

NJ Funding, Inc. v Aggarwal

2018 NY Slip Op 32300(U)

September 17, 2018

Supreme Court, New York County

Docket Number: 156931/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

INDEX NO. 156931/2016

NJ FUNDING, INC.

Plaintiff,

MOTION SEQ. NO. 001

- v -

SHEELI AGGARWAL, as Administratrix of the Estate of Rakesh K. Aggarwal a/k/a Rakesh K. Aggarwala, Deceased,

DECISION AND ORDER

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 32

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is granted.

In this action against defendant Sheeli Aggarwal, as Administratrix of the Estate of Rakesh K. Aggarwal a/k/a Rakesh K. Aggarwala, to recover for breach of a lease guaranty, plaintiff NJ Funding, Inc. moves: 1) pursuant to CPLR 3212, for summary judgment on its complaint; 2) pursuant to CPLR 3211 and 3212 to dismiss defendant's affirmative defenses and counterclaims; and 3) for such other and further relief as this Court deems just and proper. After a review of plaintiff's motion papers, as well as the relevant statutes and case, law, the motion, which is unopposed, is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff NJ Funding, Inc. was the owner and landlord of a building (“the building”) located at 88-90 Reade Street, New York, New York. Doc. 5, at par. 3.¹ On or about March 1, 2005, plaintiff entered into a 5 year lease (“the lease”) with Irshad Chaudhry, as tenant, for a commercial space known as store number 2 (“the premises”) at the building. Doc. 5, at par. 4; Doc. 14. Paragraph 19 of the lease provided, inter alia, that, in the event Chaudhry defaulted on the lease, plaintiff would be entitled to collect expenses, including attorneys’ fees, incurred in recovering any sums owed to it. Doc. 14, at Par. 19. Pursuant to a “2nd Lease Extension Agreement” dated November 30, 2015 (“the second lease extension”), the lease for the premises was extended until 2018 and, on the same date, Chaudhry assigned the lease (“the assignment”) to Global Hospitality, LLC (“Global”). Doc. 5, at pars. 5, 7; Docs. 14 and 15. Both Chaudhry and Global did business as the Pakistan Tea House. Doc. 10, at par. 6.

Concomitantly with the execution of the second lease extension and the assignment of the lease to Global, Rakesh Aggarwal (“Aggarwal”) executed a guaranty “[i]n order to induce [plaintiff] to enter into the [second lease extension].” Doc. 13. Paragraph A of the guaranty provided, inter alia, that:

The undersigned hereby jointly and severally guaranty to [plaintiff], its successors and assigns, that he/they shall pay to [plaintiff] all fixed rent, additional rent and all other charges that have accrued or may accrue under the terms of the [second lease extension] . . .

Doc. 14.

Paragraph C of the guaranty provided, inter alia, that:

¹ Unless otherwise noted, all references are to the documents filed with NYSCEF in this matter.

This guaranty is absolute and unconditional and is a guarantee of payment and not of collection. The parties hereto waive all notice of non-payment, non-performance, non-observance or proof; of notice, or demand, whereby to charge [Aggarwal] therefor, all of which the undersigned expressly waive and expressly agree that the validity of this [guaranty], and the obligation of [Aggarwal] shall in no wise be terminated, affected or impaired by reason of the assertion by [plaintiff] against [Global] of any of the rights or remedies reserved to [plaintiff] pursuant to the performance of the within [second lease extension].

Doc. 14.

The assignment provided, inter alia, that:

As consideration for the execution and delivery of this [a]ssignment and [a]ssumption of [second lease extension] by [plaintiff], [Aggarwal] does hereby acknowledge that, but for this [g]uaranty of this [second lease extension], plaintiff would not deliver this [second lease extension] to [Global].

Doc. 15.

Plaintiff last received rent for the premises on November 30, 2015. Doc. 10, at par. 12. On or about March 11, 2016, plaintiff commenced a non-payment proceeding, styled *NJ Funding Inc. v Global Hospitality Ltd. d/b/a Pakistan Tea House*, L & T Index No. 58418/16, in Civil Court, New York County. Doc. 16. Global failed to appear in the non-payment proceeding and plaintiff obtained a final judgment of possession and warrant of eviction against it on default. Doc. 17. Although a warrant of eviction was issued, it was stayed when the parties reached a stipulation of settlement in June 2016, and Global was ultimately evicted on June 28, 2016. Doc. 10, at pars. 16-18; Doc. 18. As a result of the non-payment proceeding, plaintiff incurred attorneys' fees in the amount of \$2,955. Doc. 10, at par. 27; Doc. 25.

Following the eviction, plaintiff hired a broker, who was able to find a new tenant for the premises. Doc. 10, at par. 20. The plaintiff paid a broker \$24,000 to find a new tenant for the premises. Doc. 10, at par. 21. The new tenant began its lease term on August 15, 2016. Doc. 23.

The new tenant's lease provided that the first three months of its lease term were to be rent free, saving the new tenant \$33,672.27 since the monthly rent was \$11,224.09. Doc. 10, at par. 21. The second lease extension provided that, in the event of Global's default, plaintiff was entitled to collect from Global any deficiency between the amount due on the second lease extension and any lesser rent collected from a new tenant. Doc. 14, at par. 18.

Plaintiff commenced the captioned action by filing a summons and complaint against Aggarwal on August 18, 2016. Doc. 1; Doc. 19. Plaintiff filed an amended summons and complaint on December 23, 2016. Docs. 5, 20. As a first cause of action, plaintiff alleged that Aggarwal owed it \$114,664.60 for rent and additional rent pursuant to the guaranty. Doc. 20, at pars. 38-41. As a second cause of action, plaintiff alleged that Aggarwal owed it \$49,327.27 on the guaranty for costs and expenses incurred in re-letting the premises, including, but not limited to brokerage commissions, advertising fees, attorneys' fees, costs to prepare the premises for re-letting, and the deficiency between the rent that would have been owed under the [second lease extension] and the rent collected under a lease with a new tenant. Doc. 20, at pars. 43-46. In its third cause of action, plaintiff sought attorneys' fees in the amount of \$15,000 pursuant to the guaranty. Doc. 20, at pars. 48-50.

Aggarwal joined issue by service of his answer filed March 6, 2017, denying all substantive allegations of wrongdoing. Doc. 21. As a first affirmative defense, Aggarwal asserted that, since plaintiff re-let the premises, he should be entitled to a credit for any sums received by plaintiff. Doc. 21, at par. 15. As a second affirmative defense, he asserted that plaintiff failed to state a cause of action. Doc. 21, at par. 16. As a third affirmative defense, Aggarwal asserted that the guaranty was "null and void" due to inadequate consideration. Doc. 21, at par. 17. As a fourth affirmative defense, Aggarwal asserted that plaintiff could not benefit from the guaranty if "the

conditions giving rise to the breach [were] caused by [p]laintiff's own actions." Doc. 21, at par. 18.

As a first counterclaim against plaintiff, Aggarwal asserted that, as a result of plaintiff's failure to provide "essential services" at the premises, Global was forced to close its business and was damaged in the sum of \$1 million. Doc. 21, at pars. 19-21. As a second counterclaim, Aggarwal asserted that, as a result of plaintiff's failure to cooperate with Global in obtaining permits and licenses for work to be performed at the premises, Global was forced to close its business and sustained damages in the amount of \$1 million. Doc. 21, at pars. 22-24. As a third counterclaim, Aggarwal asserted that, by taking possession of the premises and using the premises for its own benefit, plaintiff violated the terms of the second lease extension, thereby damaging him in the amount of \$1 million. Doc. 21, at pars. 25-27.

On or about February 3, 2017, plaintiff denied all allegations in the counterclaims and asserted affirmative defenses in response thereto. Doc. 22.

On March 6, 2017, plaintiff filed the instant motion seeking summary judgment against Aggarwal on the guaranty, as well as dismissal of Aggarwal's affirmative defenses and counterclaims. Docs. 9-26. The motion, initially returnable April 20, 2017, was adjourned pursuant to stipulation at defendant's request until May 19, 2017. Doc. 28. The stipulation allowed defendant until May 4, 2017 to oppose the motion. Doc. 28. Aggarwal's attorney then sought a further adjournment due to his client's illness. Doc. 29. On May 18, 2017, counsel for the parties held a conference call with this Court, during which defendant's attorney agreed to oppose plaintiff's motion or cross-move by June 15, 2017. Doc. 32. Aggarwal passed away on August 16, 2017. Doc. 63. To date, Aggarwal's attorney has not opposed the motion. Doc. 32; Doc. 63.

By notice of motion filed June 7, 2018 (mot. seq. 002), Aggarwal's attorney moved, pursuant to CPLR 1015, to substitute Sheeli Aggarwal, as the Administratrix of the Estate of Rakesh K. Aggarwal a/k/a Rakesh K. Aggarwala ("the Estate"), in place of Aggarwal as the defendant in this action, as well as to amend the caption and the pleadings to reflect the substitution. Doc. 33. This Court granted the motion by order dated and entered July 6 and 13, 2018, respectively. Doc. 59.

CONTENTIONS BY PLAINTIFF:

Plaintiff argues that it is entitled to summary judgment on the guaranty. It further asserts that Aggarwal's affirmative defenses are conclusory and without merit. Further, plaintiff asserts that Aggarwal's counterclaims must be dismissed.

LEGAL CONCLUSIONS:

Summary Judgment on Liability

[Plaintiff] established entitlement to judgment as a matter of law by submitting evidence that [Aggarwal] executed an absolute and unconditional guaranty of the defaulting tenant's rental obligations under a commercial lease. Such evidence included an affidavit . . . submitted by [plaintiff's Vice-President] that established the accrued unpaid rental obligations of the defaulting tenant, and that [Aggarwal] has declined to perform its obligations under the guaranty (*see Gansevoort 69 Realty LLC v Laba*, 130 AD3d 521 [1st Dept 2015]).

Chip Fifth Ave. LLC v Quality King Distribs., Inc., 158 AD3d 418, 418 (1st Dept 2018).

Thus, that branch of plaintiff's motion seeking summary judgment on liability is granted, and this matter is referred to a Special Referee for a determination as to the amount of damages owed to plaintiff.

Dismissal of Affirmative Defenses and Counterclaims

As noted above, Aggarwal failed to oppose the instant motion. Further, after Aggarwal's attorney successfully moved to substitute the Estate as defendant, he did not submit any opposition to the motion. Thus, neither Aggarwal nor the Estate addressed plaintiff's contention that Aggarwal's affirmative defenses and counterclaims should be dismissed.

When the defendant fails to raise a previously pleaded affirmative defense in opposition to a motion for summary judgment, or fails to oppose dismissal of the defense, the court should dismiss the defense (*Town of N. Elba v Grinditch*, 131 AD3d 150, 159, n 4 [3d Dept 2015] ["To the extent that defendants have not briefed any issues with respect to their remaining affirmative defenses and counterclaims, we deem any arguments related thereto to be abandoned"]; *Starkman v City of Long Beach*, 106 AD3d 1076, 1078 [2d Dept 2013] ["Further, the first, second, and fourth affirmative defenses must be dismissed on the ground that the defendants did not oppose the dismissal of those affirmative defenses"]).

SLG Graybar Mesne Lease LLC v Capital Programs, Inc., 2018 NY Slip Op 30602 (U), *5-6 (Sup Ct, NY County 2018); see also *New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756 (2d Dept 2013) (Supreme Court erred in finding that a triable issue of fact existed regarding affirmative defense where defendants waived that defense by failing to raise it in opposition to plaintiff's motion for summary judgment); *Flagstar Bank, FSB v Curtis*, 2018 NY Misc LEXIS 1131, 2018 NY Slip Op 50448 (U) (Sup Ct Suffolk County 2018) ("[t]he failure to raise and support pleaded affirmative defenses and counterclaims in opposition to a motion for summary judgment renders them abandoned and subject to dismissal" [citations omitted]).

Thus, that branch of plaintiff's motion seeking dismissal of Aggarwal's affirmative defenses and counterclaims is granted.

In light of the foregoing, it is hereby:

ORDERED that the branch of the motion for summary judgment by plaintiff NJ Funding, Inc. as against defendant Sheeli Aggarwal, as the Administratrix of the Estate of Rakesh K. Aggarwal a/k/a Rakesh K. Aggarwala for breach of the guaranty is granted as to liability, and the issue of damages due plaintiff, including, but not limited to, the amount of rent, additional rent, and other charges, including reasonable attorneys' fees, is referred to a Special Referee to hear and report with recommendations, or, if the parties consent, to hear and determine, and, within twenty days of the filing of this decision and order with NYSCEF, plaintiff shall serve a copy thereof with notice of entry, as well as a completed information sheet, on the Special Referee Clerk, at sprefnyc@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date, and the Special Referee's Part is to notify the parties of the time and date of the hearing; and it is further

ORDERED that the branch of the motion by plaintiff seeking summary judgment dismissing defendant's affirmative defenses and counterclaims is granted, and the affirmative defenses and counterclaims are hereby dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 10 days of the entry of this order on NYSCEF, plaintiff shall serve a copy of this order with notice of entry on defendant by certified mail, return receipt requested; and it is further

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

9/17/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE