

Talia Mgt. Co. v Delaney
2018 NY Slip Op 31249(U)
June 15, 2018
Supreme Court, New York County
Docket Number: 160067/15
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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TALIA MANAGEMENT CO., d/b/a
GREENWICH REALTY CO.

Plaintiff

Index No. 160067/15

v

DECISION AND ORDER

JAMES P. DELANEY and SEAN BARRETT

Defendants.

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover on a guaranty of a commercial restaurant sublease, the plaintiff moves pursuant to CPLR 3212 for summary judgment on the first cause of action, which seeks rent arrears and related expenses, and on the issue of liability on the second and third causes of action, which respectively seek to recover certain post-eviction expenses and an award of attorneys' fees incurred in enforcing the guaranty. The plaintiff also seeks summary judgment striking the affirmative defenses asserted by the defendants. The defendants oppose the motion. The motion is granted.

II. BACKGROUND

On June 1, 2012, the plaintiff, as sublessor, and the defendants' limited liability company, Dailyfish, LLC, d/b/a Chapter One (Dailyfish), as sublessee, entered into a 10-year sublease with respect to commercial real property in Manhattan. On June 19, 2012, the defendants both executed personal, unconditional guaranties of Dailyfish's obligations under the sublease.

The plaintiff asserts that Dailyfish breached the sublease by failing to pay rent and additional rent, and became obligated to the plaintiff for those amounts, as well as other obligations under the sublease, including attorneys' fees incurred in re-letting the leasehold, and additional post-eviction expenses.

In a nonpayment proceeding commenced in the Civil Court, the plaintiff, on November 2, 2015, secured a judgment of possession and a money judgment against Dailyfish in the sum of \$252,432.93, representing arrears that accrued from September 1, 2014, the date of breach, through October 1, 2015. On December 2, 2015, the plaintiff obtained a separate money judgment in the Civil Court against Dailyfish for attorneys' fees, in the sum of \$32,864.40, that were incurred in litigating the nonpayment proceeding. The plaintiff now

seeks to recover those judgment amounts from the defendants, as guarantors, along with statutory interest thereon, unpaid rent and additional rent through May 15, 2016, and attorneys' fees incurred in re-letting the leasehold (first cause of action), other post-eviction expenses, including damage to property and the costs of curing violations of the New York City Landmarks Preservation Law (second cause of action), and attorneys' fees incurred in enforcing the terms of the guaranty (third cause of action).

In support of its motion, the plaintiff submits the affidavit of its general partner, Arthur Wiener, along with the pleadings, the overlease, the sublease, the guaranty, tax statements referable to the leasehold, the judgments and other filings in the nonpayment proceeding, correspondence, and a sublease between it and the replacement subtenant. In opposition to the motion, the defendants submit the affidavit of defendant James P. Delaney, a proposed business plan for Dailyfish, and an internet posting announcing the opening of a restaurant at the leasehold by a person introduced by the defendants to the plaintiff as a potential replacement tenant.

III. DISCUSSION

The proponent of a motion for summary judgment pursuant

to CPLR 3212 must establish its prima facie entitlement to judgment as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985).

Should the movant meet its burden, it then becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986). "Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1st Dept. 1991). Where there is no triable issue of fact as to liability under a guaranty, or as to the amount due thereunder, summary judgment against the guarantor is appropriate. See Reliance Constr., Ltd. v Kennelly, 70 AD3d 418 (1st Dept. 2010).

The plaintiff's proof establishes its prima facie entitlement to judgment as a matter of law on the first cause of action, which seeks to recover on the guaranty for unpaid

rent, which includes both the amounts of the judgments entered in the Civil Court, plus statutory interest, and rent arrears that accrued between November 1, 2015, through May 15, 2016. The cause of action also seeks to recover additional rent, in the nature of apportioned real estate taxes, a late fee authorized by the sublease, and attorneys' fees incurred in re-letting the leasehold after Daillyfish's default. Wiener's affidavit shows that Daillyfish entered into a sublease with the plaintiff and breached it by failing timely to pay rent, that money judgments were entered in the nonpayment proceeding against Daillyfish, and that the sublease dispenses with the requirement that the plaintiff mitigate damages by reletting the leasehold. See Holy Props., Ltd., L.P. v Kenneth Cole Prods., Inc., 87 NY2d 130 (1995). He further shows that the sublease permits the plaintiff to recover the entirety of the rent from Daillyfish in the case of a default based upon nonpayment, that the defendants unconditionally guaranteed Daillyfish's obligations under the sublease, and that the obligations remain unpaid by Daillyfish.

The plaintiff correctly argues that, in light of the fact that the defendants were in privity with Daillyfish, the entry of the money judgments against Daillyfish may be imputed to the defendants, as guarantors, under the doctrines of collateral

estoppel and res judicata. See APF 286 Madison, LLC v Chittur & Assoc., P.C., 132 AD3d 610 (1st Dept. 2015). It has thus shown that the defendants are liable under the guarantee for \$252,432.93, plus statutory interest on that sum from September 1, 2014, and for \$32,864.40, plus statutory interest on that sum from December 1, 2015. Wiener's affidavit also establishes the plaintiff's entitlement to \$156,259.94 for unpaid base rent from November 1, 2015, through May 15, 2016, which post-dates the period of time referable to the amount recovered under the first Civil Court judgment, \$22,345.58 in additional rent for the share of real estate taxes apportioned to the leasehold through December 2015, and \$8,930.28 in late fees under paragraph 3(b) of the sublease, which permits the plaintiff to assess a 5% charge on certain outstanding rent obligations.

The plaintiff further establishes that paragraph 21(c) of the sublease entitles it to recover attorneys' fees that it incurred in connection with re-entering and reletting the leasehold where, as here, the sublease was terminated due to Dailyfish's default in payment.

In opposition to this showing, the affidavit of the defendant James P. Delaney is insufficient to raise a triable issue of fact, since he concedes that Dailyfish stopped paying

rent because it was unable to do so. Neither his reference to a proposed, but unexecuted, settlement agreement in the nonpayment proceeding, nor his reference to a business plan that purportedly would have permitted Dailyfish to continue its restaurant operations, can serve to relitigate that proceeding. There is no merit to his contention that the defendants, as guarantors, were entitled to be served with the same notice to cure in the nonpayment proceeding as was served upon Dailyfish, and that the failure to serve them prior to the commencement thereof relieves them of their obligations under the guaranty. The guaranty expressly provides, at page 3, that the provision of such notice is solely within the discretion of the plaintiff.

In addition, Delaney's assertion that he introduced the plaintiff to the person whose company was ultimately permitted to replace Dailyfish as the subtenant does not raise a triable issue of fact, since the sublease explicitly gives the plaintiff the authority to accept or reject a proposed assignment of the sublease. Contrary to the defendants' contention, the plaintiff's determination not to immediately accept a substitute subtenant cannot be deemed a breach of the implied covenant of good faith and fair dealing. A claim that the covenant is breached does not lie where, as here, a party

exercises a right expressly granted to it in the underlying contract. That is because "[t]he covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights." National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp., 25 AD3d 309, 310 (1st Dept. 2006).

With respect to the second cause of action, Wiener's affidavit establishes the plaintiff's prima facie entitlement to judgment as a matter of law on the issue of liability for post-eviction damages. In his affidavit, he explains that the plaintiff incurred non-legal costs in cleaning, restoring, and re-letting the leasehold, and that Dailyfish breached several other sublease provisions, including paragraphs 4, 22, and 24, by physically damaging the property in the course of removing fixtures and systems installed in the leasehold, failing to remove its own personal property, and failing to cure violations issued by the New York City Landmarks Commission. The defendants fail to raise a triable issue of fact in opposition to that showing, as their submissions do not address those claims. The issue of damages on this cause of action must await trial.

As to the third cause of action, Wiener demonstrates that

page 4, paragraph 4, of the guaranty entitles the plaintiff to recover attorneys' fees incurred in connection with any action to enforce the guaranty. The defendants do not address this issue. The amount of fees must await trial.

For the same reasons as support the award of summary judgment to the plaintiff on the first and second causes of action, the plaintiff has established its entitlement to judgment dismissing the defendants' affirmative defenses. The complaint clearly states a cause of action (first affirmative defense), no notice to cure was required to be given to the guarantors (second affirmative defense), the introduction of a suitable replacement tenant did not relieve Dailyfish or its guarantors of their obligation to pay rent (third affirmative defense), and the nonpayment proceeding was indeed based on Dailyfish's breach of its obligations under the sublease, rather than breach of an unsigned stipulation of settlement (fourth affirmative defense). In addition, paragraph 39(a) of the sublease gave the plaintiff unilateral discretion to apply the security deposit so as to reduce Dailyfish's obligations, the plaintiff thus did not breach the lease by declining to do so, and it has established that there was damage to the leasehold in any event (fifth and eighth affirmative defenses), the action is not barred by promissory estoppel,

which is duplicative of the breach of lease defense in any event (see Celle v Barclays Bank, P.L.C., 48 AD3d 301 [1st Dept. 2008]), and the "no waiver" provision of paragraph 28 of the sublease, which permits the plaintiff to accept late rent payments without waiving its right to recover all of the rent due under the terms of the sublease, defeats the defense of waiver (seventh affirmative defense). Finally, the plaintiff is not barred by the Civil Court judgments from seeking to recover additional expenses and legal fees incurred in responding to landmarks' violations, since the plaintiff demonstrated the fees awarded therein were solely to reimburse it for fees incurred in litigating that proceeding (ninth affirmative defense).

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion is granted, and it is awarded summary judgment:

(1) on the cause of action to recover on the guaranty for unpaid rent, statutory interest, additional rent, late fees, and related expenses (first cause of action) in the sum of \$472,833.12, plus statutory interest on the sum \$252,432.93 from September 1, 2014, statutory interest on the sum of

\$32,864.40 from December 1, 2015, and an award of attorneys' fees incurred in re-letting the subject leasehold;

(2) on the issue of liability on the cause of action to recover on the guaranty for other post-eviction expenses (second cause of action), and

(3) on the issue of liability on the cause of action to recover attorneys' fees incurred in the enforcement of the guaranty (third cause of action); and it is further,

ORDERED that the amount of attorneys' fees to be awarded in connection with the first cause of action shall be determined simultaneously with the trial on the issue of damages on the second and third causes of action; and it is further,

ORDERED that the parties shall appear for a preliminary conference on July 12, 2018, at 2:30 p.m.

This constitutes the Decision and Order of the court.

Dated: June 5, 2018.

ENTER: _____



J.S.C.

HON. NANCY M. BANNON