

19-23 St. Marks Assoc., LLC v Kanchik

2019 NY Slip Op 30219(U)

January 28, 2019

Supreme Court, New York County

Docket Number: 150872/18

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

A SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

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19-23 ST. MARKS ASSOCIATES, LLC,

Plaintiff,

- against -

IGOR KANCHIK,

Defendants.

-----x

DECISION and ORDER

Index No. 150872/18

Mot. Seq. 001

HON. KATHRYN E. FREED, J.S.C.:

The following documents, e-filed as NYSCEF Document Numbers 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, and 18, were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Upon the foregoing documents, it is ordered that the motions are decided as follows.

Plaintiff, 19-23 St. Marks Associates, LLC, moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendant, Igor Kanchik, in the amount of \$193,289.97, with applicable interest, as well as attorneys' fees, costs, and disbursements.

FACTUAL AND PROCEDURAL BACKGROUND

This is an action by plaintiff seeking to recover damages from defendant based on a written Form of Guaranty ("the Guaranty") (Guaranty, Not of Mot, Exh A; NYSCEF Doc. No.

4). Plaintiff, a New York limited liability company, is the owner and landlord of the building located at 19-23 St. Marks Place, New York, New York ("the Building"). By written Standard Form of Store Lease, dated April 28, 2011 ("the Lease"), plaintiff leased approximately 1,863 square feet on the ground floor of the building ("the Premises") to Addiction World, Inc. d/b/a NYC Kulture ("the Tenant") to operate a tattoo parlor and body-piercing business (Lease, Not of Mot, Exh D; NYSCEF Doc. No. 7). The Lease required Tenant to make specified monthly rental payments, as well as to pay additional rent for water and sewer charges (*id.*). Further, the lease required tenant to pay late fees and Landlord's attorneys' fees in the event of a default (*id.*).

In April 2011, plaintiff, as owner, and defendant, as guarantor, entered into the guaranty, pursuant to which defendant "guarantee[d], unconditionally and absolutely, to Owner ... the full and faithful keeping, performance and observance of all the covenants, agreements, terms, provisions and conditions of the Lease provided to be kept, observed and performed by Tenant" (Guaranty, *supra*). The guaranty expressly includes:

"[T]he payment as and when due of the fixed rent and additional rent payable by Tenant under the Lease ... and the payment of any and all other damages for which Tenant shall be liable by reason of any action or omission contrary to any of said covenants, agreements, terms, provisions or conditions, including ... reasonable legal fees and

disbursements ... due under the Lease and which are in arrears, together with interest thereon at the late payment rate set forth in the Lease"

(*id.*). Defendant also agreed to "pay to Owner all of Owner's expenses, including ... reasonable attorneys' fees ... in enforcing this Guaranty" (*id.*).

Tenant defaulted under the Lease, and plaintiff commenced a nonpayment proceeding in Civil Court, New York County. By Order entered November 9, 2017, the Civil Court, NY County (Kenney, J.) granted plaintiff's motions for summary and default judgment, awarding plaintiff a monetary and possessory judgment in the amount of \$134,073.81, as well as attorneys' fees in an amount to be determined (Order, Not of Mot, Exh B; NYSCEF Doc. No. 5). The Court noted that plaintiff may be entitled to an additional monetary judgment and directed plaintiff to file a motion, on notice, to determine the amount (*id.*). A review of the motion papers does not indicate that plaintiff filed a subsequent motion, as directed by the Civil Court, to determine the amount of any additional monetary judgment to which it may be entitled.

By letter dated November 13, 2017, tenant notified plaintiff that it would vacate the premises by March 15, 2018 (Not of Mot, Exh E; NYSCEF Doc No. 8). Defendant asserts that tenant vacated the premises much sooner (Kanchik Affid, NYSCEF Doc. No. 15).

Plaintiff moves for summary judgment in lieu of complaint against defendant for the amount of the Civil Court order, plus

\$59,216.16, which it claims tenant has accrued as additional rent arrears, late charges, and attorneys' fees. Thus, plaintiff seeks "the amount of no less than \$193,289.97, with applicable interest thereon, and ... attorneys' fees, costs and disbursements, in an amount to be determined by this Court at a hearing" (Not of Mot, NYSCEF Doc. No. 2).

LEGAL CONCLUSIONS

CPLR 3213 provides, in part, that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice for summary judgment and the supporting papers in lieu of a complaint." "CPLR 3212 is intended to provide a speedy and effective means of securing a judgment on claims presumptively meritorious" (*Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975]). "In the actions to which it applies, 'a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless'" (*id.* [internal citations omitted]). In order to make out a prima facie showing for summary judgment in lieu of complaint, a plaintiff must present proof of the "instrument for the payment of money only" and defendant's failure to make payments called for by its terms (*id.* at 155). [1975]).

It is beyond dispute that an absolute and unconditional guaranty on a commercial lease qualifies as an instrument for the payment of money only under CPLR 3213 (see *Royal Equities Operating, LLC v Rubin*, 154 AD3d 516, 517 [1st Dept 2017]). However, “[e]ven if the instrument sued on is for payment of money only, the standard for summary judgment must be separately satisfied” (*Allied Irish Banks, PLC v Young Men’s Christian Assn. of Greenwich*, 36 Misc 3d 216, 222 [Sup Ct, NY County 2012], *affd* 105 AD3d 516 [1st Dept 2013]). An instrument does not qualify as one for the payment of money only if extraneous proof is needed to interpret it. (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]).

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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated

allegations or assertions are insufficient to defeat summary judgment (*id.*).

Plaintiff has failed to meet its burden of proof. Plaintiff relies on the Civil Court order and its own Customer Ledgers for Tenant (Customer Ledgers, Not of Mot, Exh C; NYSCEF Doc. No. 6) to support its motion. However, a discrepancy exists between the Civil Court judgment and Customer Ledgers. Specifically, as noted above, the Civil Court judgment awarded plaintiff a monetary judgment in the amount of \$134,079.81, as well as a possessory judgment. However, the Customer Ledgers reflect that, as of November 8, 2017, tenant's balance was \$151,204.74.

Additionally, since plaintiff failed to comply with that portion of the Civil Court judgment directing it to file a motion on notice to determine the additional monetary award to which it may be entitled, this Court cannot calculate the total amount owed to plaintiff by tenant. Moreover, the Civil Court judgment did not determine the amount of attorneys' fees owed to plaintiff. Thus, plaintiff's demand for summary judgment in lieu of complaint would be denied whether it was based upon the guaranty or the Civil Court judgment.

Therefore, in light of the foregoing, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, within 20 days after this order is uploaded to NYSCEF; and it is further

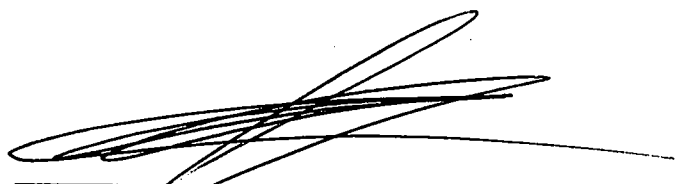
ORDERED that plaintiff's moving papers shall be deemed the complaint in this action and defendant shall move against, or serve an answer to, the complaint within 20 days after service thereof; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on June 11, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the Court:

Dated: January 28, 2019

ENTER:



HON. KATHRYN E. FREED, J.S.C.