

Lem Lee 58th L.P. v Baranzelli Silk Surplus Inc.

2018 NY Slip Op 32094(U)

August 22, 2018

Supreme Court, New York County

Docket Number: 651336/16

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

-----X

LEM LEE 58TH LIMITED PARTNERSHIP

Plaintiff

Index No. 651336/16

v

DECISION AND ORDER

BARAZZELLI SILK SURPLUS INC. and EDWIN
WARD BITTER

Defendant.

MOT SEQ 001

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking damages for breach of a lease agreement and personal guaranty, the plaintiff moves pursuant to CPLR 3212 for summary judgment in its favor on the first, second, and fourth causes of action, dismissal of the defendants' defenses and for a money judgment in the amount of \$21,802.77 as against the defendant Edwin Ward Bitter. The plaintiff also seeks reasonable legal fees incurred in connection with its prosecution of this action. The defendants' opposition is rejected as untimely. The plaintiff's motion granted in part.

II. BACKGROUND

As set forth in the complaint filed on March 14, 2016, the defendant Baranzelli Silk Surplus, Inc. (Baranzelli) entered into a written lease agreement dated October 31, 2012, with the

plaintiff, whereby the plaintiff leased to Baranzelli for a term of four years certain commercial premises and basement storage space in a Manhattan building located on East 58TH Street. The lease agreement commenced on November 1, 2012, and was set to terminate on October 31, 2016. It obligated Baranzelli to pay rent to the plaintiff monthly and in advance, without demand, in accordance with a rate schedule. The defendant Edwin Ward Bitter signed the lease agreement in his capacity as president of Baranzelli. Bitter also signed a separate limited guaranty agreement, wherein Bitter personally guaranteed payment of all "Liabilities," defined to include rent, charges, and additional sums, among other items, but not any accelerated rent upon a default, coming due under the lease agreement, through the date of surrender of the lease. The date of surrender is described as

the last day of the month in which vacant and broom clean possession of the demised premises in the condition required by the Lease (the "Vacate Date"), keys and a surrender of the Lease, in recordable form reasonably satisfactory to Owner's attorney, is tendered to Owner or Owner's attorney, along with a bank check payable to the order of Owner for rent and additional rent and other sums, if any covering the period to and including the Vacate Date, provided not less than thirty (30) days prior written notice of such tender is given to Owner by Tenant.

The guaranty further provides that the unamortized portion of any rent abatement or concession will be due at the time of delivery of the surrender agreement, and that the guarantor is obligated to pay "any and all expenses, including, but not limited to,

reasonable attorneys' fees and court costs, paid or incurred by Owner in endeavoring to gain legal possession of the demised premises, collect and gain enforcement of the Liabilities or any part thereof and enforce this Guaranty." According to the complaint, the signed lease and guaranty agreements were delivered to the plaintiff on or about November 6, 2012.

The defendants permanently vacated the premises on November 28, 2015, approximately ten and a half months prior to the expiration of the lease. The plaintiff entered a new lease agreement for the subject premises with a new tenant on April 1, 2016. Accordingly, the plaintiff seeks \$19,559.80 for the four months of rent following the defendants' abandonment of the premises, plus \$191.93 in arrears and \$2,051.04 representing the unamortized portion of the rent concession.

III. DISCUSSION

A. Defendants' Untimely Opposition

As a preliminary matter, the court notes that while the instant motion was commenced by notice of motion filed on April 20, 2018, and was fully submitted on May 3, 2018, the defendants failed to submit papers in opposition to the motion until July 2, 2018. Pursuant to CPLR 2214, where a notice of motion and supporting affidavits are served at least eight days before the time at which the motion is noticed to be heard, as is the case

here, answering affidavits must be served at least two days before such time. Thus, the defendants were required to submit their affidavits in opposition to the motion by May 1, 2018. The only reason given for the defendants' two month delay is the defendants' assertion that "no copies of any documents pertaining to the instant motion were ever served on defendants' counsel."

As stated in the New York County Supreme Court, Civil Branch, protocol on procedures for electronically filed cases, updated as of April 4, 2018, electronic filing (e-filing) is mandatory in all types of cases, other than exceptions not applicable here, that are commenced in this court on or after February 19, 2013. See 22 NYCRR 202.5-bb. Service of interlocutory documents in an action subject to mandatory e-filing is made by posting a document to the NYSCEF site, which automatically and immediately transmits an e-mail notice of the filing, including a link to the document, to all participating counsel and unrepresented litigants on the case. See 22 NYCRR 202.5-bb(c). Therefore, service was made upon the defendants on April 20, 2018, when the plaintiff properly uploaded its notice of motion and supporting documents, and noticed its motion to be heard on May 3, 2018. The defendants' purported excuse for their delay is thus without merit. Since no other reason or explanation is given for such delay, the court will not consider the defendants' untimely submissions.

B. Summary Judgment

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.

The plaintiff's notice of motion recites that the plaintiff seeks summary judgment "as against Defendant Edwin Ward Bitter as tenant and guarantor." Accordingly, the court will assess this branch of the plaintiff's motion as addressed only to Bitter, and not to Baranzelli. The plaintiff asserts, without citing to any legal authority, that Bitter is personally liable as the tenant in fact under the lease agreement he signed in his capacity as president of Baranzelli because Baranzelli is "not a legal entity." The plaintiff bases this assertion on a search that was run on the New York State Department of State website prior to the commencement of this action, which allegedly revealed that no business entities under the name "Baranzelli Silk Surplus" were registered to do business within the state. To the extent the

plaintiff invokes an agency theory of liability, it is generally true that when individuals purporting to act on behalf of a non-existent principal enter into a contract with a third party, the contract generally remains valid and enforceable as between the third party and the individuals who executed the contract on behalf of the non-existent principal. See Spring Valley Improvements, LLC v Abajian, 40 AD3d 619 (2nd Dept. 2007); Metro Kitchenworks Sales, LLC v Continental Cabinets, LLC, 31 AD3d 722 (2nd Dept. 2006). However, the plaintiff's cursory internet search, performed years after the lease agreement was entered into, does not establish that Bitter signed the agreement on behalf of a non-existent entity. Thus, the plaintiff has not made a prima facie showing that Bitter could be held personally liable under the lease agreement.

The plaintiff further asserts that Bitter is liable under the guaranty agreement. "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).

Here, the guaranty agreement by its very terms is a "limited guaranty of lease." It permits the guarantor to avoid being held liable to the same extent as the tenant where the tenant and guarantor (1) deliver vacant and broom clean possession of the premises, (2) deliver keys and a surrender in recordable form reasonably satisfactory to the owner's attorney, (3) deliver a bank check payable to the order of the owner for rent and additional rent and other sums due and owing through the date of vacatur, and (4) provide no less than 30 days' prior written notice of intent to vacate. The plaintiff alleges that the defendants failed to comply with second, third, and fourth of these conditions.

The plaintiff admits that Bitter sent notice of the surrender on October 1, 2015, but that the notice had an expressed surrender date of October 13, 2015. Bitter sent an additional letter on October 30, 2015, indicating that the defendants would not vacate until November 29, 2015. The plaintiff avers that Bitter left the letter at the plaintiff's office with a secretary at the front desk. The plaintiff's contention that the surrender notice was inadequate because it was not sent by certified or registered mail is without merit, as the guaranty agreement contains no such obligation. Similarly,

the plaintiff's blanket assertion, without explanation, that neither the notice nor the letter was "in a form acceptable to owner's attorney" is a legal conclusion that does not establish Bitter's noncompliance with the conditions of the guaranty. However, the plaintiff's submissions, which include an affidavit of an employee of the plaintiff's managing agent, a rent ledger, and copies of the surrender notice and letter sent by Bitter, establish that (1) Bitter did not submit any bank check in payment of the \$191.93 Baranzelli owed in rent arrears, plus the \$2,051.04 comprising the unamortized portion of a rent concession of \$8,950.00, and (2) Bitter did not provide the plaintiff with the requisite 30 day notice of surrender. Thus, the limitation of liability provided in the guaranty agreement is inapplicable.

The plaintiff further establishes that Baranzelli entered into the lease agreement with the plaintiff and breached it by vacating the premises prior to the expiration of the lease, that pursuant to the terms of the lease Baranzelli owes rent for the months of December through March in sum of \$19,559.80 and has not paid that sum, that \$191.93 in arrears and \$2,051.04 comprising the amortized portion of the rent concession remains due and owing to the plaintiff. Therefore, the plaintiff has made a prima facie showing that under the terms of the lease agreement and guaranty, Bitter is liable to the plaintiff for the sum of \$21,802.77 as guarantor. As the defendants have not submitted

timely opposition, they have failed to come forward with proof in admissible form to raise a triable issue of fact.

The plaintiff has also demonstrated that the terms of the guaranty entitle the plaintiff to recover attorneys' fees incurred in connection with any action to enforce the guaranty. See *Flemming v Barnwell Nursing Home and Health Facilities, Inc.*, 15 NY3d 375 (2010); *Coopers & Lybrand v Levitt*, 52 AD2d 493 (1st Dept. 1976); see also *Goldberg v Mallinckrodt, Inc.*, 792 F2d 305 (2nd Cir. 1986); *Rich v Orlando*, 108 AD3d 1039 (4th Dept. 2013). The matter is referred to a referee to hear and report on the issue of the appropriate award.

C. Dismissal of Affirmative Defenses

For the same reasons supporting the award of summary judgment to the plaintiff on its fourth cause of action for breach of a personal guaranty, the plaintiff has established its entitlement to judgment dismissing the defendants' affirmative defenses. The complaint clearly states a cause of action (third affirmative defense), there was no accord and satisfaction between the parties as the lease agreement was not satisfied (fourth affirmative defense), and Bitter failed to satisfy the conditions for limiting the scope of the personal guaranty he signed (fifth affirmative defense). In addition, the defendants' first and second affirmative defenses, which stated

that the court lacked personal jurisdiction over the defendants because they were not properly served, are without merit as the plaintiff has submitted affidavits of service demonstrating, prima facie, that service was properly completed upon both defendants, and the defendants have not rebutted that showing.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiff's motion is granted to the extent that it is awarded summary judgment as against the defendant Edwin Ward Bitter (1) on its fourth cause of action to recover on the guaranty for unpaid rent, rent arrears, and the unamortized portion of the rent concession provided by the plaintiff, in the total sum of \$21,802.77 plus statutory interest from the date of judgment, and (2) on the issue of liability on the cause of action to recover attorneys' fees incurred in the enforcement of the guaranty, and the affirmative defenses interposed in the defendants' answer are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: *the issue of the amount due to the plaintiff for reasonable attorneys' fees*

and costs in connection with prosecuting the fourth cause of action under the subject guaranty agreement; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel for the plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the plaintiff shall serve a proposed accounting of attorneys' fees within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of the plaintiff's papers, and the

foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the plaintiff may enter an amended judgment adding the award of attorneys' fees and costs to the amount recovered, if any; and it is further,

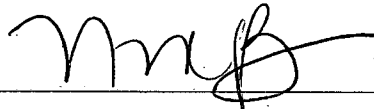
ORDERED that the plaintiff shall serve a copy of this order

upon all parties within 15 days of this order.

This constitutes the Decision and Order of the court.

Dated: August 22, 2018

ENTER: _____



J.S.C.

HON. NANCY M. BANNON