

FC 80 Dekalb Assoc., LLC v Dekalb Bagels LLC
2021 NY Slip Op 31733(U)
May 21, 2021
Supreme Court, New York County
Docket Number: 650230/2021
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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FC 80 DEKALB ASSOCIATES, LLC,

Plaintiff,

- v -

DEKALB BAGELS LLC D/B/A BERGEN BAGELS, ALAN
PHILIPS

Defendant.

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INDEX NO. 650230/2021

MOTION DATE 05/17/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25

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

The motion by plaintiff for summary judgment is granted.

Background

Plaintiff is the owner of a building located at 80 Dekalb in Brooklyn. Defendant Dekalb Bagels LLC (“Tenant”) entered into a lease in November 2011 that ends on May 31, 2021. Defendant Philips (“Guarantor”) signed a guaranty in connection with the lease in which he personally guaranteed the Tenant’s lease obligations.

Plaintiff contends that the Tenant vacated the premises prior to the expiration of the lease and, at the time the Tenant left, it owed rent to plaintiff. It moves for summary judgment against the Tenant and the Guarantor.

In opposition, defendants claim that plaintiff has not met its prima facie burden for summary judgment. They also insist there is an issue of fact with respect to the Guarantor’s potential liability for rent that was incurred after the Tenant surrendered the premises.

Defendants question the admissibility of the statements included in the affidavit submitted by plaintiff in support of its motion and argue the instant motion is premature.

In reply, plaintiff contends that defendants presented only vague and unsupported arguments in opposition. It claims that the Guarantor's obligations were not extinguished upon the Tenant's vacatur of the premises because there was rent due and owing at the time of the surrender. Plaintiff maintains that discovery is not necessary and that it has established its prima facie case for summary judgment.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*,

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants the motion. As an initial matter, the Court finds that plaintiff met its prima facie burden for summary judgment with the affidavit of its general counsel (NYSCEF Doc. No. 11). Ms. Seewald, as general counsel, was entitled to submit documents and make assertions from plaintiff's business records.

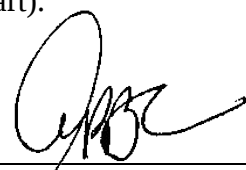
Moreover, plaintiff is correct that the Guarantor's liability is clear because there was rent owed when the Tenant left the premises. The guaranty defines the surrender date to include, among other requirements, that "All Rent due Landlord, irrespective of how the same may be denominated, has been paid to Landlord through the last day of the month in which Surrender Date is intended to occur" (NYSCEF Doc. No. 17). There is no dispute that the Tenant owed rent when it vacated the premises.

The Court also dismisses defendants' affirmative defenses as defendants did not offer any substantive opposition to that branch of plaintiff's motion.

Although the Court grants the motion with respect to liability, it is unable to award the amount plaintiff seeks. In its notice of motion, plaintiff demands a judgment for \$238,410.12 against the Tenant and \$121,334.61 against the Guarantor. But the affidavit in support (NYSCEF Doc. No. 11) only seeks \$198,581.92 against the Tenant. There is no explanation for this discrepancy in plaintiff's papers and the Court is unable to guess or speculate. An inquest is necessary to determine the amount due to plaintiff, including reasonable legal fees as provided by the lease.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted as to liability only, defendants' affirmative defenses are severed and dismissed, and plaintiff is directed to file a note of issue for an inquest to determine the amount due on or before May 28, 2021 (to be determined at a remote hearing to be scheduled by the clerk of this part).

<u>5/21/2021</u>			
DATE		ARLENE P. BLUTH, 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