104 Second Realty, LLC v Beer Factory LLC
2019 NY Slip Op 32511(U)
August 27, 2019
Supreme Court, New York County
Docket Number: 152095/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** IAS MOTION 38EFM
Justice

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104 SECOND REALTY, LLC,

Plaintiff,

- v -

BEER FACTORY LLC, FRANGIOS HALKIADAKIS, GEORGIOS TZIKAS, CONSTANTINOS ALEXIOU, SAKIS PITSIONAS,

Defendants.

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INDEX NO. 152095/2018

MOTION DATE 04/18/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff moves: (i) for summary judgment against defendants Beer Factory LLC, Franios Halkiadakis, Georios Tzikas, and Constantinos Alexiou (collectively, the "Non-Defaulting Defendants"); and (ii) for a default judgment against defendant Sakis Pitsionas. The Non-Defaulting Defendants cross-move for leave to serve and file an amended answer and counterclaim.

Background:

Plaintiff is the owner of commercial real property located at 104 Second Avenue, New York, New York. By written lease dated August 11, 2015, plaintiff leased that property to defendant Beer Factory LLC for anticipated use as a restaurant (*see*, NYSCEF Doc. No. 14). The term of the lease was for ten years, ending on July 31, 2025 (*id.*). The individual defendants guarantied Beer Factory's obligations under the lease by written guaranties (NYSCEF Doc. Nos. 15-18).

The complaint (¶ 25) alleges that Beer Factory vacated the premises prior to the expiration date of the lease, in November 2017, without satisfying the pre-expiration surrender conditions found at paragraph 8 of the guaranties. That paragraph is reproduced in full, directly hereafter:

> Notwithstanding anything contained herein, if (a) Tenant is in good standing and is not in default beyond applicable notice and cure periods under any of the terms of the Lease both when (1) the Surrender Notice (referred to below) is given to the Landlord and (2) on the Final Day (defined below), and (b) Tenant gives written notice ("Surrender Notice") by certified mail, return receipt requested or by reputable overnight carrier with signature requested, to the Landlord at Landlord's address in the same manner as set forth in the Lease that Tenant will vacate the Premises on the last calendar day (the "Final Day") of the 5th (fifth) calendar month after the month in which the Surrender Notice is actually received by the Landlord, and (c) Tenant performs all of the conditions set forth in subparagraphs (i) through (viii) below (the "Release Conditions"), on or before the Final Day, TIME AND TENANT'S PERFORMANCE BEING OF THE ESSENCE, then (and only in such circumstances) Guarantor shall be released from liability under this Guaranty accruing after the Final Day. The Release Conditions are as follows, i.e., Tenant shall have:
>
> > (i) Vacated and surrendered the Premises to the Landlord, in broom clean condition, free from any occupancies and in the condition called for on the expiration of the Lease term; and
> > (ii) Delivered the keys and all alarm codes relating to the Premises to the Landlord; and
> > (iii) Delivered to Landlord a duly executed and notarized surrender of lease (a form of which is annexed hereto as an exhibit); and
> > (iv) Paid to Landlord all Rent and Additional Rent, including court costs and reasonable legal fees incurred by the Owner through the Final Day; and
> > (v) Delivered reasonable proof to the Landlord that there are no Mechanic's Lien(s) filed or recorded against the Premises; and
> > (vi) Complied with provisions of Paragraph 82 of the Rider to the Lease; and
> > (vii) Paid to Landlord the unamortized portion of all broker's fees or commissions paid by the Landlord in connection with the Lease, such amortization to be determined as of the Final Date; and
> > (viii) Paid to Landlord an amount equal to any rent credit, abatement or concession received by Tenant between lease execution and the Final Date.
>
> If Tenant has not strictly complied with all of the requirements as set forth in this Article 8, on or before the Final Day, then Guarantor agrees and acknowledges that the provisions of this Article 8 shall be null and void and of no force and effect as if they were not including in the Guaranty and all of the other provisions of this Guaranty shall remain in full force and effect.

> Nothing contained in this Guaranty shall be in any way construed or deemed to create any right by the Tenant to terminate, cancel and/or surrender the Lease prior to the expiration of the Term thereof and the provisions of this Article shall operate solely to limit the liability of the Guarantor in the event the Tenant vacates the Premises prior to the expiration of the Term in strict conformance with all the terms and conditions of this Article 8.

(NYSCEF Doc. No. 14 at 27-28.)

The complaint (¶¶ 31, 39) alleges that the premises remained vacant after Beer Factory's November 2017 vacatur, for the months of December 2017 and January 2018, until a new lease could be procured with a replacement tenant, commencing February 1, 2018, and lasting to January 31, 2028. The complaint seeks various categories of damages from the defendants, separately classified as: (i) base rent and additional rent through January 2018 in an aggregate principal sum of $262,429.15 (the first cause of action); and (ii) the difference in rent between the Beer Factory lease and the replacement lease in an aggregate principal sum of $453,305 (the second cause of action).

In opposition to plaintiff's motion for summary judgment, the Non-Defaulting Defendants assert, through the affidavit of defendant Constantinos Alexiou, that "plaintiff to date has wrongfully converted more than $227,000 of equipment and furniture installed by the defendants," annexing a detailed list of such items along with invoices from suppliers and vendors of same (*see*, NYSCEF Doc. Nos. 27, 29). Such items include: oven, grill, beer coolers, tables, chairs, sound system, surveillance system, commercial freezers, floor fryer, dishwasher, dish tables, refrigeration equipment, prep table, bar furniture, sofa, and stools (*id.*, Doc. No. 29). This, in fact, forms the predicate for said defendants' cross-motion for leave to serve and file an amended answer and counterclaim, which counterclaim seeks a recoupment of said expense, plus ancillary expenses, aggregating, in all, a principal sum of $297,000 (*see*, NYSCEF Doc. No. 38).

Discussion:

Plaintiff asserts that the pre-expiration surrender conditions were breached. However, the Non-Defaulting Defendants assert their own allegations of breach, directed at plaintiff. The lease explicitly provides, in Article 3 thereof, titled "Alterations," that: "Nothing in this article shall be construed to give Owner title to, or to prevent Tenant's removal of, trade fixtures, moveable office furniture and equipment . . . ." (NYSCEF Doc. No. 14 ¶ 3.) The Non-Defaulting Defendants assert that:

> [I]n or about November 2017, we were forced to stop operating the business and we communicated again with the landlord's representative Mr. Lavian, in an effort to "return the keys" and to make good faith arrangements to remove the substantial equipment and related items which we had purchased for use in our business. Again unfortunately, the landlord "locked us out" and prevented us from removing our property from the location.

(NYSCEF Doc. No. 27 ¶¶ 13-14.)

It is elementary that summary judgment cannot be granted in the face of triable issues of fact submitted in opposition (*e.g., Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). Here, the Non-Defaulting Defendants have submitted such triable issues by virtue of their affidavit assertion that plaintiff is preventing them from enforcing their own property rights under the lease and carrying out their surrender obligations under the guaranties that secure the lease. (As noted above, said opposing affidavit is accompanied by exhibited material relating to defendants' property, and their cost to defendants.) Accordingly, the court cannot grant summary judgment to plaintiff at this time, in the face of such issues of fact.

Furthermore, by virtue of this posture, whereby the Non-Defaulting Defendants have raised such issues of fact in opposition to summary adjudication, this court cannot deliver such adjudication to plaintiff by way of a gratuitous grant of default judgment against defendant Sakis Pitsionas, as it has become necessary to try plaintiff's underlying right to judgment in the face of

such issues of fact. It is elementary that, even in a default context, the plaintiff still bears the burden of "proof of the facts constituting the claim" (CPLR 3215[f]. *See also*, Weinstein-Korn-Miller, NY Civ Prac ¶ 3215.24, *et seq.*) Consequently, plaintiff's motion for a default judgment against defendant Pitsionas must also be denied at this point in time.

The Non-Defaulting Defendants cross-move for leave to serve and file an amended answer and counterclaim. The nature of the counterclaim is discussed hereinabove. It is fundamental that leave to amend a pleading should be freely given (CPLR 3025[b]; *e.g., Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404 [1st Dept], *appeal dismissed* 12 NY3d 880 [2009]). The court perceives no undue prejudice to the plaintiff, especially since this 2018 case has not even had its first preliminary conference. The cross-motion is granted. The verified amended answer and counterclaim is deemed served and filed, by virtue of its e-filing of January 10, 2019 (NYSCEF Doc. Nos. 38-39). Plaintiff now has twenty days from the date hereof to serve and file a reply to the amended counterclaim (CPLR 3025[d]).

Accordingly, it is

ORDERED that plaintiff's motions for summary judgment and for a default judgment are denied; and it is further

ORDERED that the cross-motion by defendants Beer Factory LLC, Franios Halkiadakis, Georios Tzikas, and Constantinos Alexiou for leave to serve and file an amended answer and counterclaim is granted; and it is, accordingly,

ORDERED that the proposed verified amended answer and counterclaim served and filed in this action on January 10, 2019 (NYSCEF Doc. Nos. 38-39) shall be deemed the verified amended answer and counterclaim in this action, and that plaintiff shall have twenty days from the date hereof to serve and file a reply to said counterclaim; and it is further

ORDERED that a preliminary conference is hereby scheduled to occur on September 26, 2019, at 2:15 p.m.

This shall constitute the decision and order of the court.

ENTER:

8/27/2019
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE