

M. Lexington, LLC v Triple SSS Equities, LLC

2019 NY Slip Op 32384(U)

August 8, 2019

Supreme Court, New York County

Docket Number: 650651/2018

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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M. LEXINGTON, LLC, M. CUSHING, LLC, 180 OAKMONT
LP, BALLSTON TWO, LLC

INDEX NO. 650651/2018

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

TRIPLE SSS EQUITIES, LLC, JACK JAFFA, LOUIS
SCHWARTZ,

**DECISION + ORDER ON
MOTION**

Defendant.

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HON. SALIANN SCARPULLA

In this action to recover damages for breach of a lease agreement and personal guaranty, plaintiffs M. Lexington, LLC (“Lexington”), M. Cushing, LLC (“Cushing”), 180 Oakmont LP (“Oakmont”) and Ballston Two, LLC (“Ballston”) move for summary judgment on their complaint.

Defendant Triple SSS Equities, LLC (“SSS”) entered into a master lease agreement with plaintiffs on February 16, 2017. On the same date, defendants Jack Jaffa (“Jaffa”) and Louis Schwartz (“Schwartz”) executed a guaranty in which they unconditionally guaranteed to the plaintiffs the payment of all sums payable by SSS and performance of all obligations owed by SSS to plaintiffs.

According to the allegations of the complaint, SSS failed to pay amounts owed under the master lease and Jaffa and Schwartz failed to pay amounts owed pursuant to their guaranty: (1) to Lexington in relation to a property located at 840 Emerson Gardens Road in Lexington, MA; (2) to Cushing in relation to a property located at 1 Chief Justice

Cushing Highway in Cohasset, MA; (3) to Oakmont in relation to a property located at 25 Ann Street in Oakmont, PA; and (4) to Ballston in relation to a property located at 149 Ballston Avenue in Ballston, NY. Specifically, plaintiffs alleged that defendants owed \$2,249,302.01 in outstanding bed tax, real estate tax, personal property tax, water charges and sewer charges. Plaintiffs asserted causes of action for breach of contract and breach of the guaranty.

Plaintiffs now move for summary judgment on their complaint. They argue that the master lease and guaranty are valid and enforceable agreements, plaintiffs performed all of their obligations under the agreements, and SSS breached its obligations by not paying amounts due and owing under the master lease, and Jaffa and Schwartz breached their obligations by not paying amounts due and owing pursuant to the guaranty.

In opposition, defendants argue that the motion is premature because discovery has not yet been complete. They further argue that plaintiffs' damages at this stage are non-existent, because the amounts claimed to be due and owing are all the subject of "payment plans or closure plans with the applicable governing state authorities." Finally, they argue that there is no basis to impose liability under the guaranty at this time because there has not yet been any breach of the master lease.

The subject contract provides, in relevant part:

3.3 Rent Tax. If any governmental taxing authority levies, assesses, or imposes any tax, excise or assessment including a bed tax (other than income or franchise taxes) upon or against the rentals payable by Tenant to Landlord, including without limitation sales tax on rents, either by way of substitution for or in addition to any existing tax on land and buildings or otherwise, then Tenant shall be responsible for and shall pay such tax, excise or assessment, or, if Landlord

pays same, Tenant shall reimburse Landlord for the amount thereof within thirty (30) days after demand by Landlord.

4.3 Taxes. Tenant shall be solely responsible for the payment, prior to delinquency, of all general and special real estate taxes, health care taxes (i.e. Bed and Use Taxes) assessments, fire district taxes, liens, impositions, personal property taxes and any and all other taxes attributable to the Leased Premises (the "Impositions") that accrue from the commencement date throughout the Term. Adjustment shall be made for Impositions applicable to any period prior to the commencement date. Tenant shall pay all of the Impositions directly to the applicable taxing authorities in order to receive the maximum allowable discount, if any, and Tenant shall promptly forward proof of payment to Landlord in such form as shall be reasonably acceptable to Landlord unless Landlord elects to require escrow deposits in accordance with Section 4.3 hereof. Landlord shall promptly forward any tax bills which it may receive to the Tenant. Landlord shall only bill Tenant for any of the Impositions if Tenant does not pay any of the Impositions before delinquency and Landlord is obligated or elects (in Landlord's sole and absolute discretion) to pay any of the Impositions directly to remain current with all taxing authorities. Tenant shall pay the full amount of any increases in any of the Impositions resulting from alterations or improvements made by or for the benefit of Tenant. After the expiration or termination of this Lease, Tenant shall pay all bills for any of the impositions which become due and payable after the expiration or termination of the Lease covering any period through the expiration or earlier termination of the Lease. If any governmental taxing authority acting under any present or future, ordinance or regulation, shall levy, assess or impose a tax, excise and/or assessment (other than an income or franchise tax) upon Landlord or Tenant for rental payable by Tenant to Landlord, either by way of substitution for or in addition to any existing tax on land, buildings or otherwise, then Tenant shall be responsible for and shall pay such tax, excise and/or assessment or shall reimburse Landlord for the cost and expense thereof, as the case may be. Tenant shall be responsible for any and all late payment fees or penalties, including interest, imposed by applicable taxing authorities for late payment of Impositions.

At oral argument on this motion, counsel for defendants admitted that certain amounts of real estate taxes were due and owing and did not dispute whether sewer and water charges were also due and owing. Counsel for defendants did dispute whether personal property tax and bed tax were due and owing. I asked for supplemental letters

from plaintiffs and defendants explaining their positions about who is ultimately responsible for the bed taxes - landlord or tenant - and explaining “personal property tax.” I received a letter only from the plaintiffs.

According to plaintiffs’ letter, the claim for personal property taxes relate only to the properties in Massachusetts, where “tax is imposed on all personal property, including tangible items that are not firmly attached to land or buildings or considered part of the real estate, unless specifically exempt.” Further, the letter states that plaintiffs are entitled to seek the amounts owed for bed tax directly, pursuant to Sections 4.3 and 4.4 of the master lease agreement.

Based on the evidence submitted I find that plaintiffs have established prima facie entitlement to judgment on liability as a matter of law. They have proven that defendants breached the lease agreement and guaranty by failing to pay certain amounts owed for water and sewer usage and taxes. The specific amounts owed will be determined by a Special Referee at a hearing.

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs’ motion for summary judgment on their complaint is granted as to liability; and it is further

ORDERED that the amount of damages owed to plaintiffs is referred to a Special Referee to hear and report. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another


person designated by the parties to serve as referee, shall determine the damages issue; and it is further

ORDERED that counsel for plaintiffs shall, within 30 days from the date of this order, serve a copy of the order, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report, I will enter judgment in favor of plaintiffs in accordance with the results of the Special Referee's report and this decision.

This constitutes the decision and order of the court.

8/8/2019
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: