

222 W. 83rd St. LLC v Feldman
2019 NY Slip Op 32072(U)
June 14, 2019
Supreme Court, New York County
Docket Number: 655180/2016
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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222 WEST 83RD STREET LLC,

Plaintiff,

Index No. 655180/2016
TP 595159/2017

v

TUVIA FELDMAN,

Defendant.

DECISION AND ORDER

MOT SEQ 004

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TUVIA FELDMAN,

Third-Party Plaintiff,

v

POONAM KAMBLI and ARUN KUMAR,

Third-Party Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, seeking damages for breach of a lease agreement and breach of a personal guaranty, the defendant Tuvia Feldman commenced a third-party action for contractual indemnification and to recover on several promissory notes. By order dated July 31, 2018, the court granted Feldman's motion

pursuant to CPLR 603 and 1010 to sever his third, fourth, and fifth third-party claims against the third-party defendants, Poonam Kambli and Arun Kumar, which are to recover on the promissory notes and for an award of attorney's fees under the terms of such notes. Feldman now moves pursuant to CPLR 3212 for an award of summary judgment against the third-party defendants on his third, fourth, and fifth third-party claims against them, and pursuant to CPLR 3211(b) to strike all of the affirmative defenses of the third-party defendants on the grounds that they are barred by express contract. No opposition is submitted. The motion is granted in part.

II. DISCUSSION

It is well settled that the proponent of a motion for summary judgment is entitled to that relief upon a prima facie showing, by proof in admissible form, that there are no triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Feldman's submissions include, *inter alia*, the pleadings, an attorneys' affirmation, his own affidavit of merit, a series of promissory notes executed by Kambli, a security agreement signed by Feldman, Kambli, and nonparty Corned Beef Express, LLC (CBE), a written guaranty signed by Kumar, a letter acknowledging the guaranty agreement sent by Kumar to Feldman, and notices of default. These submissions establish that, on August 10, 2015, Feldman sold a forty-nine percent interest in CBE to Kambli, in exchange for twenty four promissory notes each dated August 10, 2015, whereby Kambli agreed to pay a total principal amount of \$253,750.00. The first note became due and payable on September 10, 2015, and the balance of the notes became due and payable on the 10th day of each consecutive month thereafter up to August 10, 2017. Each note provided for a payment of \$11,246.35, which included interest at a rate of 6% per annum. The notes were secured by a written security agreement dated August 10, 2015, signed by Kambli and CBE as debtors, and Feldman as the secured party. The security agreement provided for the payment of reasonable attorneys' fees and legal expenses by the debtor in the event of default. The notes were further secured by an unconditional written guaranty dated August 10, 2015, and executed by Kumar. Feldman avers that the first five promissory notes were paid, but that since February 10, 2016, payments ceased. Feldman served Kambli with a notice of default on

February 10, 2017, requiring Kampli to cure her default within five days of service of the notice. However, no further payments have been made since February 10, 2016, on the remaining nineteen notes, leaving a balance of \$213,680.65 due and owing to Feldman.

The proof submitted by Feldman establishes, prima facie, that there was "formation of a contract between the parties, performance by the [third-party] plaintiff, the [third-party] defendant's failure to perform, and resulting damage."

Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept. 2009).

Hence, Feldman established his prima facie entitlement to judgment as a matter of law on his third cause of action, which seeks to recover for breach of contract as against Kampli.

Feldman has also established, prima facie, that Kumar is personally liable for any of Kampli's obligations under the promissory notes. "Although a guaranty must be construed in the strictest manner (see White Rose Food v Saleh, 99 NY2d 589 [2003]), a guarantor will be bound to the express terms of the written guaranty. See 665-75 Eleventh Ave. Realty Corp. v Schlanger, 265 AD2d 270 (1st Dept. 1999). Kumar personally guaranteed all of Kampli's obligations under the promissory notes, including the obligation to pay the entire outstanding debt in the event of Kampli's default. Hence, Feldman established his prima facie entitlement to judgment as a matter of law on the fourth cause of action.

Feldman also seeks contractual attorneys' fees incurred in bringing the third-party action. Attorney's' fees that are merely incidents of litigation are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). Here, the security agreement between Feldman, Kambli, and CBE provides that "Upon any default, the Secured Party's reasonable attorneys' fees and the legal and other expenses for pursuing, searching for, receiving, taking, keeping, storing, advertising, and selling the collateral shall be chargeable to the Debtor." The guaranty executed by Kumar provides that "In the event legal action, either by suit or otherwise, is required to enforce this instrument or collect any monies hereunder, the undersigned agrees to pay reasonable attorneys fees and the costs and disbursements of any action." Thus, Feldman has established that he is entitled to an award of reasonable attorney's fees for the third-party defendants. Although Feldman's attorney submits an affirmation and log describing legal work performed on Feldman's behalf, it is not clear what portion of the work was performed in connection with prosecuting the severed claims in the third-party action, rather than in connection with defending the main action and prosecuting

the unsevered third-party claims. Accordingly, the issue of the appropriate amount of attorneys' fees and costs due to Feldman is referred to a referee to hear and report.

The branch of Feldman's motion seeking dismissal of the third-party defendants' affirmative defenses, insofar as it is premised on Feldman's argument that the guaranty executed by Kumar in connection with the promissory notes waives the right to interpose any affirmative defense in an action brought by Feldman against Kumar, is rendered academic by this court's granting summary judgment to Feldman on his fourth cause of action. Accordingly, that branch of the motion is denied without prejudice to any future motion Feldman might seek to bring pursuant to CPLR 3211(b) to dismiss the affirmative defenses asserted in the third-party answer as they apply to the first and second third-party claims, from which the Feldman's remaining claims were severed.

By failing to oppose the motion, the third-party defendants failed to raise any triable issue of fact. Prejudgment interest shall be awarded from the date of the third-party defendants' breach, which here is February 10, 2016. See CPLR 5001.

III. CONCLUSION

Accordingly, it is,

ORDERED that the branch of the motion of the third-party plaintiff, Tuvia Feldman, pursuant to CPLR 3212 for partial summary judgment on the severed third, fourth, and fifth causes of action of the third-party complaint, which are to recover on a series of nineteen promissory notes, breach of a personal guaranty, and for an award of attorney's fees, respectively, is granted without opposition, and the branch of his motion pursuant to CPLR 3211(b) to strike the affirmative defenses of the third-party defendants is denied without prejudice, and it is further,

ORDERED that the Clerk shall enter judgment in favor of Tuvia Feldman and against Poonam Kambli and Arun Kumar, jointly and severally, in the sum of \$213,680.65, plus statutory interest from February 10, 2016; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the third-party plaintiff for reasonable attorneys' fees and costs under the subject agreements; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance

with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel for the third-party plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the third-party plaintiff shall serve a proposed accounting of attorneys' fees within 24 days from the date of this order and the third-party defendants shall serve objections to the proposed accounting within 20 days from service of the third-party plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the third-party plaintiff and third-party defendants shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the third-party plaintiff may enter an amended judgment adding the award of attorneys' fees and costs to the amount recovered, if any; and it is further,

ORDERED that the third-party plaintiff shall serve a copy of this order upon the third-party defendants within 15 days of this order.

This constitutes the Decision and Order of the court.

Dated: June 14, 2019

ENTER:

A handwritten signature in black ink, appearing to read 'NMB', is written over a horizontal line.

J.S.C.

HON. NANCY M. BANNON