Daval 37 Assoc. LLC v Mobile Training & Educ., Inc.
2019 NY Slip Op 30285(U)
February 6, 2019
Supreme Court, New York County
Docket Number: 157142/2017
Judge: Barbara Jaffe
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
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

---X

DAVAL 37 ASSOCIATES LLC,

Plaintiff,

- v -

MOBILE TRAINING & EDUCATION, INC., RICHARD BACHRACH,

Defendants.

---X

INDEX NO. 157142/2017

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 36, 37, 38, 39, 40, 41
were read on this motion for summary judgment.

Plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment, for the entry of a money judgment against defendant Mobile for rent and additional rent through entry of the money judgment, the entry of a money judgment as against defendant-guarantor Bachrach, and an order summarily dismissing the two counterclaims, along with attorney fees.

By cross motion, defendants maintain that should plaintiff's motion be granted, they seek an order holding in abeyance an award of partial summary judgment.

I. BACKGROUND

By lease dated February 28, 2015, defendant Mobile rented from plaintiff-building owner (NYSCEF 11) for a period of seven years the 11th floor of 39 West 37th Street in Manhattan. (NYSCEF 12). In paragraph 20 of the lease, the parties agreed that "[t]here shall be no allowance to [Mobile] for diminution of rental value and no liability on the part of [plaintiff] . . . making any repairs in the building or any such alternations, additions and improvements," and in paragraph 21, Mobile took the premises "as is." (*Id.*). Pursuant to paragraph 26, the parties

agreed that "in the event [plaintiff] commences a proceeding or action for possession, including a summary proceeding for possession of the demised premises, [Mobile] will not interpose any counterclaim, of whatever nature or description, in any such proceeding, including a counterclaim under Article 4, except for statutory mandatory counterclaims." *(Id.)*.

In a guaranty executed on the same date, the parties agreed that

> [Plaintiff] does not desire to have [guarantor] guarantee the obligations of [Mobile] under the lease. [Plaintiff] is concerned, however, that if [Mobile] defaults under the Lease, [Mobile] may continue to occupy the Demised Premises, to the detriment of [plaintiff]. Therefore, in order to avoid that situation, [plaintiff] has requested [guarantor] to guarantee to [plaintiff] that if [Mobile] defaults under the Lease, [Mobile] will vacate the Demised Premises. The result being that if [Mobile] vacates the Demised Premises at the time of the default, after the expiration of any notice, grace, cure period, [guarantor] will have no obligation or liability under this Agreement (although the obligation and liability of [Mobile] under the Lease will continue in accordance with the Lease).

(NYSCEF 13).

Guarantor also agreed to pay plaintiff's costs and expenses, including attorney fees, if judgment was entered against him in any action to enforce the guaranty. In paragraph C.2. of the agreement, the parties agreed that guarantor's obligations under the agreement are "unconditional, are not subject to any set-off or defense based upon any claim [he] may have against [Daval]." (*Id.*).

As Mobile defaulted in the payment of rent, plaintiff commenced a summary nonpayment proceeding against it in the Civil Court of the City of New York. (NYSCEF 14). In its answer, Mobile alleged a constructive eviction from part of the premises and partial actual eviction from a part of the premises due to plaintiff's wrongful conduct. (NYSCEF 19).

By stipulation dated May 3, 2017, plaintiff was granted a final judgment of possession and a money judgment in the amount of $127,557.16 payable by Mobile on or before May 31, 2017, with execution of the warrant of eviction stayed through and including May 31, pending

Mobile's payment of the judgment before then. If Mobile failed to pay the full judgment amount by May 31, 2017, the warrant would execute and Mobile would be evicted from the premises. (NYSCEF 15). Mobile vacated the premises on or about May 31, 2017, and failed to pay plaintiff pursuant to the stipulation.

Plaintiff thus commenced this action on August 9, 2017. (NYSCEF 16). By verified answer dated September 28, 2017, defendants interposed counterclaims for breach of contract and breach of quiet enjoyment. In the first counterclaim, defendants claim that due to plaintiff's failure to provide elevator service "on numerous occasions," the rental value of the premises was reduced in an amount not less than $150,000. In the second counterclaim, they assert that at various times during Mobile's occupancy, plaintiff failed to provide quiet enjoyment of the premises, making it impossible for Mobile to use and enjoy the premises, again alleging that the rental value of the premises without such quiet enjoyment was reduced to not less than $150,000. (NYSCEF 17).

II. CONTENTIONS

A. Plaintiff (NYSCEF 6-20, 39-41)

Based on the lease, guaranty, Mobile's default in paying rent, stipulation, the tenant ledger, and three affidavits, plaintiff argues that it is entitled to summary judgment as to its complaint and as to Mobile's counterclaims, arguing that the stipulation estops Mobile from asserting defenses in the form of counterclaims in this action. (NYSCEF 7).

By affidavit, the director of management for the managing agent of the building states that the alleged lack of elevator service as set forth in the counterclaims occurred while work was being conducted. Moreover, he maintains, the work in the building was completed in or around March 2015, the lease did not commence until then, and Mobile did not stop paying rent until

December 2016. Additionally, as guarantor was principal of other tenant entities within the building, he had been aware of the worked conducted on the elevators and the effect on elevator service, and nonetheless took the premises "as is." In any event, he claims that appropriate arrangements were made to provide alternative elevator service and that at all times, at least two elevators were available and in working order. These assertions are supported by the affidavits of the building's superintendent and the owner of the elevator company that served and maintained the elevators. (NYSCEF 8-10).

B. Defendants (NYSCEF 35-38)

Defendants oppose plaintiff's motion on the ground that it is premature, absent discovery, and as facts necessary to oppose are within plaintiff's exclusive knowledge. They also assert that plaintiff has exclusive possession and control of the evidence in support of their counterclaims for breach of contract and failure to provide quiet enjoyment of the premises due to the continuous problems with the elevators and construction repairs. Moreover, they contend, absent an offer of records in support of the contention that all repairs and maintenance were performed within the brief period alleged, plaintiff fails to set forth, *prima facie*, its right to summary judgment and argue that the affidavits offered by plaintiff in support solely raise factual issues and are not dispositive.

Defendants also argue that the defenses available to Mobile are equally available to guarantor, and that "a failure of consideration in regards [sic] to the lease and condition of the premises during the tenancy," entitles the guarantor to be released from the guaranty, even if the failure of consideration is partial.

By affidavit, guarantor states that Mobile's employees and students were regularly stuck in the elevators, and that "[o]n numerous occasions [he] personally had to deal with one of the

doormen . . . and have him re-start the elevators because they were stuck." He described students and employees as "fearful on a daily basis" of the elevator service. Moreover, he states that "at some period" maintenance work commenced on the building exterior, bringing "excessive construction noise." As a result, guarantor alleges, classes were canceled or students walked out "many times" and some of them "switched to other companies and locations." Guarantor unsuccessfully attempted to alleviate the problems with the doorman or with the superintendent. (NYSCEF 36).

In their cross motion, defendants seek an order pursuant to CPLR 3212(e)(2) holding in abeyance, should plaintiff be awarded summary judgment on its complaint, entry of the order pending the determination of their counterclaims in order to avoid prejudice to them.

In opposing the dismissal of the counterclaims, defendants argue that having been precluded from filing any counterclaims in the summary proceeding, Mobile is obliged to advance the counterclaims in this action.

C. Plaintiff's reply (NYSCEF 39-41)

Plaintiff argues that defendants fail to show that discovery will lead to relevant evidence, and that given the 10 months since defendants served and filed their answer without having served any discovery demands, defendants' assertion that discovery is needed rings hollow. Moreover, evidence in support of the counterclaims, such as when and how Mobile's business was disrupted, is in Mobile's exclusive possession. Moreover, plaintiff observes that absent specific dates and non-hearsay descriptions of the alleged elevator malfunctions and consequent trapping of students and employees, defendants fail to raise issues of fact, and that in any event, defendants' recovery on their counterclaims is precluded by paragraph 20 of the lease which prohibits rent abatements for work performed. (NYSCEF 39, 41).

In a second affidavit, the director of management states that plaintiff had received no complaints from other building tenants concerning noise or occupants being trapped in elevators, and that defendants' complaints coincide with their failure to pay rent commencing almost two years after the work on the elevators was complete. Additionally, having taken the space "as is," at a time when guarantor knew about the elevator work, defendants' counterclaims are meritless. (NYSCEF 40).

III. ANALYSIS

A. CPLR 3212(f)

Pursuant to CPLR 3212(f):

> Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

As guarantor's allegations concern matters that are solely within Mobile's knowledge, defendants fail to demonstrate that facts essential to oppose plaintiff's motion may exist. Absent a description of the circumstances underlying *Gao v City of New York*, defendants fails to show that it supports their argument as the Court qualified its holding that the summary judgment motion was properly denied "in the circumstances presented." (29 AD3d 449, 449 [1st Dept 2006]). Moreover, in the decision cited by the Court in *Gao*, the Court distinguished circumstances where "defendants can be charged with a failure to diligently seek discovery . . ." (*McGlynn v Palace Co.*, 262 AD2d 116, 117 [1st Dept 1999]).

Defendants do not deny that they failed to seek discovery diligently. Thus, and under all of the circumstances, defendants do not demonstrate that their entitlement to discovery precludes the granting of plaintiff's motion.

B. Plaintiff's motion for summary judgment

The affidavits offered by plaintiff, along with the lease, stipulation, and ledger, constitute a sufficient demonstration, *prima* facie, of plaintiff's entitlement to summary judgment, for rent and additional rent due from June 1, 2017 through the end of the lease in February 2022, in the sum of $1,170,389.96, plus reasonable attorney fees, costs, and expenses incurred in connection with the instant action and the non-payment proceeding.

Although precluded by the lease from raising counterclaims in defense of the summary proceeding, Mobile is entitled to advance them in this action. However, as Mobile had agreed in the lease that it entitled to no allowance for the diminution of rental value, and as the premises was rented "as is," those documents constitute evidence warranting dismissal of the counterclaims.

The guaranty, however, by its explicit terms, shields the guarantor from liability for any of Mobile's lease violations unless Mobile fails to vacate the premises after the expiration of any notice, grace, or cure period. Here, the parties stipulated in the non-payment proceeding that execution of the warrant of eviction was stayed until May 31, 2017, thereby giving Mobile until that date to vacate the premises. As it is undisputed that Mobile did so, plaintiff does not establish that the guarantor is liable for any rent or additional rent on Mobile's behalf from before or after its vacatur of the premises.

In light of this result, there is no need to address defendants' cross motion.

IV CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that plaintiff's motion for summary judgment is granted as to defendant Mobile, and denied as to guarantor Bachrach, and the clerk of the court is directed to enter a

judgment in favor of plaintiff and as against defendant Mobile Training & Education, Inc. a/k/a Mobile Training and Education Inc. in the sum of $1,170,389.96, plus costs and expenses to be taxed by the clerk upon submission of an appropriate bill of costs; it is further

ORDERED, the plaintiff's claim for attorney fees is severed and the issue of the amount of reasonable attorney fees that plaintiff may recover against defendant Mobile Training & Education, Inc. a/k/a Mobile Training and Education Inc. is referred to a Special Referee to hear and report; it is further

ORDERED, that counsel for plaintiff 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,[1] upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; it is further

ORDERED, that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures For Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); it is further

ORDERED, that defendants' counterclaims are dismissed in their entirety; and it is further

ORDERED, that defendants' cross motion is denied.

2/6/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

[1] Available on the Court's website at www.nycourts.gov/supctmanh under the "References" link on the navigation bar.

	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE