100-106 LLC v Cafe Water Inc.
2020 NY Slip Op 33041(U)
September 15, 2020
Supreme Court, New York County
Docket Number: 154944/2019
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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100-106 LLC,

Plaintiff,

- v -

CAFE WATER INC. and HYON YI,

Defendants.

----------X

INDEX NO. 154944/2019

MOTION DATE 03/11/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31

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

ORDER

Upon the foregoing documents, it is hereby

ORDERED that defendants' cross motion for discovery is denied; and

It appearing to the court that plaintiff is entitled to judgment on liability and that the only triable issues of fact arising on plaintiff's motion for summary judgment relate to the amount of damages to which plaintiff is entitled, it is

ORDERED that the motion is granted with regard to liability; and it is further

ORDERED that a trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon

counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with such Clerk a note of issue and statement of readiness and shall pay the fee therefor, and such Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

DECISION

In this motion (sequence number 002; NYSCEF Doc. No. 16), plaintiff 100-106 LLC seeks an order of the court striking the first through eleventh affirmative defenses from the answer of defendants Café Water, Inc. (Tenant) and its president Hyon S. Yi (Guarantor) pursuant to CPLR 3211 (b), and granting plaintiff summary judgment pursuant to CPLR 3212. Defendants filed a belated cross motion (NYSCEF Doc. No. 23) for an order directing the parties to conduct discovery in this action. For the reasons stated below, defendants' cross motion shall be denied, and plaintiff's motion shall be granted.

Background and Procedural History

The following allegations, unless otherwise indicated, are derived primarily from plaintiff's complaint (Complaint; NYSCEF Doc. No. 1) and the affirmation of plaintiff's counsel in support of the instant motion (Plf. Aff.; NYSCEF Doc. No. 17). Plaintiff is the owner and landlord of the building located at 519-521 Sixth Avenue, New York City (Complaint, ¶ 4).

Pursuant to an assignment and assumption of lease dated June 10, 2016 (Lease) between Jackies Fine Food Corp. (the predecessor tenant), as assignor, and Tenant, as assignee, Tenant leased the subject premises from plaintiff (id., ¶ 5). Under the Lease, Tenant was obligated, among other things, to pay fixed rent and additional rent to plaintiff (id., ¶¶ 6-8). Pursuant to the "Rider" to the Lease, as amended by the "Modification of Lease," Guarantor assumed the obligations of the so-called "Original Guarantors" under the Lease, guaranteeing that in the event Tenant fails to pay "Fixed Rent, Additional Rent, or other charges set forth in the Lease," Guarantor shall pay such amounts, and "shall be liable to the Landlord for the unamortized cost of the Lease in addition to any other liability" (id., ¶¶ 9-11).

By petition dated January 15, 2019, Plaintiff commenced a nonpayment proceeding against Tenant in the non-housing part of the Civil Court, New York County, and the amount sued for was

$62,570.31 of unpaid rent and additional rent through January 31, 2019 (id., ¶ 12). Plaintiff obtained a judgment of possession along with a warrant of eviction, and on March 19, 2019, the warrant was executed and Tenant was evicted (id., ¶ 13). "Various rent and additional rent" have accrued since, and the amount due as of May 31, 2019 was $181,281.13 (id., ¶ 12)

On or about May 15, 2019, plaintiff commenced the instant action against defendants in this court, and the Complaint asserts five causes of action: first and second (breach of contract against Tenant and Guarantor, respectively) in the amount of $181,281.13; third and fourth (attorneys' fees against Tenant and Guarantor, respectively) in an amount to be determined by the court; and fifth ("unamortized cost of the Lease" against Guarantor) in the amount of $131,277.79 (id., ¶¶ 17-40).

Defendants filed a pre-answer motion to dismiss the Complaint (sequence number 1; NYSCEF Doc. No. 4) along with an affirmation of counsel in support (NYSCEF Doc. No. 5). By decision dated October 8, 2019 (NYSCEF Doc. No. 12), this court denied the motion to dismiss, and defendants were ordered to serve an answer to the Complaint within 20 days (Plf. Aff., ¶ 11). On November 7, 2019, defendants served a "late, unverified answer" (id., ¶ 12). Pursuant to the instant motion, plaintiff

moves to strike the affirmative defenses in the answer, for summary judgment in its favor and for other relief.

Discussion

Defendants' Cross Motion

Plaintiff's instant motion was filed on January 17, 2020, and any opposition papers were to be served seven days before the return date of the motion, which was originally returnable on February 4, 2020 (NYSCEF Doc. No. 16). At the request of defendants, this court adjourned the return date of the motion to February 25, 2020 (NYSCEF Doc. No. 27, ¶ 3). On February 24, 2020, defendants' counsel (Michael Kimm, Esq.) filed a notice of cross motion for discovery (NYSCEF Doc. No. 23), and in support of the cross motion and in opposition to plaintiff's instant motion, Guarantor filed his affidavit of even date (Guarantor Affidavit; NYSCEF Doc. No. 24) and asserted, among other things, that "I do not understand the nature of this action;" that Tenant "was never provided with any notice of eviction of formal legal proceedings in [the] Tenancy Court in New York City;" and that "had I received [the eviction papers in March 2019] I would have provided those immediately to [Michael Kimm, Esq.] who has represented my business since before March 2019" (Guarantor Affidavit, ¶ 3). Guarantor also asserted that, "in addition to requesting that the Court direct discovery, I also request that the Court direct plaintiff to provide me with access to the

[leased premises] to retrieve third-party properties . . . and various articles of personal effects" (id., ¶ 6). In response to defendants' cross motion, plaintiff filed a notice, dated February 25, 2019, indicating its rejection of the cross motion as untimely pursuant to CPLR 2214 (b) (NYSCEF Doc. No. 26).

Separately, in opposition to the cross motion and in reply to the assertions made in the Guarantor Affidavit, plaintiff, by its counsel (Brian Haberly, Esq.), stated in an affirmation dated March 9, 2020 (Plf. Opp. Reply; NYSCEF Doc. No. 30), that Guarantor's assertion that no petition for eviction papers were filed or served upon Tenant "is baseless and false," because "I am the attorney who prepared and signed these papers and I am personally familiar with" the nonpayment proceedings against the Tenant in the Civil Court (Plf. Opp. Reply, ¶¶ 10-11). As evidence in support of such statement, plaintiff attached (as exhibits) to the affirmation, copies of the verified petition, the rent demand and the affidavits of filing and service of same (exhibits G and H), along with copies of plaintiff's request for issuance by the Civil Court of a final order and a warrant of eviction (exhibit I) (id., ¶ 11; referencing the exhibits). Plaintiff also stated, among other things, that "on March 19, 2019, more than a year ago, the warrant of eviction was executed and Tenant was evicted from the commercial space at the Building," and since then, the leased premises "has already

[been] relet to a new tenant as of August 1, 2019" (id., ¶¶ 12, 15). Plaintiff further stated that, Guarantor's assertion that there was "third party property" in the premises (a leased ATM) is "totally frivolous," because no third party has sought property from the premises nor have defendants provided any "documentary proof of any type" that an alleged "third party claim would somehow provide an offset against the Plaintiff's claims for a money judgment against Defendants" (id., ¶ 16).

In light of the foregoing statements, and the attached exhibits consisting of copies of plaintiff's filed court documents, defendants' assertions -- that "we were not shown any judgment of possession;" that "there was no city marshal, there was no proceeding that complied with what I had understood to be required procedures before eviction could be completed;" and that "these facts [must] be permitted to be developed in discovery" (Guarantor Affidavit, ¶ 4) -- are unavailing.

Moreover, in opposition to defendants' belated cross motion, plaintiff argues that defendants' counsel "failed to submit an affirmation in [support of] the cross motion;" that the untimely cross motion "failed to make even one legal argument for its non-existent claims;" that defendants "are merely trying to delay the hearing on this summary judgment motion" by filing the cross motion; and that defendants "failed to identify any specific item to be produced in discovery" other

than "facts to be developed in discovery" (Pf. Opp. Reply, ¶¶ 17 and 24-27). These arguments are persuasive and, thus, the cross motion is denied.

Defendants' Affirmative Defenses

As noted above, after their motion to dismiss the Complaint was denied by the court, defendants filed an unverified answer (NYSCEF Doc. No. 14) asserting 11 affirmative defenses, each of which is comprised of a short sentence. By the instant motion, plaintiffs seeks an order striking each of the affirmative defenses pursuant to CPLR 3211 (b), which states that "a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit."

As a preliminary matter, plaintiff argues that the third (lack of jurisdiction) and fourth (defective service of process) affirmative defenses must be stricken because since defendants made a pre-answer motion to dismiss the Complaint without raising therein any objection to this court's alleged lack of jurisdiction or defective service of process (Plf. Aff., ¶¶ 13-14), defendant waived such defenses. This court concurs with plaintiff's argument.

Next, plaintiff argues that each of the remaining affirmative defenses is "no more than a very short sentence, without any specifics or details of any kind," and as such, these affirmative defenses should be stricken because they are

"not plead with particularity as required by CPLR 3013," and are thus subject to dismissal pursuant to CPLR 3211 (b) (id., ¶¶ 15-18).

On a motion to dismiss affirmative defenses pursuant to CPLR 3211 (b), the moving party bears the burden of demonstrating that the defenses are without merit as a matter of law (Vita v New York Waste Servs., LLC, 34 AD3d 559, 559 [2d Dept 2006]). On such a motion, affirmative defenses that consist of "bare legal conclusions" without supporting facts are stricken (Carlyle, LLC v Beekman Garage LLC, 133 AD3d 510, 511 [1st Dept 2015]; Robbins v Growney, 229 AD2d 356, 358 [1st Dept 1996]).

Here, all of defendants' one-sentenced affirmative defenses are mere legal conclusions without supporting facts. For example, the second ("plaintiff's antecedent breaches precludes relief"), sixth ("waiver precludes relief"), seventh ("estoppel precludes relief"), ninth ("plaintiff's failure to satisfy conditions precedent precludes relief"), and eleventh ("plaintiff's breach of one or more covenants in the lease precludes relief") affirmative defenses all fit within the category of "bare legal conclusions." More importantly, in the face of plaintiff's instant motion to strike these affirmative defenses, defendants' counsel failed to file any response to the motion so as to provide supporting facts for such defenses that

are any more than bare legal conclusions. Such failure is fatal and, accordingly, these affirmative defenses are stricken as a matter of law.

Summary Judgment Relief

As noted above, except for the third and fourth causes of action seeking to recover attorneys' fees against defendants in an amount to be determined by the court, the Complaint's remaining causes of action (first, second and fifth) seek to recover itemized sums of money from defendants on breach of contract and guaranty causes of action. In this motion, plaintiff requests an award of summary judgment in its favor on such causes of action.

In a summary judgment motion, the movant 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 (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). If the movant fails this showing, the motion should be denied (id.). However, if this showing is made, the burden then shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action (id.).

Furthermore, in weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion" (*Martin v Briggs*, 235 AD2d 192, 196

[1st Dept 1997]), and the motion should be denied if there is any doubt about the existence of a material issue of fact (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012]).

By the instant motion, plaintiff asserts that it is entitled to "a money judgment" against defendants "for additional rent in the sum certain amount of $251,395.92, along with the additional sum certain of $131,277.78 against just the Guarantor representing the unamortized cost of the Lease" (Plf. Aff., ¶ 28), and that it is "currently reserving the claims for legal fees" against defendants, pending a hearing to determine the amount owed (id., ¶ 29). In further support of the relief sought, plaintiff submitted an affidavit of Andrew Duell, the president of Morgan Holding Capital Corporation, the agent and signatory for plaintiff (Duell Aff.; NYSCEF Doc. No. 18), along with various exhibits (exhibits A to F [including the Lease, the Rider, the Modification of Lease, the Assignment and Assumption of Lease, and damage calculations]; NYSCEF Doc. No. 19).

In connection with the causes of action in the Complaint, Duell explained the liability of defendants under the Lease/Rider (exhibits D and E), and the relationship of the foregoing with other documents (Duell Aff., ¶ ¶ 7-14; referencing exhibits). Duell then explained the amount sued for in the petition filed in the non-payment proceedings against Tenant, and the rent amount plaintiff was able to relet the

premises to a new tenant at a significantly lower rate after Tenant's eviction (id., ¶ ¶ 15-16). Duell also explained the "various rent and additional rent" that have accrued through January 31, 2020, and the calculation of various amounts owed by defendants to plaintiff which are reflected in an annexed ledger (*id.*, ¶ 17; referencing exhibit F [calculation of damages]). Duell further explained the computation of Guarantor's liability to plaintiff under the long-term Lease in connection with the "unamortized cost of the Lease" (id., ¶¶ 19-22).

Based on the foregoing, plaintiff has presented a prima facie case for the instant summary judgment motion with respect to liability only, by tendering sufficient evidence in support thereof. In opposing the motion, defendants only submitted the affidavit of Guarantor, who stated, in relevant part, that "I do not understand the nature of this action but with the assistance of my attorney [Michael Kimm, Esq.] who is fluent bilingual I came to understand . . . this lawsuit for money" (Guarantor Affidavit, ¶ 3).

It is hornbook law that the inability to understand English, without more, is no defense to the enforceability of a guaranty. See Maines Paper and Food Service Inc. v Adel, 256 AD2d 760, 761 (3rd Dept. 1998).

Defense counsel's defense of this action lacks rigor, and yet this court must strive to render justice with fairness under

these circumstances (see generally, Doody v Gottshall, 31 Misc3d 1240[A], 2010 NY Slip Op 52404[U], Exhibit A [Sup Ct, Monroe County 2010] [court has the inherent authority to protect the integrity of the adjudication process, and fairness of the adversary system depends on the assumption that "trial lawyers temper zealous advocacy" of their client's cause with an "objective assessment of its merits" (internal citations omitted)]; 22 NYCRR 700.5 [a] [the administration of justice requires a judge to "safeguard the rights of the parties and the interests of the public"] [Obligations of the Judge]).

Pursuant to CPLR 3212(c), there must be a trial assessing damages, as plaintiff's evidence does not prima facie establish the liquidated damages amounts, including, but not limited to, ongoing rent, costs of reletting the premises, if any, and reasonable attorneys' fees. See Lloyd v Imperial Auto Collision, Inc., 120 AD2d 354 (1st Dept 1986).

9/15/2020
DATE

DEBRA A. JAMES, J.S.C.

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