased certain commercial real estate in Manhattan to the tenant Spurs 771, Inc., doing business as Spurs Eatery (tenant). The lease permitted the landlord to recover attorney's fees in the case of the tenant's default. The tenant's principal, the defendant Nickolas Pirgousis (Nickolas), his wife, the defendant Anna E. Pirgousis, and his son, the defendant Andrew S. Pirgousis, together executed a personal guaranty, pursuant to which they obligated themselves to perform the tenant's obligations under the lease if it defaulted. Paragraph 5 of the guaranty provided, in relevant part, that

"Guarantor's obligations under this Guaranty shall remain in full force and effect without regard to, and shall not be impaired or affected by: (a) any amendment . . . or modification of or . . . any of the terms, conditions, or provisions of the Lease . . . ; or (b) any compromise, release, consent . . . relating to any terms, conditions or provisions of the Lease."

Paragraph 3 permitted the tenant to serve the landlord with a 90-day notice that it intended to vacate the premises prior to the end of the lease term, provided that rent, additional rent, and fixed charges were current, the tenant simultaneously paid the landlord such rent, additional rent, and fixed charges that had accrued from the date of the notice to the date it intended to vacate the premises, and

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

ultimately vacated on the date specified in the note. If those conditions were met, the guarantors would be released from liability under the guaranty. However, paragraph 3 further provided that

"If Tenant shall be in monetary default or material non-monetary default under the Lease on the Vacate Date, then Guarantor shall not be released from its obligations under this Guaranty, this Paragraph 3 shall be deemed deleted from this Guaranty and of no further force and effect, Guarantor's liability shall not be limited as set forth in this Paragraph 3 and Guarantor shall be deemed a general guarantor of all of Tenant's obligations for the entire term of the Lease."

The tenant stopped paying rent in July 2013, only one month after the commencement of the lease term. On August 9, 2013, the landlord served a notice to cure. When the tenant failed to cure by August 31, 2013, the landlord declared that the lease was terminated, and commenced a holdover proceeding in the Civil Court on October 16, 2013, with the petition returnable October 28, 2013. When the tenant defaulted in appearing, the Civil Court scheduled in inquest for November 26, 2013. Rather than proceed with the inquest, the tenant and landlord entered into a lease termination agreement dated November 30, 2013, executed by all three defendants. The termination agreement obligated the tenant to vacate the premises as of November 30, 2013, and pay the sum of \$154,622.35 to compensate the landlord for rent, additional rent, and fixed charges that were due and owing as of the date of the notice to cure, plus any rent and charges that accrued between August 2013, and November 30, 2013. The tenant did not immediately vacate the premises and did not pay the stated amount upon execution of the termination agreement. It did not vacate the premises until December 20, 2013, and did not tender any payment to the landlord until December 31, 2013, when it tendered a check in the sum of \$174,622.35 to Bruce A. Spiegel, a representative of the landlord's managing agent. The account on which the check was drawn concededly had insufficient funds to cover it. On January 6, 2014, the parties entered into a stipulation discontinuing the Civil Court action.

Over the next several months, Nickolas and Spiegel engaged in an ongoing email correspondence, in which Nickolas repeatedly promised that he would transfer funds to cover the tendered check, offering numerous excuses for the delay. No funds were transferred, and the check remained worthless. The landlord commenced this action on April 2, 2014, seeking to hold the defendants personally liable for the sum of \$164,245.67, representing fixed rent, additional rent, and charges for water and sewer services that had accrued under the lease through December 19, 2013, the day before the tenant actually vacated the premises, plus attorney's fees in the sum of \$2,180.75.. Prior to the completion of discovery, the landlord moved for summary judgment on the complaint. By order dated June 15, 2016, this court denied the plaintiff's motion, without prejudice to renewal after completion of discovery and upon the submission of proper papers, such as the termination agreement and documents from the holdover proceeding.

On its renewed motion, the landlord submits the pleadings, an attorney's affirmation, Spiegel's affidavit, the lease, the guaranty, the petition and stipulation of discontinuance in the holdover proceeding, the termination agreement, copies of uncanceled checks from the tenant, correspondence between the parties concerning the holdover proceeding, copies of emails between Nickolas and

Spiegel concerning the unfunded check, the parties' deposition transcripts, rent invoices, and a detailed breakdown of the legal work undertaken by the landlord's attorneys. These submissions are sufficient to demonstrate, prima facie, that the tenant breached the lease by failing to pay rent, and breached the termination agreement as well by virtue of both nonpayment and failure timely to vacate the premises. See 4 USS, LLC v DSW MS, LLC, 120 AD3d 1049 (1st Dept 2014). They also show that the defendants guaranteed the tenant's obligations under the lease, and that the defendants are now personally responsible for those obligations jointly and severally with the tenant and each other. See 104 W. 27th St. Realty, Inc. v Lim, 110 AD3d 551, 551-552 (1st Dept 2013). In opposition to the motion, and in support of their cross motion, the defendants submit an attorney's affirmation and their own affidavits. These affidavits do not challenge the tenant's failure to abide by either the lease or the termination agreement, but only contain legal argument. The court rejects the contention that, once the termination agreement was executed, the defendants were, by its terms, expressly released from any further obligations under the guaranty. Where an individual unconditionally guarantees a tenant's performance of a lease, the guaranty survives the expiration of the lease term, and the guarantor remains personally liable thereunder, where, as here, any of the conditions of the guaranty are not satisfied. See 300 Park Ave., Inc. v Café 49, Inc., 89 AD3d 634 (1st Dept. 2011). There is also no merit to the argument that the lease was terminated when the defendants were served with the notice of termination, thereby rendering both the lease and guaranty invalid and unenforceable. See Rocar Realty Northeast, Inc. v Jefferson Val. Mall Ltd. Partnership, 38 AD3d 744 (2nd Dept. 2007). The defendants' submissions thus do not raise a triable issue of fact or support the relief they request.

Accordingly, it is

ORDERED that the plaintiff's renewed motion for summary judgment on the complaint is granted; and it is further,

ORDERED that the defendant's cross motion for summary judgment dismissing the complaint and pursuant to CPLR 3211(a)(7) to dismiss the complaint is denied; and it is further,

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff, Aspenly Co., LLC, and against the defendants Nickolas Pirgousis, Andrew S. Pirgousis, and Anna E. Pirgousis, jointly and severally, in the sum of \$164,245.67 on the first cause of action, with statutory interest from August 30, 2013, and in the sum of \$2,180.75 on the second cause of action, as and for an award of an attorney's fee.

This constitutes the Decision and Order of the Court.

Dated: 7/28/17

 JSC
HON. NANCY M. BANNON

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: CROSS MOTION IS: GRANTED DENIED GRANTED IN PART OTHER