

Avamer 57 Fee LLC v Lynn

2019 NY Slip Op 32731(U)

September 16, 2019

Supreme Court, New York County

Docket Number: 653393/2019

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

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AVAMER 57 FEE LLC,

Plaintiff,

- v -

JERRY LYNN, ROBERT WINEGARDEN, MITCHELL LYNN

Defendant.

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INDEX NO. 653393/2019
MOTION DATE 07/16/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2
were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT .

Upon the foregoing documents

Plaintiff Avamer 57 Fee LLC ("Avamer") seeks an award of Summary Judgment in Lieu
of a Complaint based on Defendants' breach of a Lease and associated Guaranty pursuant to
CPLR 3213. Plaintiff filed the instant motion on June 10, 2019. Defendants have not opposed
the motion. For the following reasons, Avamer's motion is Granted.

CPLR 3213 provides: "When an action is based upon an instrument for the payment of
money only . . . the plaintiff may serve with the summons a notice of motion for summary
judgment and the supporting papers in lieu of a complaint." "CPLR 3213 was enacted to provide
quick relief on documentary claims so presumptively meritorious that a formal complaint is
superfluous, and even the delay incident upon waiting for an answer and then moving for
summary judgment is needless." Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v.
Navarro, 25 N.Y.3d 485, 491-92 (2015) (internal quotation marks and citation omitted). Under
CPLR 3213, a plaintiff makes out a prima facie case for summary judgment in lieu of complaint
by proof of an instrument and the defendant's failure to make payment according to its terms.

See *Seaman-Andwall Corp. v. Wright Machine Corp.*, 31 A.D.2d 136, 137 (1st Dep't 1968). The burden then shifts to the defendant to establish, by admissible evidence, the existence of a triable issue of fact in order to avoid enforcement. *Simoni v. Time-Line, Ltd.*, 272 A.D.2d 537, 537 (2nd Dep't 2000).

Here, there is no question that this action is based on an instrument for the payment of money only. Avamer entered into a Lease agreement with non-parties Shermit Corp., Robert F. Winegarden, DDS, PC and Shermit II LLC (collectively "Tenant") whereby a portion of the 6th floor of 57 West 57th Street, New York, New York was leased in exchange for an annual rent of \$313,283.00. (NYSCEF 5). Under the Lease, in the event of dispossession Tenant was required to pay all rent due at the time of dispossession and the full amount of rent due under the remaining term of the Lease Agreement. Tenant also agreed to pay utility costs, late charges and tax escalation fees. *Id.* §§15, 16, 32 and 37. The term of the Lease was from January 1, 2008 through December 31, 2027. *Id.* §3(a). Avamer reserved the right to accelerate all remaining payments due under the Lease.

On December 7, 2018 Avamer and Tenant entered into a Stipulation acknowledging Tenant's failure to satisfy its payment obligations and agreeing to suspend Tenant's eviction so long as Tenant paid rent and additional rent according to an agreed upon schedule. Tenant failed to make its January 2019 payment and Avamer then secured a warrant of eviction against Tenant. In that judicial proceeding, the Court found that Tenant had no valid excuse for its repeated failure to make timely rental payments or for its failure to cure the breach. (NYSCEF 7). Exercising its acceleration rights under Section 23 of the Lease, Avamer seeks \$3,135,692.00 for rent due for the remainder of the lease term as well as associated costs and fees.

Defendants Jerry Lynn, Robert Winegarden and Mitchell Lynn are principals of Tenant. The Defendants collectively unconditionally guaranteed Tenant's obligations under the Lease as well as payment, on demand, for all of Avamer's costs in connection with enforcing Defendants' obligations. Tenant's default, as outlined above, triggered Defendants' obligations under the Guaranty which Defendants have failed to satisfy.

Advancing these allegations, offering proof of entry into both the Lease and the Guaranty, and evidencing Tenant's and Defendants' respective failures to remit payment under the agreements, Avamer has made a prima facie case for Summary Judgment in Lieu of Complaint. As noted above, Defendants have not submitted any opposition to the motion and thus have failed to suggest any material issues of fact that would preclude awarding summary judgment in favor of Avamer. *Mitsubishi Trust & Banking Corp. v. Housing Servs. Assocs.*, 227 A.D.2d 305, 305 (1st Dep't 1996) (plaintiff entitled to summary judgment in lieu of complaint because proof that notes were duly executed and defendant defaulted in its payment obligations was sufficient); *Tongkook America, Inc. v. Bates*, 295 A.D.2d 202 (1st Dep't 2002) (defendants' failed to raise a triable issue of fact to avoid summary judgment in lieu of complaint where agreement was clear on its face that they owed sums certain to plaintiff, despite the defendants' obligations having been partially satisfied).

Therefore, Avamer's Motion for Summary Judgment in Lieu of Complaint is Granted. The matter will be referred to a Judicial Hearing Officer for a determination as to the amount of collection costs and fees.

Accordingly, it is:

ORDERED that Avamer's unopposed Motion for Summary Judgment in Lieu of Complaint is Granted; it is further

ORDERED that the Court clerk is directed to enter judgment against Defendants Jerry Lynn, Robert Winegarden and Mitchell Lynn, jointly and severally, in the amount of \$3,252,748.52 together with post-judgment interest at the statutory rate of 9% per annum; it is further

ORDERED Avamer's request for collection costs and fees is Granted and is referred to a JHO to hear and determine; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon 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 "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that Avamer's counsel shall serve a copy of this order with notice of entry on defendants within five days and that counsel for Avamer shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf>) 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

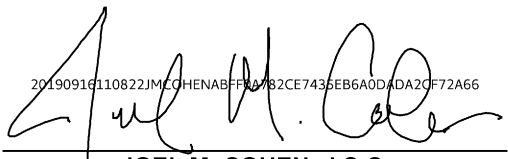
ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may 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 Referee's Part in accordance with the Rules of that Part; it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

ORDERED that Avamer shall serve this Order with Notice of Entry on Defendants within 5 days of the date of this Order.

This constitutes the Decision and Order of the Court.

9/16/2019
DATE


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JOEL M. COHEN, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE