

AARK Hospitality Staten Is. BC TK LLC v Bricktown Pass, LLC
2019 NY Slip Op 30740(U)
February 26, 2019
Supreme Court, Richmond County
Docket Number: 150718/18
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

DCM Part 21

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AARK Hospitality Staten Island BC TK LLC and
AMOL KOHLI,

Present:

Hon. Orlando Marrazzo

Plaintiffs,

-against-

DECISION AND ORDER

BRICKTOWN PASS, LLC,

Defendants.

Index No. 150718/18

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AARK Hospitality Staten Island BC TK LLC and
AMOL KOHLI,

Motion No. 4021-003

Petitioner/Landlord,

-against-

BRICKTOWN PASS, LLC,

Respondents/Tenants

Index No. LT-050738-18/RI
Consolidated Action

Premises:
185 Bricktown Way, Unit D, Staten Island, New York
10309

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The following papers numbered 1 to 3 were marked submitted on the 22nd day of January, 2019:

Notice of Motion to Reargue

By Defendant, with Supporting Papers and Exhibits
(dated September 21, 2018)..... 1

Memorandum of Law in Opposition

By Plaintiffs
(dated November 9, 2018)..... 2

Reply Affirmation in Support of Motion to Reargue

By Defendant
(dated November 26, 2018)..... 3

Upon the foregoing papers, Defendant's motion for leave to reargue is granted.

The facts of this matter are set forth in the Court's Decision and Order dated August 27, 2018. Therein, the Defendant's prior motion to dismiss was denied. Upon reargument, the Court grants the Defendant's prior motion to dismiss with respect to the causes of action for fraud in the

inducement and breach of the covenant of quiet enjoyment. Upon reargument, the Court also grants the Defendant’s prior motion for summary judgment for non-payment of rent.

A motion for leave to reargue is addressed to the sound discretion of the Supreme Court (see *Central Mtge Co v. McClelland*, 119 AD3d 885, 886 [2nd Dept 2014]). A motion for leave to reargue must be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion (CPLR 2221[d]; see *Cioffi v. SM Foods, Inc*, 129 AD3d 888, 891 [2nd Dept 2015]; *Central Mtge Co v. McClelland*, 119 AD3d 885, 886 [2nd Dept 2014]). Here, Defendant has demonstrated that the Court has overlooked or misapprehended certain facts and legal issues in denying its prior motion (see *Knizeski v. Settembres Limousine, Inc*, 54 AD3d 1005 [2nd Dept 2008]). The Court inadvertently overlooked the verification of Guido Passarelli dated April 2, 2018, which appears to satisfy the requirements of RPAPL 741 and CPLR 3020. Moreover, the attorney’s affirmation may serve as the vehicle for the submission of acceptable attachments which do provide “evidentiary proof in admissible form” (see *Zuckerman v. New York*, 49 NY2d 557, 563 [1980]). Therefore, the annexed documents thereto, including the lease agreement, proof of debt and surrender of lease qualify as documentary evidence within the intendment of CPLR 3211(a)(1) (see *Sunset Café, Inc v. Mett’s Surf Sports Corp*, 103 AD3d 707, 709 [2nd Dept 2013]).

In this regard, Plaintiff’s cause of action asserting fraud in the inducement is dismissed. Here, Plaintiff alleges, inter alia, that it was induced to rely upon misrepresentations made by Defendant regarding the construction of the movie theatre (see Verified Complaint, paras 38-53). However, section 5.2 of the lease agreement provided that Defendant reserves the right at any time “to make or permit changes to the Shopping Center including increasing, reducing or changing the

number, type, size, location, elevation, nature and use of any of the building” (*see* Defendant’s Exhibit “B”). In addition, section 28.2 of the lease agreement stated that “the parties hereto acknowledge that all of the terms and covenants contained herein were reviewed by both parties and/or their counsel thereto and all negotiations, considerations, representations, inducements and understandings between the parties are incorporated herein” (*see* Defendant’s Exhibit “B”).

Pursuant to CPLR 3211(a)(1), a defendant may move to dismiss a cause of action on the ground that a defense is founded upon documentary evidence. A motion to dismiss a complaint based upon CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes a plaintiff’s factual allegations, conclusively establishing a defense as a matter of law. In order for evidence to qualify as documentary it must be unambiguous, authentic and undeniable (*see Sunset Café, Inc v. Mett’s Surf Sports Corp*, 103 AD3d 707, 708-709 [2nd Dept 2013]). Contrary to the Plaintiff’s contention, the subject lease conclusively established a defense to the allegations that he was fraudulently induced into entering into the lease, as those allegations were barred by the specific disclaimer provisions contained in the lease agreement (*see Santostefano v. Middle Country Cent Sch Dist*, 156 AD3d 926, 928 [2nd Dept 2017] *citing Danann Realty Corp v. Harris*, 5 NY2d 317, 320-321 [1959]). Accordingly, the cause of action asserting fraud in the inducement is dismissed.

Likewise, the cause of action alleging breach of the covenant of quiet enjoyment is dismissed. In actions for damages for breach of the covenant of quiet enjoyment, a tenant must show an ouster, or if the eviction is constructive, an abandonment of the premises. However, the tenant must perform the conditions precedent to maintain the action for breach of the covenant of

quiet enjoyment, unless there was a waiver of those conditions (*see TDS Leasing, LLC v. Tradito*, 148 AD3d 1079, 1080 [2nd Dept 2017]). Here, the proof of debt documents conclusively established that Plaintiff failed to perform the conditions precedent, including the failure to pay rent, real estate taxes and insurance, in order to maintain the action for breach of the covenant of quiet enjoyment (*cf. TDS Leasing, LLC v. Tradito*, 148 AD3d at 1081 [2nd Dept 2017]). Accordingly, the cause of action alleging breach of the covenant of quiet enjoyment must be dismissed.

Similarly, the branch of Defendant's prior motion for summary judgment is granted on the issue of nonpayment of rent. Annexed to the Verified Petition, Defendant submitted the Lease agreement along with the proof of debt documents, and a "Good Guy Guaranty" (*see* Defendant's Exhibit "B"), evidencing that the nonpayment of rent was undisputed.

On a motion for summary judgment to enforce a written guaranty, all that the creditor need to prove is the existence of an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (*see HL Realty, LLC v. Edwards*, 131 AD3d 573, 574 [2nd Dept 2015]). Here, the terms of the guaranty were unambiguous and unconditional, and the Defendant otherwise met its *prima facie* burden its motion for summary judgment. The guaranty specifically stated that Plaintiff "unconditionally guarantees the punctual performance and payment by Tenant of any and all obligations of Tenant arising under the Lease including, without limitation, the payment of Fixed Minimum Rent and Additional Charges... due and owing under the Lease" (*see* Defendants Exhibit "B"). In opposition, Plaintiff failed to raise a triable issue of fact.

Accordingly, it is hereby

ORDERED that the motion (No. 4021-003) by Defendant Bricktown Pass, LLC for leave to reargue is granted; and it is further

ORDERED that upon reargument, Defendant's prior motion (No. 2160-002) to dismiss is granted with respect to the causes of action for fraud in the inducement and breach of the covenant of quiet enjoyment; and it is further


ORDERED that the causes of action for fraud in the inducement and breach of the covenant of quiet enjoyment are hereby severed and dismissed; and it is further

ORDERED that upon reargument, Defendant's prior motion (No. 2160-002) for summary judgment is granted on its claim for unpaid rent; and it is further

ORDERED that the parties report to DCM Part 21 located at 26 Central Ave, Staten Island, NY Room 430 on March 20, 2019 at 9:30 A.M. for a pre-trial conference; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,



J.S.C.

Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice

DATED: 2/28/19