

152-154 Spring St. Retail LLC v Schreiber

2020 NY Slip Op 30496(U)

February 20, 2020

Supreme Court, New York County

Docket Number: 655024/2017

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
NEW YORK COUNTY**

PRESENT: HON. SALIANN SCARPULLA PART IAS MOTION 39EFM

Justice

-----X

152-154 SPRING STREET RETAIL LLC,
Plaintiff,

- v -

JOEL SCHREIBER AND, WATERBRIDGE CAPITAL LLC,
Defendant.

-----X

INDEX NO. 655024/2017
MOTION DATE 09/18/2019
MOTION SEQ. NO. 002

**AMENDED DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

This decision and order amends and supersedes the decision and order entered in this action on January 2, 2020 (NYSCEF #102).

Plaintiff 152-154 Spring Street Retail LLC moves for partial summary judgment on the complaint’s first two causes of action, to sever the first two causes of action from the complaint’s remaining three causes of action, and to dismiss defendant Joel Schreiber’s (“Schreiber”) and defendant Waterbridge Capital LLC’s (“Waterbridge,” collectively, “Defendants”) ninth affirmative defense and first counterclaim.

Discussion

Plaintiff owns a retail condominium unit, which is located on the ground floor and basement of the building located at 152-154 Spring Street, New York, New York (the “Property”). Schreiber is the founder, CEO, and majority owner of Waterbridge, a limited liability corporation used to acquire and own real estate. Plaintiff entered into a

lease agreement dated April 24, 2014 with 154 Spring Tenant LLC (“Tenant”), an entity owned in whole or in part by Schreiber, whereby Plaintiff agreed to lease the Property to Tenant for ten years – from April 24, 2014 until April 30, 2024 – and Tenant agreed to pay the Rent in equal monthly installments prior to the first day of that month. The Rent is comprised of: (1) Fixed Minimum Rent, which increases annually; and (2) Additional Rent, which consists of Plaintiff’s “reasonabl[e] estimate” of Tenant’s share of both the real estate taxes and common area maintenance costs. Lease §5.

On June 18, 2015, Plaintiff and Tenant executed an amendment (“First Amendment”) to the existing lease (the First Amendment and initial lease are jointly referred to as the “Lease”), which, *inter alia*, obligated Tenant to provide Plaintiff with a \$1,000,000 security deposit (“Security Deposit”) that was to “be held by [Plaintiff], without liability for interest thereon, as security for the full and faithful performance by Tenant of each and every term, covenant and condition of the Lease on the part of Tenant to be observed and performed.” Amendment §3(A).

Defendants maintain that Schreiber pledged and assigned his membership interest in the ownership of the residential condominium units in the Property consideration for the establishment of the Security Deposit.

Amendment §3(F) provides that “the Security Deposit shall be drawn down on a monthly basis in an amount equal to the Fixed Minimum Rent and recurring items of additional rent. When the Security Deposit is equal to [\$400,000] or less, Tenant shall immediately replenish the Security Deposit to an amount equal to [\$1,000,000.00], unless the Lease has been assigned to a ‘Qualified Tenant.’ Tenant’s failure to replenish the

Security Deposit to [\$1,000,000.00] shall be deemed an immediate default under the Lease and [Plaintiff] shall be entitled to all remedies available under the Lease and at law and in equity.”

Schreiber executed two guarantees dated June 18, 2015, one in his individual capacity and the other on behalf of Waterbridge, guaranteeing the Lease (“Guarantees”).

Specifically, the Guarantees provide that the Defendants

absolutely, unconditionally and irrevocably guarantees to [Plaintiff] the full and prompt payment of all Fixed Minimum Rent additional rent and all other charges and sums (including, without limitation, [Plaintiff’s] **legal expenses and attorneys’ fees** and disbursements) payable by Tenant under the Lease, and the full and timely performance and observance of all the covenants, terms, conditions and agreements of the Lease provided to be performed and observed by Tenant (collectively, the “Obligations”), all such Obligations of [Defendants] being retroactive to the date of the Lease. [Defendants] hereby covenant[] and agree[] to and with [Plaintiff] that if a default shall occur at any time under the Lease, [Defendants] shall and will, without notice or demand, forthwith pay and faithfully perform and fulfill all of the Obligations, including but not limited to the payment to Landlord, without delay, of all Fixed Minimum Rent additional rent and other charges and sums, and any arrears thereof, payable by Tenant under the Lease, and will forthwith pay to [Plaintiff] all damages, costs and expenses that may arise in consequence of any default by Tenant under the Lease, **including, without limitation, all reasonable attorneys’ fees** and disbursements incurred by [Plaintiff] or caused by any such default or arising from the enforcement of this Guaranty.

(emphasis added).

It is undisputed that: on or before March 16, 2017, the Security Deposit was drawn down to an amount less than \$400,000; Plaintiff notified Tenant that it was in default under the Lease by letter dated March 16, 2017 and, thereafter, Tenant failed to replenish the Security Deposit or pay Rent; and Plaintiff sent Tenant a notice dated March 6, 2018 terminating the Lease because Tenant failed to timely cure its default.

Plaintiff commenced this action against Defendants, as Tenant's guarantors, and the complaint asserts the following five causes of action: (1) damages in the amount of \$952,159.30 under the Guarantees, representing unpaid Rent; (2) damages in the amount of \$404,940.50 under the Guarantees, representing past deficiencies under the Lease; (3) either a declaration that Defendants are liable for deficiencies arising between August 1, 2018 and the date judgment is entered or liquidated damages in the amount of \$5,500,000 under the Guarantees; (4) attorneys' fees and the costs of enforcing the Guarantees; and (5) specific performance under the Guarantees, directing Defendants to deliver to certain financial statements to Plaintiff.

Defendants collectively filed a verified answer, asserting nine affirmative defenses and a counterclaim for breach of contract and tortious interference. Plaintiff filed a verified reply to Defendants' counterclaim, in which it denied the substantive allegations set forth in, and asserted affirmative defenses to, the counterclaim.

In this motion, Plaintiff seeks, *inter alia*: (1) partial summary judgment on the first two causes of action and to sever these causes of action from the remaining causes of action; and (2) to dismiss Defendants' ninth affirmative defense and first counterclaim (hereinafter, the ninth affirmative defense and counterclaim are collectively referred to as the "counterclaim").

In the ninth affirmative defense and first counterclaim, Defendants allege that the Property was developed as a mixed-use condominium project (the “Project”), which was allegedly financed, in part, by Plaintiff’s affiliates, by mortgages secured by the Property.

In his affidavit submitted in opposition to this motion, Schreiber maintains that he had an alleged oral partnership relationship with non-party Acadia Realty Trust (“Acadia”), Plaintiff’s affiliate. Allegedly, Schreiber and Acadia were former partners in the ownership of the Property, and that in furtherance of this purported partnership, Schreiber created Tenant to execute the master lease and he provided personal guarantees.

Defendants maintain that Schreiber executed the Guarantees, against the advice of his attorneys and accountant, because of his partnership with Acadia, “who [he] trusted to act fairly and reasonably in the disposition of the Master Lease and guaranties.”

Schreiber Aff. ¶8. Defendants argue that, because of this alleged partnership, Plaintiff owed Defendants a duty, “the breach of which gives rise to the counterclaims,” which sound in breach of contract and tortious interference.

Discussion

The party moving for summary judgment “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case,” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (citations omitted). Once the movant has established its *prima facie* entitlement to summary judgment, the burden shifts to the opposing party “to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact.” *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986) (citations omitted).

In the breach of contract portion of the counterclaim, Defendants allege that, in or around the fall of 2016, the parties entered into an agreement to terminate the Lease and Guarantees, based upon a release of the security deposit and a \$600,000 payment, and that this agreement is reflected by the proposed second amendment to the Lease (“Second Amendment”). Plaintiff allegedly: delayed execution of the Second Amendment and continued to draw down the rent from the Security Deposit; reneged on this agreement and refused to execute the Second Amendment; and demanded additional payments in March 2017.

Plaintiff argues that the breach of contract portion of the counterclaim should be dismissed because the parties never signed the Second Amendment and therefore are not bound by it. Moreover, Plaintiff maintains that ¶11 of the Second Amendment clearly establishes the parties’ intent to not create a binding agreement until Plaintiff signed and delivered the Second Amendment to the Tenant.

¶11 of the Second Amendment contains the following provision: “No Offer. The submission of this Amendment to Tenant shall not be construed as an offer, nor shall Tenant have any rights with respect hereto, unless and until Landlord shall execute a copy of this Amendment and unconditionally deliver the same to Tenant.” The language of the Second Amendment expressly indicates an intent not to be bound until Plaintiff executed and delivered it to the Tenant, which Plaintiff indisputably never did.

In opposition, Defendants do not deny that the Second Amendment was not executed and have failed to raise an issue of fact as to part performance between the parties. Because the Second Amendment was never executed and Defendants do not allege facts showing that either party performed thereunder, it was not binding on the parties, and the portion of Defendants' counterclaim sounding in breach of contract must be dismissed. *See ADCO Elec. Corp. v HRH Const., LLC*, 63 AD3d 653, 654 (2d Dept 2009) quoting *Scheck v Francis*, 26 NY2d 466, 469-70 (1970)) (“[I]f the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed.”) (additional citations omitted); *see also Metro. Steel Indus., Inc. v Citnalta Const. Corp.*, 302 AD2d 233, 233 (1st Dept 2003).

As to the remaining portion of the counterclaim for tortious interference, which Defendants maintain arises out of a breach of duty owed to Defendants, Defendants have failed to raise any questions of fact as to the existence of a special or fiduciary relationship between the parties. Defendants' counterclaim merely describes “an arms-length business relationship” which “does not give rise to a fiduciary obligation.” *WIT Holding Corp. v Klein*, 282 AD2d 527, 529 (2d Dept 2001) (citation omitted); *see also V. Ponte and Sons, Inc. v Am. Fibers Intern.*, 222 AD2d 271, 271 (1st Dept 1995) (“The counterclaim sounding in breach of fiduciary duty was properly rejected, as defendants have pleaded only an arm's length business transaction without special circumstances which might give rise to a fiduciary relationship.”) (citation omitted).

Because the pleadings and the record establish that no special duty is owed by Plaintiff to Defendants, the tortious interference counterclaim purportedly arising out of this duty is insufficient as a matter of law and must be dismissed.

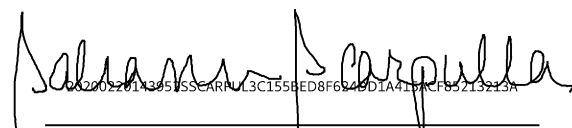
Finally, as per my statements on the record, the portion of Plaintiff’s motion for partial summary judgment on the first two causes of action and to sever these causes of action from the remaining causes of action is denied at this time to preserve judicial economy, to avoid having to enter multiple judgments, and to avoid the incurrence of duplicative attorneys’ fees.

In accordance with the foregoing, it is

ORDERED that plaintiff 152-154 Spring Street Retail LLC’s motion for partial summary judgment is granted solely to the extent that the ninth affirmative defense and first counterclaim is dismissed and is otherwise denied without prejudice.

This constitutes the decision and order of the Court.

2/20/20
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE