

110 Fifth Realty Corp. v Town Flatiron LLC
2019 NY Slip Op 32139(U)
July 18, 2019
Supreme Court, New York County
Docket Number: 653055/2018
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 653055/2018

110 FIFTH REALTY CORP., GOLDMICK, LLC

MOTION DATE 07/19/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

TOWN FLATIRON LLC, ANDREW HEIBERGER,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 35

were read on this motion to/for

JUDGMENT - SUMMARY

This is an action for breach of contract and breach of guaranty brought by 110 Fifth Realty Corp. (110 Fifth) and Goldmick LLC (Goldmick) against Town Flatiron LLC (Town Flatiron) and Andrew Heiberger. 110 Fifth and Goldmick move for summary judgment pursuant to CPLR § 3212. For the reasons set forth below, the motion is granted.

FACTS RELEVANT TO THE MOTION

110 Fifth and Goldmick are the owners of the building located at 110 5th Avenue, New York, New York (the **Building**) (Complaint, ¶ 3). Pursuant to a Lease Agreement (the **Lease**), dated March 1, 2013, by and among 110 Fifth, Goldmick, and Town Flatiron, 110 Fifth and Goldmick agreed to lease to Town Flatiron the entire rentable portion of the sixth floor of the Building for a term of ten years, commencing March 1, 2013 and expiring on June 30, 2023. Town Flatiron agreed to pay fixed rent equal to \$78,696.33 per month for the first five years, increasing to \$85,480.50 per month for the balance of the lease term.

Pursuant to Article I of the Lease, Town Flatiron agreed to pay a security deposit of \$236,089.00 to 110 Fifth and Goldmick. Pursuant to Section 8.2 of the Lease, Town Flatiron agreed to pay, as additional rent, sales tax and 9.42% of any and all increases in real estate taxes over and above the real estate taxes payable for the base tax year. In addition, pursuant to Sections 8.1 and 8.3 of the Lease, Town Flatiron was responsible for additional Common Area Maintenance (CAM) Charges. Sections 2.2 (d) and 12.11 obligated Town Flatiron to pay all electric charges for the leased premises. Further, Section 12.5 of the Lease required Town Flatiron to pay water and sewer charges. Section 21.2 of the Lease entitles 110 Fifth and Goldmick to recover its legal fees and expenses incurred in connection with any legal action or proceeding brought by 110 Fifth and Goldmick to enforce any obligations under the Lease.

Pursuant to a Limited "Good Guy" Guaranty (the **Guaranty**), dated March 1, 2013, given by Andrew Heiberger for the benefit of 110 Fifth and Goldmick, Andrew Heiberger absolutely, unconditionally, and irrevocably guaranteed the payment obligations under the Lease, which obligations survive surrender of the leased premises (NYSCEF Doc. No. 12). To wit, Paragraph D of the Guaranty provides:

This Guaranty is absolute and unconditional and is a guaranty of payment and performance, not of collection. This Guaranty may be enforced without the necessity of resorting to or exhausting any other security or remedy, and without the necessity at any time of having recourse to Tenant. The validity of this Guaranty shall not be affected or impaired by reason of the assertion by Landlord against Tenant of the rights or remedies reserved to Landlord under the Lease, including termination of the Lease. Guarantor agrees that this Guaranty shall be unaffected by and shall remain in force and effect after any assignment, transfer, renewal, modification or extension of the Lease whether or not Guarantor shall have received any notice of or consented to such renewal, modification, extension, assignment or transfer (NYSCEF Doc. No. 12, ¶ D).

Town Flatiron defaulted on its obligations under the Lease by failing to pay rent, real estate tax charges, and other amounts when due for the period of January 1, 2018 through June 30, 2018 (*id.*, ¶ 6; Rabina aff, exhibit 10). By Notice, dated May 10, 2018, by and among 110 Fifth, Goldmick, Town Flatiron, and Andrew Heiberger, Town Flatiron agreed to surrender possession of the leased premises, without prejudice to 110 Fifth and Goldmick's rights and remedies against Town Flatiron as tenant or Andrew Heiberger as guarantor as permitted under the Lease (Complaint, ¶ 7).

110 Fifth and Goldmick commenced this action by filing a summons and verified complaint on June 19, 2018, asserting causes of action for breach of the Lease and breach of the Guaranty (NYSCEF Doc. No. 1). Town Flatiron and Andrew Heiberger filed a verified answer on July 20, 2018, denying each and every allegation set forth in the complaint and asserting a sole counterclaim for violation of Section 7-103 of the General Obligations Law, alleging that 110 Fifth and Goldmick failed to keep Town Flatiron's security deposit in a segregated account or otherwise co-mingled the funds (Answer, ¶ 30). 110 Fifth and Goldmick filed a reply to Town Flatiron's counterclaim on August 7, 2018, asserting a general denial of all of the allegations of the counterclaim (NYSCEF Doc. No. 6). 110 Fifth and Goldmick's motion for summary judgment is now before the court.

DISCUSSION

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense

to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

Breach of Contract

To prevail on a cause of action for breach of contract, the plaintiff must establish: (i) the existence of a contract, (ii) the plaintiff's performance, (iii) the defendant's breach, and (iv) resulting damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, 110 Fifth and Goldmick submit the Lease (NYSCEF Doc. No. 11), under which they performed by leasing the premises to Town Flatiron and fulfilling their obligations under the Lease. 110 Fifth and Goldmick also submit a schedule listing all sums due as a result of Town Flatiron's breach of the Lease through October 2018 (NYSCEF Doc. No. 16). To wit, 110 Fifth and Goldmick have established that, for the period of January 1, 2018 through June 30, 2018, Town Flatiron failed to pay (i) the full amount of base rent, in the sum of \$365,752 (ii) real estate taxes in the sum of \$46,377.84 and sales taxes in the sum of \$1,265.76 as required under Section 8.2 of the Lease, (iii) CAM charges in the amount of \$5,581 as required under Sections 8.1 and 8.3 of the Lease, (iv) electric charges totaling \$17,609.07 as required under Sections 2.2 (d) and 12.11 of the Lease, (v) water and sewer charges of \$1,000 under Section 12.5 of the Lease, and

(vi) miscellaneous charges including administrative fees totaling \$679.14 and a bounced check fee of \$35.00. The documentary evidences establishes that 110 Fifth and Goldmick have been damaged in the amount of \$438,299.89 as a result of Town Flatiron's breaches of the Lease. Nowhere in its opposition does Town Flatiron dispute the amounts owed or allege that any of the outstanding payments have been made, and it fails to offer any evidence to raise a triable issue of fact as to its liability for breach of the Lease.

Breach of Guaranty

In a cause of action for breach of a guaranty, a plaintiff must establish the existence of a guarantee executed by the defendant(s), the underlying debt, and the guarantor's failure to perform under the guarantee (*Sarfati v Palazzolo*, 142 AD3d 877, 877 [1st Dept 2016]). Here, as discussed above, 110 Fifth and Goldmick have submitted evidentiary proof of the underlying debt, and it is undisputed that Andrew Heiberger unconditionally guaranteed the obligations of Town Flatiron pursuant to the Guaranty (NYSCEF Doc. No. 12). It is likewise undisputed that Andrew Heiberger has failed to perform under the guaranty by making any payments to 110 Fifth and Goldmick. Accordingly, there are no triable issues of fact as to Andrew Heiberger's liability for breach of the Guaranty.

General Obligations Law § 7-103

Town Flatiron and Andrew Heiberger's sole counterclaim and only defense in this action is that 110 Fifth and Goldmick violated Section 7-103 of the General Obligations Law by failing to

keep the security deposit of \$236,089.00 in a segregated account or by otherwise co-mingling the funds. This allegation is utterly refuted by the documentary evidence. The original deposit slip submitted by 110 Fifth and Goldmick illustrates that the security deposit was deposited in a Lease Security Account at M&T Bank on March 26, 2013 with its own separate new account number (NYSCEF Doc. No. 34). 110 Fifth and Goldmick also submit monthly bank statements as evidence that the security deposit was at all times held in the Lease Security Account, segregated from other funds with the same separate account number (NYSCEF Doc. No. 35). Town Flatiron and Andrew Heiberger have failed to come forward with any evidence to create a material issue of fact. The motion for summary judgment is granted in its entirety.

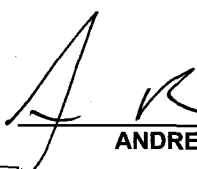
Accordingly, it is

ORDERED that 110 Fifth Realty Corp. and Goldmick, LLC's motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of the plaintiffs and against Town Flatiron LLC and Andrew Heiberger in the amount of \$438,299.89, together with interest thereon at the rate of 9% per annum from January 1, 2017, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that that portion of the plaintiffs' action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees that plaintiff may recover against Town Flatiron LLC and Andrew Heiberger is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the 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, 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; and it is further

ORDERED that such service upon the Special Referee Clerk 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).

7/18/2019					
DATE			ANDREW BORROK, J.S.C.		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE