

QN Realty, LLC v MRCJ Inc.

2019 NY Slip Op 32804(U)

September 17, 2019

Supreme Court, New York County

Docket Number: 651926/2017

Judge: Gerald Lebovits

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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. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

-----X

QN REALTY, LLC,

Plaintiff,

- v -

MRCJ INC.,
RANDY MALKA, MARC DESATNICK, JOHN MAGNA,
CHRIS MAGNA

Defendant.

-----X

INDEX NO. 651926/2017

MOTION DATE 07/31/2019

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166

were read on this motion for PARTIAL SUMMARY JUDGMENT

Cornicello, Tendler & Baumel-Cornicello, LLP (David B. Tendler of counsel), for plaintiff.
Westerman Ball Ederer Miller Zucker & Sharfstein, LLP (Philip J. Campisi, Jr. and David Shargel of counsel), for defendants Marc Desatnick and Randy Malka.

Gerald Lebovits, J.:

Plaintiff, QN Realty LLC, moves for summary judgment against defendants Marc Desatnick and Randy Malka on plaintiff's first, second, third, fifth, sixth, and seventh causes of action. Plaintiff also moves to strike defendants Desatnick and Malka's affirmative defenses. Plaintiff's motion is granted in part and denied in part.

On plaintiff's first cause of action, plaintiff seeks judgment for \$124,996.16 in unpaid rent. Desatnick and Malka executed an unconditional guaranty of defendant MRCJ's obligations under a stipulation settling a landlord-tenant action in Civil Court, Queens County. The stipulation required MRCJ both to make payments covering back rent that was in arrears and to remain current on rent payments going forward. The stipulation also incorporated the terms of a related stipulation settling an action in Supreme Court, Queens County, under which MRCJ was required to undertake certain construction and remediation work on the premises and to document to plaintiff that it had performed that work.

Civil Court later issued an order finding that MRCJ had failed to comply with the landlord-tenant stipulation, and that MRCJ owed \$78,996.16 in rent. That amount, plus \$46,000 in unpaid rent that plaintiff had agreed to waive if MRCJ complied with the stipulation's terms, equals the \$124,996.16 that plaintiff now seeks from guarantors Desatnick and Malka.

The guarantors argue that MRCJ made all payments required by the stipulation. But their evidence establishes at most that MRCJ made the required payments to cover the rent arrears existing at the time of the stipulation, and that MRCJ was current on rent through the end of March 2016. The Civil Court order, issued in March 2017, held that MRCJ was no longer in compliance with the stipulation and was approximately \$79,000 behind on rent. MRCJ is collaterally estopped from challenging the court's finding that it did not comply with the stipulation.

The guarantors argue that they are not estopped because they were no longer principals of MRCJ at the time of the Civil Court order and that they did not have an opportunity to be heard. But MRCJ *is* estopped from contesting Civil Court's order. Thus, under the stipulation, MRCJ owed plaintiff \$124,996.16. Desatnick and Malka each unconditionally guaranteed MRCJ's obligations under the stipulation. And as defendants acknowledge, the guaranty clearly provided in paragraph 10 that each guarantor's obligations would persist even if the guarantor later transferred away his ownership interest in MRCJ. Plaintiff is thus entitled to summary judgment on this cause of action against Desatnick and Malka as guarantors.

On plaintiff's second and third causes of action, plaintiff seeks fees and costs incurred in the landlord-tenant proceeding and to enforce the terms of the stipulation. Plaintiff's motion for summary judgment on these causes of action is granted as to liability, with an inquest on damages to be held at the time of trial. As with the first cause of action, MRCJ is bound by Civil Court's order finding that it failed to comply with the stipulation. Thus, under the stipulation's terms, MRCJ is liable for plaintiff's reasonable attorney fees; and also for plaintiff's costs incurred in evicting MRCJ based on its failure to comply and in subsequently reletting the premises. Desatnick and Malka are responsible for these amounts as unconditional guarantors of MRCJ's obligations under the stipulation.

On plaintiff's fifth and sixth causes of action, plaintiff claims that MRCJ failed properly to complete the construction/remediation work required under the terms of the Supreme Court stipulation, and also failed to provide proof to plaintiff that MRCJ had completed that work. Plaintiff seeks the costs required for plaintiff to complete that work and costs incurred in enforcement of the stipulation. Plaintiff's motion on these causes of action is granted as to liability, with an inquest on damages to be held at the time of trial.

Desatnick and Malka argue that MRCJ did complete the construction/remediation work as required, or that at a minimum plaintiff acquiesced to the state of the premises and thus cannot now be heard to claim a breach of the Supreme Court stipulation. But beyond a single conclusory paragraph in Malka's affirmation, Desatnick and Malka do not provide any evidence either that MRCJ completed the required work or that it provided the required documentation to plaintiff. Plaintiff is therefore entitled to summary judgment.

On plaintiff's seventh cause of action, plaintiff seeks the amount of rent owed by MRCJ on the balance of the lease term. Plaintiff's motion for summary judgment is denied in part, and granted in part on liability only. What amount, if any, plaintiff is entitled to under this cause of action is to be dealt with in the future inquest on damages.

The guaranty under which plaintiff proceeds expressly limits the guarantors' obligations to MRCJ's obligations under the landlord-tenant stipulation in Civil Court, rather than MRCJ's obligations under the lease as a whole. The landlord-tenant stipulation, in turn, provides merely in paragraph 6 that in addition to paying the rent then in arrears, MRCJ also "shall pay current rent when due." What plaintiff now seeks from the guarantors, however, is not current rent. Rather, under paragraph 18 of the lease, that sum constitutes *liquidated damages* for a default by MRCJ on its lease obligations, for which the guarantors did not make themselves responsible. The mere fact that the measure of those damages is monthly rent does not alone create an obligation on the part of the guarantors.

Instead, at most, under the rent ledger provided on this motion by plaintiff, the guarantors would be liable for approximately \$29,000—the sum that accrued in unpaid rent and interest between the time of the Civil Court order discussed above and MRCJ's eviction at the end of May 2017. (Defendants do not dispute the accuracy of this amount.) At oral argument on this motion, though, plaintiff informed the court that defendant had made partial payment of approximately \$113,000, and that plaintiff was reducing the total amount sought under plaintiff's second, third, fifth, sixth, and seventh causes of action accordingly. The question whether this partial payment wholly offsets the \$29,000 owed in unpaid rent under the seventh cause of action is best left for the inquest on damages at the time of trial.

Plaintiff's motion to strike the affirmative defenses raised in Desatnick and Malka's answer is granted without opposition.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its first cause of action against defendants Desatnick and Malka is granted, and plaintiff is awarded the sum of \$124,996, plus appropriate prejudgment interest; and it is further

ORDERED that plaintiff's motion for summary judgment on its second and third causes of action against defendants Desatnick and Malka is granted, but only as to liability; and it is further

ORDERED that plaintiff's motion for summary judgment on its fifth and sixth causes of action against defendants Desatnick and Malka is granted, but only as to liability; and it is further

ORDERED that plaintiff's motion for summary judgment on its seventh cause of action is granted only as to liability for unpaid rent accruing between March 20, 2017, and May 25, 2017, and is otherwise denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision with notice of entry on all defendants and on the Office of the County Clerk, who is directed to enter judgment accordingly.

9/17/2019

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE