

138 N.Y. Realty Corp. v Conroy
2019 NY Slip Op 32438(U)
August 16, 2019
Supreme Court, New York County
Docket Number: 650068/2017
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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138 N.Y. Realty Corp.,

Plaintiff,

Index Number:

-against-

650068/2017

Bruce E. Conroy and
Ronald M. Rudolph,

Defendants.

-----X
Melissa A. Crane, J.:

Plaintiff moves, pursuant to CPLR 3212, to dismiss defendants’ affirmative defenses and for summary judgment for past due rent and for a hearing on attorneys’ fees. Defendants have cross-moved for summary judgment dismissing plaintiff’s complaint, based upon the bankruptcy of the tenant.

Underlying Allegations and Procedural Background

Plaintiff alleges that it is the owner of a building (the Building), located at 138 Fifth Avenue, New York, New York and that Its Bashert LLC d/b/a Senses New York Salon & Spa (Senses) occupied the second floor of the Building (the Premises) pursuant to a lease dated March 25, 2016 (the Lease) (Pae affidavit, ¶¶ 4-5). It states that, as part of the consideration for execution of the Lease, Bruce E. Conroy (Conroy) and Ronald M. Rudolph (Rudolph) executed identical personal guarantees (the Guarantees) that “unconditionally guarantee[d] to [plaintiff] . . . the full and faithful payment and performance and observance of all obligations . . . including . . . the prompt and punctual payment of all Base Annual Rent, Additional Rent and other sums payable under the Lease and reasonable costs of collection and enforcement (including legal fees

and disbursements)” (*id.*, ¶ 6; Guarantees, ¶ 2 [a]). The Guarantees also provided that “[t]he viability and enforceability of this Guaranty and the obligations of the Guarantor hereunder shall not terminate and shall not be affected or impaired by . . . the commencement of any bankruptcy or insolvency action or proceeding or the grant of relief thereunder [against Sense]” (*id.*, ¶ 5). The Lease contained a provision in Article Twenty for attorneys’ fees.

Plaintiff contends that Senses defaulted on its rent and that pursuant to an arrears agreement (the Arrears Agreement), the rental arrears were reduced from \$83,024.01 to \$70,905.03, but that Senses breached the Arrears Agreement by defaulting on its payment obligations and that, on December 12, 2016, Senses filed for bankruptcy (Pae affidavit, ¶¶ 7-9). Plaintiff states that when Senses vacated the Premises on February 9, 2017, it owed rent and additional rent in the amount of \$74,848.21 and that this amount remains unpaid (*id.*, ¶¶ 10-11, 16-26, Exhibit 7).

On or about January 4, 2017, plaintiff commenced this action against defendants for breach of contract, based upon the Guarantees seeking the unpaid rent and for attorneys’ fees. Defendants interposed their answer with affirmative defenses. The court held a preliminary conference on February 15, 2018 and issued an order (the PC Order) that set forth a discovery schedule, filing a note of issue and, pursuant to CPLR 3212 (a), imposed a time frame for dispositive motions by August 15, 2018. On May 2, 2018, the court held a compliance conference and issued a compliance conference order (the CC Order) that reaffirmed the time frame for the completion of discovery and filing of a note of issue and reaffirmed the date of August 15, 2018 as the deadline for filing of motions for summary judgment.

Plaintiff filed its note of issue on June 15, 2018 and made its motion for summary judgment on August 15, 2018. Defendants filed a cross motion for summary judgment on

September 19, 2018, alleging that they had no liability because the claims for rent had been settled in Senses' bankruptcy proceeding. Defendants agreed to withdraw their affirmative defenses relating to the Statute of Frauds and plaintiff's authority to do business in New York State (Hufnagel affirmation dated September 19, 2018, ¶ 31). Defendants' cross motion did not include an affidavit by a party with personal knowledge, but rather only an attorney's affirmation. Defendants stated that discovery was not complete, but there was no explanation for their failure to meet the time deadline set forth in the PC and CC Orders. Plaintiff served a notice on September 20, 2018, rejecting defendants' cross motion, based upon its untimeliness. In their reply papers, defendants stated that, as depositions had not been held, the cross motion was timely (Hufnagel affirmation dated September 25, 2018, ¶ 6).

Plaintiff asserts that the settlement of the bankruptcy proceeding involved, according to that document, "a security deposit" and not the outstanding unpaid rent. It therefore seeks summary judgment for the unpaid rent and a hearing on reasonable attorneys' fees, pursuant to the Lease and the Guarantees.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). “Where different conclusions can reasonably be drawn from the evidence, the motion should be denied” (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). “[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment” (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]). However, “[f]acts appearing in [a party’s] papers which the opposing party does not controvert, may be deemed to be admitted” (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [1st Dept 2006]).

Contract Claim

“[A] party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms . . . [, there must be] sufficiently definite terms and the parties must express their assent to those terms” (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 [1st Dept 2012]; *see also Carione v Hickey*, 133 AD3d 811, 811 [2d Dept 2015]).

Contract Interpretation

Generally, “when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing” (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties’ agreement and the best evidence of the parties’ agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Put another way, “[c]ourts will give effect to the contract’s language and the parties

must live with the consequences of their agreement [and] [i]f they are dissatisfied . . . , the time to say so [is] at the bargaining table” (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [2013] [internal quotation marks and citation omitted]; *see also McFarland v Opera Owners, Inc.*, 92 AD3d 428, 428-429 [1st Dept 2012]; *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

“To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation . . . by examining the entire contract . . . as a whole [and] in deciding the motion, [t]he evidence will be construed in the light most favorable to the one moved against” (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] [internal quotation marks and citations omitted]).

Bankruptcy

“It is well-settled that the liability of a guarantor of a corporate debt is not affected by the institution of bankruptcy proceedings involving the corporation” (*Taubes v Stuart*, 181 AD2d 669, 670 [2d Dept 1992]; *see also CIT Group/Equip. Fin., Inc. v Riddle*, 31 AD3d 477, 478 [2d Dept 2006]; *Milliken & Co. v Stewart*, 182 AD2d 385, 386 [1st Dept 1992]).

Discussion

Generally, the parties must adhere to the time frame for filing summary judgment motions (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 83 [1st Dept 2013]). “[A] litigant cannot ignore court orders [setting forth time guidelines] with impunity” (*Brill*, 2 NY3d at 652-653). Additionally “defendants have not established good cause for their belated filing” (*Appleyard v Tigges*, 171 AD3d 534, 536 [1st Dept 2019]; *see also Encore I, Inc. v Kabcenell*, 160 AD3d 450, 451 [1st Dept 2018]). In this case, defendants have not presented any reason for their failure to file their cross motion by the

August 15, 2018 date set by the court in the PC and CC Orders and, consequently, their cross motion is denied as untimely.

Plaintiff has presented proof that, pursuant to the Lease and the Guarantees, rent and additional rent, including water and sewer fees and real estate taxes, remain unpaid in the amount of \$74,848.21 and that consequently, the defendants' "unconditional guarantee" renders defendants liable (Pae affidavit, ¶¶ 10-11, 16-26, Exhibit 7). These documents are clear and unambiguous. They require payment of rent and additional rent and impose the obligation to pay on defendants, in the event of Senses' default. As noted, defendants have not submitted an affidavit by a party with personal knowledge contesting plaintiff's showing and, therefore, these facts "may be deemed to be admitted" (*Kuehne & Nagel*, 36 NY2d at 544). The settlement document in Senses' bankruptcy concerned a "security deposit" and not the unpaid rent. Accordingly, the principle applies that "the liability of a guarantor of a corporate debt is not affected by the institution of bankruptcy proceedings involving the corporation" (*Taubes*, 181 AD2d at 670; *see also Milliken*, 182 AD2d at 386). Additionally, the Lease in paragraph 20 and the Guarantees in paragraph 5 include the right to recover legal fees. The court must enforce the parties' agreement, including the Guarantees. Therefore, plaintiff's motion for summary judgment must be granted (*see Enjoy Realty*, 22 NY3d at 424).

Accordingly, it is,

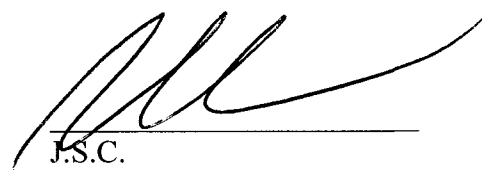
ORDERED that plaintiff's motion to dismiss defendants' affirmative defenses and for summary judgment, pursuant to CPLR 3212, is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$74,848.21, with interest from February 9, 2017, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's request for a hearing on attorney's fees is denied without prejudice to plaintiff making a motion on notice for same within 30 days of the efiled date of this decision and order; and it is further

ORDERED that defendants' cross motion for summary judgment, pursuant to CPLR 3212, is denied.

Dated: *August 16*, 2019

ENTER:



J.S.C.

HON. MELISSA A. CRANE
J.S.C.