

Allen House LLC v Viaport Tavern, Inc.
2019 NY Slip Op 30040(U)
January 3, 2019
Supreme Court, New York County
Docket Number: 650353/2016
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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ALLEN HOUSE LLC,

INDEX NO. 650353/2016

Plaintiff,

**MOTION
DATE** 10/17/2018

- v -

VIAPORT TAVERN, INC., JOSEPH DEGRAW,
and LARRY KING,

**MOTION
SEQ. NO.** 001

Defendants.

DECISION AND ORDER

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HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 001)
15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39,
40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52

were read on this motion JUDGMENT - SUMMARY.

Plaintiff, Allen House, LLC, is the owner of the commercial building located at 159-161 East Houston Street in Manhattan. In November 2007, Defendant Viaport Tavern, Inc. (Viaport), began its tenancy of the commercial space at the building and subsequently extended its lease through November 30, 2014. Defendants Joseph Degraw and Larry King executed an agreement with plaintiff guaranteeing Viaport’s obligations under the lease. Defendant Degraw also leased the apartment above the commercial space from plaintiff. Plaintiff now moves pursuant to CPLR 3212 for summary judgment on the complaint, seeking money judgments for unpaid rent, additional rent, and for attorney’s fees for both the commercial and residential spaces.

Defendants oppose the motion arguing that there is an issue of fact as to whether plaintiff breached the covenant of good faith and fair dealing.

The Court first addresses the branch of plaintiff's motion seeking summary judgment on its cause of action for unpaid rent and additional rent for the commercial space rented by defendants. In early 2013, after Viaport began defaulting on its rental payments, plaintiff commenced a non-payment proceeding against Viaport in the Civil Court of the City of New York. On April 2, 2013 the Civil Court issued a warrant of eviction, which was executed on April 22, 2013, and Viaport was evicted on that day. In May of 2013, plaintiff and Viaport agreed in a written stipulation that plaintiff would restore Viaport to possession of the premises and that plaintiff would be awarded, among other things, a money judgment against Viaport and defendant Degraw in the amount of \$173,685.74, representing the balance of rent and related charges owed to plaintiff. The stipulation also provided that if Viaport found a "qualified buyer" of the business, plaintiff would accept the lower amount of \$100,000.00 in full satisfaction of Viaport's debt. Specifically, paragraph nine of the stipulation provides, in relevant part:

[I]f Respondent Viaport Tavern, Inc. finds a buyer and said buyer is approved by Petitioner, the amount due pursuant to paragraphs 1-6 shall be reduced to \$100,000 provided that such amount is actually paid. If Joseph Degraw, on behalf of Viaport Tavern Inc., cannot secure a buyer by May 28, 2013, then Respondents agree to take any and all lawful steps required to transfer said liquor license to any entity/person so designated by Petitioner and/or assist in any way with such transfer.

Ultimately, Viaport defaulted on its obligations under the stipulation and, as a result, the plaintiff re-executed the warrant of eviction and evicted Viaport from the premises on or about November 22, 2013.

The dispute between the parties now concerns what, if any, monies are owed to plaintiff. Plaintiff claims that it is entitled to the full \$173,685.74 owed pursuant to the

stipulation plus interest and fees, and that it is also entitled to additional arrears outstanding to date. Defendants argue that there is an issue of fact as to whether plaintiff breached its obligations by failing to comply with the covenant of good faith and fair dealing, and until that issue is decided, this Court cannot determine how much is owed.

On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn (*Benjamin v City of New York*, 55 Misc3d 1217[A], 2017 NYSlipOp 50619[U] [Sup Ct, NY County 2017]). Summary judgment "is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 363 [1974]).

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*id.*, [internal citations omitted]). When the contract contemplates the exercise of discretion by the parties, it includes a promise not to act arbitrarily or irrationally in exercising that discretion (*Tedeschi v Wagner Coll.*, 49 NY2d 652, 659 [1980]).

It appears to the Court that there are questions of fact which must be resolved in order to determine whether plaintiff complied with the covenant of good faith and fair

dealing in its dealings with defendants. The undisputed facts are that defendants attempted to comply with the terms of the stipulation to reduce the amount owed to plaintiff by presenting James Morrissey as a qualified buyer prior to the stipulated date. Plaintiff was initially amenable to Morrissey as a qualified buyer and began negotiating with defendants and Morrissey regarding terms of a new lease agreement. For reasons that are unclear, the negotiations between the parties broke down, and Morrissey was no longer willing to finalize the deal according to the negotiated terms.

Although defendants did not succeed in getting an approved buyer by the stipulated date, defendants have raised a question as to whether plaintiff acted in good faith. Specifically, after the deal with Morrissey failed, defendants attempted to procure another potential buyer, but plaintiff denied them out of hand and instead insisted that the stipulation had been breached. However, after defendants were evicted from the premises for breaching the stipulation, plaintiff leased the space to Morrissey, and Morrissey has stayed on as tenant in the premises to date. The Court rejects plaintiff's contention that defendants have set forth nothing more than bald conclusory assertions of bad faith. The undisputed facts themselves, *i.e.*, plaintiff rejected Morrissey as defendants' "qualified buyer" only to lease the premises to Morrissey after defendants were evicted, are sufficient to raise a question as to good faith.

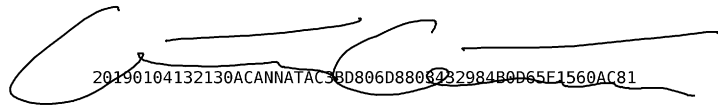
The Court next addresses that branch of plaintiff's motion which seeks summary judgment on its cause of action for unpaid rent and additional rent for the apartment plaintiff leased to defendant Degraw in 2012. Plaintiff has established its *prima facie* entitlement to such relief by attaching as exhibits to its motion the lease agreement, the rental history of the apartment for the duration of Degraw's tenancy, and an affidavit of personal knowledge by plaintiff's agent attesting to the amounts owed. In response, defendant Degraw has failed to set forth a valid defense or raise any issues of facts sufficient to require a trial. Defendants' effort to conflate the issues surrounding the

commercial lease from the (far more straightforward) question concerning the residential lease is unavailing. As such, the branch of plaintiff's motion seeking summary judgment on the cause of action for rent and additional rent for the apartment is granted.

Accordingly, it is

ORDERED that the branch of plaintiff's motion seeking summary judgment on its cause of action for rent and additional rent for the apartment is granted, and plaintiff shall have a money judgment in the amount of \$22,720.00, with interest from February 1, 2013 at the statutory rate until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it further

ORDERED that plaintiff's motion is otherwise denied.


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1/3/2019
DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: