

154-7th Ave. Chelsea, Inc. v Ballagherreen Corp.

2018 NY Slip Op 31729(U)

March 27, 2018

Supreme Court, New York County

Docket Number: 650516/2017

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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154-7th AVE. CHELSEA, INC.,

Plaintiff,

Index No. 650516/2017

- against -

BALLAGHADERREEN CORP., 152 SEVENTH
AVENUE REALTY LLC and MARTIN GERSHON,

Defendants.

-----x
152 SEVENTH AVENUE REALTY LLC,

Third-Party Plaintiff,

-against-

ABDO SALEH,

Third-Party Defendant.

-----x
Masley J.:

Defendant and third-party plaintiff 152 Seventh Avenue Realty LLC (Landlord) moves (1) pursuant to CPLR 3212 to dismiss the amended complaint; (2) pursuant to CPLR 3001 for a declaratory judgment that plaintiff is not entitled to the \$1 million surrender fee; (3) pursuant to CPLR 3001 for a declaratory judgment directing the escrow agent to release the escrow to Landlord; (4) pursuant to CPLR 3001 against guarantor Abdo Saleh declaring that the obligation to pay \$200,000 is due; and (5) scheduling an inquest on attorneys' fees.

Plaintiff 154-7th Ave. Chelsea, Inc. (Deli) and third-party defendant Abdo Saleh cross-move (1) pursuant to CPR 3212 for summary judgment in Deli's favor; (2) dismissing Landlord's counterclaim for a declaratory judgment; (3) pursuant to CPLR 3001 for a declaration that Deli is entitled to escrow funds; and (4) dismissing the third party complaint against Saleh, the guarantor.

This is a breach of contract action pursuant to which the Landlord would pay Deli

\$1 million in exchange for surrendering the premises on December 1, 2016. It is undisputed that Deli vacated after December 2, 2016.

According to the February 10, 2017 amended complaint, Deli purchased the 2009 lease between defendant Ballaghadereen Corp. (Ballaghadereen) and the prior tenant, expiring June 2014, for a basement and first floor commercial space to operate a delicatessen. Deli alleges that, in November 2011, Ballaghadereen and the original tenant had agreed in writing to extend the lease to May 2024. In February 2014, Ballaghadereen sued its managing agent for fraud and bad faith, creating false financial statements, commingling funds, and mismanaging Landlord's leases.¹ Specifically, Ballaghadereen accused its managing agent of inducing Ballaghadereen to enter disadvantageous transactions. Although Deli was not accused of wrongdoing, Ballaghadereen named Deli as a defendant and sought a declaration that Deli's lease was invalid. The parties settled the 2014 action with a Surrender Agreement pursuant to which Deli agreed to accept \$1 million in exchange for vacating and surrendering the lease on December 1, 2016. Deli was paid the first part of the Termination Payment of \$200,000 on March 14, 2016. Deli alleges that it ended its business on November 16, 2016, but continued to sell inventory. On November 28, 2016, Deli requested in writing more time to dismantle refrigeration equipment. Landlord failed to respond. Landlord delivered a written Failure to Surrender Notice on December 2, 2016. Deli admits to surrendering the premises in broom clean condition after December 3, 2016.²

¹Index # 650637/2014, NY County Supreme Court.

²According to Abdo Saleh, Deli's president, Deli surrendered the premises on December 5, 2016. (Affidavit of Saleh, May 2, 2017, ¶36.) Stephen Matri, the Landlord's managing agent, states that he received the keys on December 6. (Affidavit of Matri, March 23, 2017, ¶¶51-60.) He also submits receipts demonstrating that Deli was operating after the termination date and photos of property removal from the premises on December 5, 2016.

Section 4 (b) of the Surrender Agreement provides:

"If Deli fails to timely comply with its obligation to surrender the Premises pursuant to Paragraph 5, then (i) Owner shall have no objection to pay to Deli any portion of the Termination Fee, (ii) Deli shall refund to Owner the First Termination Payment within three (3) business days after Owner's demand therefor, and (iii) Escrow Agent shall return to Owner the Second Termination Payment within three (3) business days after Owner's demand therefor."

(See also ¶¶ 6 and 10 [d] [i].) Paragraphs 5 (a) and 12 (c) state that "time is of the essence."

Summary judgment under CPLR 3212 is a drastic remedy that will only be granted where the movant demonstrates that no genuine triable issue of material fact exists. (See *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) If the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman*, 49 NY2d at 562.)

The fundamental rules of contract construction require strict enforcement of the Surrender Agreement, a stipulation settling litigation. "Strict enforcement of the parties' stipulation ... is warranted based upon the principle that the parties to a civil dispute are free to chart their own litigation course ... Enforcement of the stipulation also serves the interest of efficiency in the final resolution of this dispute." (*Mill Rock Plaza Assocs. v Lively*, 224 AD2d 301, 301-02 [1st Dept 1996][citations omitted].) Where a contract

contains a time is of the essence provision, the parties' strict compliance is required and failure constitutes a material breach. (*New Colony Homes, Inc. v Long Island Prop. Grp., LLC*, 21 AD3d 1072, 1072-73 2d Dept 2005.) Commercial certainty is paramount, particularly in real property transactions. (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990].)

Deli appears to justify its delay because there existed a "two week delay of the deposit of the Second Termination Payment." (Complaint ¶¶ 24.) Under the Surrender Agreement, the escrow agent was to provide instructions by October 31, 2016 and Landlord was to wire \$800,000 to the escrow agent by November 1, 2016. (Surrender Agreement ¶ 4 [a] [ii].) However, the escrow agent failed to timely provide wire instructions. The Surrender Agreement provides that such a contingency would not change the termination date. (*Id.*) A copy of the HSBC deposit memo shows that the Landlord deposited \$800,000 with the escrow agent on November 16, 2016, two weeks before the payment was due on December 1, 2016.

Deli argues that the time is of the essence clauses are unenforceable penalty clauses, and not valid liquidated damages. The law concerning liquidated damages has no application here. "Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of contract." (*Truck Rent-A-Ctr., Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 423-24 [1977] [internal citation omitted]). Deli confuses forfeiture with its "contracted-for financial consequence of the tenants' own failure to do that which they promised to do." (*1029 Sixth LLC v Riniv Corp.*, 9 AD3d 142, 150 [1st Dept 2004].) Indeed, Deli's continued operation for days after the termination date is far more egregious than the tenants in 1029 Sixth LLC who failed to surrender the premises in broom clean condition. The court

is compelled to reject Deli's argument.

The guaranty provides that the "guarantor..unconditionally and irrevocably guaranteed to Owner, its successors and/or assigns the full and prompt payment of the First Termination Payment, if such payment is required pursuant to the terms of the Surrender Agreement." Landlord served the Failure to Surrender Notice on December 2, 2016. The Surrender Agreement provides that Deli was to return the First Surrender payment within three days of the demand. Having failed to timely return the initial payment, Saleh, the guarantor, is now responsible for payment.

The guaranty and paragraph 12 (j) of the Surrender Agreement provide for attorneys' fees. As the prevailing party, the Landlord is entitled to reasonable attorneys' fees, charges, expenses and all reasonable costs incurred in the enforcement of the Surrender Agreement.

Accordingly, it is hereby

ORDERED, that the motion of Plaintiff 154-7th Ave. Chelsea, Inc. and third-party defendant Abdo Saleh's motion for summary judgment is denied; and it is further

ORDERED, that defendant and third-party plaintiff 152 Seventh Avenue Realty LLC's motion for summary judgment dismissing the amended complaint is granted; and it is further

ORDERED that the branch of 152 Seventh Avenue Realty LLC's motion which seeks a declaratory judgment on its counterclaim, cross-claim, and third-party claims is granted; and it is further

ADJUDGED and DECLARED that (1) the escrow agent is to release the escrow to 152 Seventh Avenue Realty LLC, (2) plaintiff 154-7th Ave. Chelsea, Inc. is not entitled to the \$1 million surrender fee, and (3) guarantor Abdo Saleh's obligation to pay \$200,000

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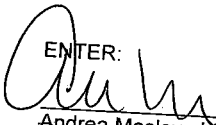
was due on December 5, 2016, the date of the Failure to Surrender Notice plus three days; and it is further

ORDERED and ADJUDGED that Abdo Saleh is directed to pay 152 Seventh Avenue Realty LLC \$200,000 with interest from December 2, 2016 at the legal rate; and it is further

ORDERED the issue of reasonable attorneys' fees, charges, expenses and all reasonable costs incurred in the enforcement of the Surrender Agreement is severed and referred to a Special Referee to hear and report with recommendations (or, if the parties shall so stipulate, to hear and determine). That issue is held in abeyance until the court receives the report and a motion pursuant to CPLR 4403, and a final determination is issued; and it is further

ORDERED that 152 Seventh Avenue Realty LLC 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, upon the Special Referee Clerk in the Motion Support Office (Room 119M),³ who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

DATED: 3/27/18

ENTER: 
Andrea Masley, J.S.C.
~~HON. ANDREA MASLEY~~

³Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link.