25 W. 26th St., Inc. v HLC Wholesales Inc.
2022 NY Slip Op 32983(U)
September 6, 2022
Supreme Court, New York County
Docket Number: Index No. 653307/2019
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** *Justice* **PART** **38M**

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25 WEST 26TH STREET, INC.,

Plaintiff,

- v -

HLC WHOLESALES INC., d/b/a HLC WHOLESALE INC., and TIANXIA ZHAO,

Defendants.

---X

INDEX NO. 653307/2019

MOTION DATE 08/13/2020, 09/18/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 45, 46, 47, 48, 49, 50, and 51

were read on this motion for SUMMARY JUDGMENT BY DEFENDANTS.

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 52, 53, 54, 55, 56, and 57

were read on this motion for SUMMARY JUDGMENT BY PLAINTIFF.

LOUIS L. NOCK, J.

The parties' motions are consolidated for disposition.

Upon the foregoing documents, defendants' motion for summary judgment (motion seq. no. 001) is denied, and plaintiff's motion for summary judgment (motion seq. no. 002) is granted in part, per the following memorandum.

Background

In this action, plaintiff commercial landlord 25 West 26th Street, Inc. ("Landlord"), asserts two causes of action for breach of contract: breach of lease agreement (first cause of action) and breach of guaranty agreement (second cause of action) against defendants HLC Wholesales Inc., d/b/a HLC Wholesale Inc. ("Tenant"), and Tianxia Zhao ("Guarantor"), respectively.

Defendants assert five affirmative defenses and one counterclaim. The parties now each move for summary judgment.

Pursuant to a written lease agreement dated December 1, 2015, Landlord leased to Tenant the street level space and basement in the building located at 25 West 26th Street in Manhattan for a term of five years, from January 1, 2016, through December 31, 2020 (NYSCEF Doc. No. 19 at 1). Guarantor signed the lease as its guarantor, which lease sets forth the terms of the "good-guy" guaranty. Tenant was to use the premises "for the sale of phone accessories, electronics, and computers" (*id.* ¶ 2.01).

After nonpayment of rent began in April 2018: on July 10, 2018, Landlord and Tenant entered into a written stipulation filed in Part 52 of the Civil Court of the City of New York (*25 W. 26th St., Inc. v HLC Wholesales Inc.* [index No. 063872/2019] [Civ Ct NY County]) (NYSCEF Doc. No. 21). The stipulation states that Tenant must surrender possession of the premises by July 14, 2018; Landlord would keep Tenant's security deposit; and both sides released each other from all other claims. The failure of Tenant to vacate by July 14, 2018, would result in Tenant being responsible for outstanding rent for the balance of the lease term. This is the basis for this action, as Landlord alleges that it did not receive the keys from Tenant until August 2018, thereby rendering Tenant liable for all future accruing rents to the end of the lease term, which is December 31, 2020, aggregating, as of now, an alleged amount of $814,646.45. However, the term "surrender" is left undefined in the stipulation. The same is true of the lease, which simply provides in section 18.01, titled "End of Term": "Upon the expiration or other termination of the term, Tenant shall quit and surrender to Landlord the demised premises, broom clean, in good order and condition . . . ."

Landlord asserts that Tenant did not vacate the premises until the month following the July 2018 surrender deadline – in August 2018 (Complaint ¶ 11; *see also*, NYSCEF Doc. No. 29 [Affidavit of Landlord's Managing Agent] ¶ 15). Tenant correctly notes that the stipulation does not equate "surrender" with return of the keys, and attests, through Guarantor's affidavit (NYSCEF Doc. No. 56), that the premises were vacated on time and left in broom clean condition just as the lease had required in its "End of Term" provision. In addition, Guarantor attests that she called "the building super and management company in an attempt to return the keys, both before and after the July 14, 2018, deadline for surrender" as evidenced by telephone records which she submits to the court (*see*, NYSCEF Doc. No. 52 ¶ 8; NYSCEF Doc. No. 53).

Landlord's attorney implicitly acknowledged that Tenant vacated the premises in July 2018 through his email communication to defendants' attorney *on July 16, 2018*, lodging a complaint about the sufficiency of that vacatur (*see*, NYSCEF Doc. No. 22). But defendants took photographs of the vacated space on July 18, 2018, to be able to show that the premises were, in fact, left in broom clean condition (*see*, NYSCEF Doc. No. 52; NYSCEF Doc. No. 55). Guarantor attests that the building superintendent did not get back to her about the key-turnover until August 2018 (*see*, NYSCEF Doc. No. 52).

Defendant moves for summary judgment dismissing the complaint. Plaintiff moves for summary judgment on its rent claim for $814,646.45.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.,* 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a

trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Discussion

Defendants argue that the Civil Court stipulation is *res judicata,* barring the entirety of plaintiff's claims in this action. Application of the doctrine of *res judicata* requires that "once a claim is brought to a final conclusion, all other claims arising out the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Marinelli Assocs. v Helmsley-Noyes Co., Inc.*, 265 AD2d 1, 5 [1st Dept 2000])." Here, defendants argue that the July 10, 2018, stipulation filed in connection with the Civil Court proceeding between Landlord and Tenant is a final judgment involving the same claim against the same defendants (*see*, NYSCEF Doc. No. 15).

However, *res judicata* applies only when the court determining the summary proceeding would have jurisdiction over the claims brought in the second action or proceeding (*see, Rostant v Swersky,* 79 AD3d 456 [1st Dept 2010]; *Lukowsky v Shalit,* 110 AD2d 563 [1st Dept 1985]; *see also, Truppin v Cambridge Dev., LLC*, 2017 NY Slip Op 30249 [U] [Sup Ct NY County 2017]). The present action was not actually litigated in Civil Court, since "an action on a guaranty does not belong in a summary proceeding because the obligation owed under the guaranty is not classified as 'rent'" (*e.g., Tottenville Sq. LLC v Ledjim Corp*., 2010 NY Slip Op 31728 [U] [Sup Ct Richmond County 2010]). Guarantor was, accordingly, not a party to the Civil Court proceeding or the stipulation entered into between Landlord and Tenant in that proceeding (*see*, NYSCEF Doc. No. 21). Additionally, as Landlord asserts, Civil Court did not possess

jurisdiction over the present claims, because once the Civil Court proceeding concluded by way of stipulation, any monies owed under that stipulation are not classified as "rent," but as "contract damages" (*Ross Realty v V&A Fabricators, Inc.*, 42 AD3d 246, 249 [2d Dept 2007]*; see also, 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528 [2014]). Since Civil Court did not have jurisdiction over the present claims, *res judicata*, strictly speaking, cannot apply.

In considering whether Landlord has made out a *prima facie* claim against Tenant for breach of the lease, the court must consider whether the Civil Court stipulation was violated. The stipulation provides that if Tenant "surrenders possession" of the premises in "broom clean" condition by July 14, 2018, then it will not be liable for rent accruing through the end of the lease term (NYSCEF Doc. No. 21 ¶¶ 1, 3). If Tenant did not do so, then the stipulation provides that Landlord "reserves its rights to the arrears and any amounts owned under the lease" (NYSCEF Doc. No. 21 ¶ 4).

Landlord claims that Tenant did not "surrender possession" of the premises because Tenant did not return the keys until August 2018. Tenant acknowledges that the keys were not returned until August 2018; however, it attests that it made several attempts to do so in a timely fashion by calling the building superintendent and management company – submitting copies of phone records in corroboration (*see*, NYSCEF Doc. No. 52 ¶¶ 8, 9; NYSCEF Doc. No. 53). Those records indicate that Tenant called three times on July 13th, twice on July 16th, twice on July 18th, and three times on July 20th, of which none were returned until August (*see, id.*). And, indeed, plaintiff's attorney's email communication to defendants' attorney on July 16th (NYSCEF Doc. 22) taking note of a vacatur at least at that point in time stands as relevant evidence of a vacatur prior to that date. Landlord remains silent as to this, except to say that

defendants "knew where Plaintiff's managing agent maintained a place of business" (NYSCEF Doc. No. 30 at 6).[1]

The Civil Court stipulation and the lease describe the premises as needing to be "broom clean" for surrender (NYSCEF Doc. No. 21 ¶ 3; NYSCEF Doc. No. 19 ¶ 18.01). Neither the Civil Court stipulation, nor the lease, requires a return of the keys on the day of vacatur of premises in order for the surrender to be considered a "surrender" within the meaning of the parties' material obligations toward one another as of the date of surrender.

Moreover, defendants have submitted photographs depicting the premises as broom clean. Landlord submits nothing to discredit such evidence, nor does it submit evidence that would contradict defendants' attestation and photographic evidence regarding broom clean conditions of the vacated premises.

Since it has not been definitively shown that the Civil Court stipulation was breached by Tenant, the court is unable to evaluate whether Landlord has made a *prima facie* case of breach of the lease. Thus, summary judgment for the plaintiff is impossible.

Defendants assert five affirmative defenses and one counterclaim (NYSCEF Doc. No. 3). The first two affirmative defenses rely on *res judicata*, which the court has disposed of hereinabove. Defendants' third affirmative defense of failure to state a cause of action is, by its nature, addressed only to the pleading; not to the evidence (*e.g., I.J.E. Constr. Corp. v Dollar Fed. Sav. & Loan Assn.*, 92 AD2d 525 [1st Dept 1983]). Viewing the complaint solely as an

[1] Landlord places reliance on certain language in the post-bench-trial decision of *Pacific Coast Silks LLC v 247 Realty LLC* (index No. 600505/2007, 2008 LEXIS 1819 [Sup Ct NY County July 21, 2008], *revd* 76 AD3d 167 [1st Dept 2010]), stating that "[a] key is the symbol of possession. . . . [S]urrender of the key by the tenant is evidence of an intent on its part to surrender possession" (*id.*, at *30). However, that decision seems to state thereafter that "the key is merely symbolic" and is not necessarily exclusive of "the actual delivery of possession" (*id.*). In any event, as the textual discussion herein observes, Tenant has submitted what it believes is credible photographic and phone record evidence that it made every diligent effort to return the keys after it vacated the premises in broom clean condition. That evidence is for the trier of fact to assess at trial.

instrument of pleading, without regard to whether its allegations can be proven, this court does not conclude that, if proven, the allegations do not state causes of action for breach of lease or breach of guaranty. Thus, the affirmative defense of failure to state a claim should be dismissed. This, of course, is distinct of whether, at trial, plaintiff will be able to prove that the Civil Court stipulation's vacatur provision was, in fact, breached.

The fourth affirmative defense asserts that Guarantor cannot be held liable for any of the claims, as her "Good Guy Guarantee lacks [c]onsideration," and the fifth affirmative defense states, "The Defendant not leaving is not [a] reason Plaintiff cannot find Tenants for their building, as it is in despair." As to this affirmative defense, Guarantor signed the lease, containing its "Good-Guy" Guaranty provision (*see*, NYSCEF Doc. No. 19). "[W]here one party agrees with another party that, if such party for a consideration performs a certain act or a third person, he will guarantee payment of the consideration by such person, the act specified is impliedly requested by the guarantor to be performed and, when performed, constitutes a consideration for the guaranty" (*Sun Oil Co. v Heller,* 248 NY 28 [1928]). Nothing exists to disturb that principle or obstruct its operation to find that the guaranty here was not supported by consideration.

The fifth affirmative defense, which dwells on Landlord's efforts, or lack thereof, to re-let the premises after Tenant's vacatur, is without merit, as there is no duty imposed on commercial landlords to mitigate damages by re-letting the premises (*see, Syndicate Bldg. Corp. v Lorber*, 128 AD2d 381 [1st Dept 1987]). In commercial leases, "a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages" (*Holy Props. Ltd., L.P. v Kenneth Cole Prods.*, 87 NY2d 130 [1995]).

Defendants' counterclaim seems to be a corollary to the fifth affirmative defense, just discussed above. It does not state a cause of action for the reason just stated.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's motion for summary judgment on the causes of action asserted in its complaint is denied; and it is further

ORDERED that the plaintiff's motion for summary judgment dismissing defendants' affirmative defenses is granted, and said defenses are dismissed; and it is further

ORDERED that the plaintiff's motion for summary judgment dismissing defendants' counterclaim is granted, and it is, therefore, dismissed; and it is further

ORDERED that a status conference will be held at the Courthouse, 111 Centre Street, Room 1166, New York, New York, on September 15, 2022, at 10:00 a.m.

This shall constitute the decision and order of the court.

ENTER:

9/6/2022				
DATE			LOUIS L. NOCK, J.S.C.	
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[X] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE