480 Park Ave. Corp. v Raffaele Caruso SPA
2020 NY Slip Op 33881(U)
November 20, 2020
Supreme Court, New York County
Docket Number: 152394/2018
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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480 PARK AVENUE CORP.

Plaintiff,

- v -

RAFFAELE CARUSO SPA,

Defendant.

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INDEX NO. 152394/2018

MOTION DATE 02/05/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 76, 77, 78, 79, 80, 82

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, plaintiff 480 Park Avenue Corporation (Landlord) moves pursuant to CPLR 3212, seeking an order granting summary judgment against defendant Raffaele Caruso SPA (Caruso). Based on a Good Guy Guaranty (Guaranty), plaintiff seeks $537,665.62 in rent and additional rent, 18% interest per annum for each year the Guaranty is not paid, and attorney's fees and other expenses that the Court deems just and proper.

Plaintiff is a New York corporation that owns the premises at 480 Park Avenue in the County, City and State of New York and was the Landlord of defendant's subsidiary Nabucco LLC d/b/a Caruso (Nabucco). A commercial lease (Lease) was executed on March 10, 2014 between the plaintiff and Nabucco.[1] Contemporaneously, Nabucco's parent company Caruso entered into the Guaranty with plaintiff, which among other things, obligates Caruso "to pay all fixed rent and additional rent due and owing under the Lease" (NYSCEF Doc. No. 5, ¶ 4A; see NYSCEF Doc. No. 52, p. 52, Art. 29.1).

[1] The Court also presumes the commencement date for taking possession of the premises is on said date.

As of October 1, 2017, Nabucco had rental arrears of $859,884.78. The plaintiff on September 14, 2017 drew down the entire letter of credit (i.e. $1,100,000), $700,000 of which was applied to the rent arrears on October 4, 2017, while the remaining $400,000 was held as an alleged security deposit. On or around October 26, 2017, plaintiff served Nabucco with a rent demand to either pay $170,844.72 or surrender the premises. In November 2017, plaintiff initiated a proceeding in Part 52 of the Civil Court of the City of New York, New York County (Civil Court) to collect the remaining monies due and owing under the Lease (the L&T nonpayment proceeding).[2] During the nonpayment proceedings, Nabucco remained in possession of the premises up until January 16, 2018. In the Civil Court proceeding before the Honorable Louis L. Nock, plaintiff was awarded a monetary judgment for $978,095.46 (see NYSCEF Doc. Nos. 64-65).

Plaintiff commenced this action by filing a motion for summary judgment in lieu of complaint on March 16, 2018 to seek enforcement of the Guaranty to collect the remaining rental arrears. This Court on May 22, 2019 denied the motion.[3]

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008] [internal quotation marks and citation omitted]). "[A] motion should not be granted where the

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[2] 480 Park Avenue Corp. v Nabucco LLC d/b/a Caruso, Index Number: LT-080610-17/NY. Judgment awarded 05/18/2018 (see NYSCEF Doc. No. 65).

[3] In the instant matter, the $537,665.62 that plaintiff seeks is a portion of the Civil Court's award for $978,005.46.

facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

"A prima facie right to recover under a guaranty agreement is established by showing the execution thereof and a failure to pay in accordance therewith" (*Samsung Am., Inc. v Noah*, 209 AD2d 367, 367 [1st Dept 1994]). "On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). When a guaranty provides that a guarantor agrees that their "liability" will be "absolute and unconditional irrespective of [...] any lack of validity or enforceability of the agreement [...] or [...] any other circumstance which might otherwise constitute a defense available," a guarantor will be "forceclose[d from] challeng[ing ...] the enforceability and validity of the documents which establish [a guarantor's] liability" or any "possible defense [as to] liability" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 494 [2015]).

In support of its motion, plaintiff submits the Bornstein affidavit, attesting to the outstanding debt and nonpayment (*see* NYSCEF Doc. No. 48). Plaintiff also submits the Guaranty, which states as follows at paragraph 4 A:

> "Guarantor absolutely, irrevocably and unconditionally guarantees to Landlord the punctual payment, performance and fulfillment of all of the Obligations and hereby fully indemnifies and holds Landlord harmless from and against any cost, claim, liability, damage or expense (including but not limited to reasonable attorneys 'fees [...] which Landlord may incur in the event Guarantor does not punctually pay, perform and/or fulfill all of the Obligations"

(NYSCEF Doc. No. 49, Guaranty). Therefore, plaintiff has met their prima facie burden for summary judgment as to liability.

Defendant does not contest its liability, but only the measure of damages. It asserts two arguments in its defense: (1) plaintiff was not entitled to hold the remaining $400,000 from the letter of credit as security but was instead supposed to apply it to the rent arrears; and (2) based on this error, and other separate inaccurate calculations, the fees and taxes owed are drastically lower.

While the parties agree that defendant cannot assert any independent defense(s) based on the Guaranty, defendant can assert defenses or arguments that are available to Nabucco (see NYSCEF Doc. No. 49, Guaranty ¶ 12).

In this regard, plaintiff asserts that both of defendant's arguments on the amount of damages were necessarily decided in the L&T nonpayment proceeding against Nabucco and are therefore precluded in this action based on the doctrine of collateral estoppel.

> "Collateral estoppel applies when (1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits"

(*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 201 [1st Dept 2011]). "[T]he proponent of collateral estoppel has the burden of demonstrating that the issue in question is identical and decisive, it is the opponent's burden to show the absence of a full and fair opportunity to litigate the issue in the prior determination" (*id.*; *see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990] [collateral estoppel can prohibit "a party, or one in privity with a party" from "relitigate[ing] an issue decided against it" in a prior proceeding]).[4] "The party seeking the

[4] (*see e.g. Buechel*, 97 NY2d 295, 304 [2001] ["[P]rivity is an amorphous concept not easy of application ... and 'includes those [...] who control an action although not formal parties to it, [and] those whose interests are represented by a party to the action"] [internal quotation marks omitted]; *see e.g. Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334, 335 [1st Dept 2006] [privity will bind a non-formal party in a suit if there is an element of control and their interest was represented by a formal party in the earlier action]). Here, Caruso admits in its opposition papers that Nabucco was established for the purpose of insulating Caruso from liability beyond what Caruso had guaranteed (*see* NYSCEF Doc. No.

benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination" (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 456 [1985]).

Plaintiff contends that the following arguments "were previously raised by [Nabucco] in the Nonpayment Proceeding and rejected by the Civil Court": that "(a) the amounts sought should be reduced by the remainder of the Letter of Credit held by Landlord; and (b) the rent arrears sought are in dispute" (NYSCEF Doc. No. 47 at ¶ 56 [emphasis removed]). In support, plaintiff cites and submits Nabucco's opposition in Civil Court (NYSCEF Doc. No. 63) and the Civil Court decision and order dated May 18, 2018 (NYSCEF Doc. No. 64).

The reasoning of the Civil Court decision is a single sentence that cites paragraph 3.4(A) of the Lease, which states: "Notwithstanding anything in this Lease to the contrary, Landlord may draw down on the Letter of Credit to the extent required for the payment of any amounts owed by Tenant pursuant to the first sentence of this Section 3.4 without being obligated to give Tenant any prior notice that such amounts are due" (NYSCEF Doc. No. 62).

The Civil Court interpreted this and stated that the sentence "clearly permits petitioner the discretion to either draw down on the Letter of Credit or pursue a judgment for arrears as petitioner has done in this proceeding" (*id.*).

While this Court disagrees with that interpretation, as the sentence does not explicitly state that Landlord has that option, it is nonetheless true, from the Lease as a whole, that the Landlord may pursue a judgment for arrears or "may draw" on the letter of credit. However, the issue in this case goes a step further: if plaintiff drew on the line of credit, is it permitted to apply a portion of the funds to arrears and keep a portion as security? Or must it apply the whole

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72, Opp. papers, ¶ 17 & 25). Moreover, there is a parent-subsidiary structure as Nabucco is doing business as Caruso. Therefore, the Court presumes privity exists between Nabucco and Caruso.

amount drawn to satisfy the outstanding amount? That issue is not addressed in the decision and order of the Civil Court. Moreover, the fact that plaintiff (1) drew from the letter of credit; and (2) held part of it as security, first appeared in plaintiff's supplemental affirmation — *after* the parties had submitted moving papers, opposition papers, and reply papers (see NYSCEF Doc. No. 75) — to which defendant had no opportunity to formally respond. Defendant's opposition papers simply referred to the letter of credit as an available remedy for plaintiff to satisfy the arrears, and argued that plaintiff has not explained whether it had, in fact, used that remedy before coming to court to pursue a monetary judgment (NYSCEF Doc. No. 63). Under these circumstances, it cannot be said that the issues were identical. Even if they were, it can hardly be said that the parties had a full and fair opportunity to litigate them.

In considering defendant's arguments regarding the letter of credit, the Court finds that the Lease does not permit plaintiff to draw from the letter of credit and hold any portion as security.[5] Accordingly, that amount should have been applied to the outstanding arrears and the determination of the amount due to plaintiff shall be referred to a Judicial Hearing Officer (JHO) or Special Referee to calculate the rent and additional rent less the portion of the letter of credit held as security. The additional rent shall not include any interest on the outstanding arrears that plaintiff would not have incurred had it applied the full credit when drawn. Arguments and proof concerning taxes and other items of additional rent shall be presented to the JHO or Referee to compute.

As for that branch of plaintiff's motion for attorneys' fees, the Court finds that the Guaranty explicitly entitles plaintiff to attorneys' fees for this action to enforce the Guaranty according to paragraphs 4 and 7. Plaintiff also seeks attorneys' fees for the L&T nonpayment

[5] Except as set forth in paragraph 29.1(c), involving a non-renewal notice and a replacement letter of credit, which is not applicable here.

proceeding. As paragraph 3 of the Guaranty defines obligations as those accruing "under the Lease up to and including the Surrender Date," plaintiff would be entitled to attorneys' fees incurred from commencement of the L&T proceeding through January 16, 2018.

Accordingly, it is hereby ORDERED that the motion is granted in part as to liability; and it is further

ORDERED that a JHO or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of calculating damages (rent and additional rent) under the Guaranty, consistent with this order as it pertains to the letter of credit;

(2) the issue of the amount of attorneys' fees owed to plaintiff for services rendered in this action and the L&T proceeding (only through January 16, 2018 as discussed herein); and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) 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 "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-

401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) 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 plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the referenced hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon.

11/20/2020
DATE

ALEXANDER M. TISCH, 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