UD 31st St., LLC v Cast Iron Korean BBQ 2 Inc.
2022 NY Slip Op 34038(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 651219/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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UD 31ST STREET, LLC,

Plaintiff,

- v -

CAST IRON KOREAN BBQ 2 INC. FORMERLY KNOWN AS CAST IRON POT INC., and HYUN C PARK,

Defendants.

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INDEX NO. 651219/2020

MOTION DATE 08/12/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this breach of contract action, the plaintiff, UD 31st Street, LLC, owner of commercial premises at 23 West 31st Street in Manhattan (the premises), seeks to recover unpaid rent and additional rent from the defendants Cast Iron Korean BBQ 2, Inc. (the tenant), and Hyun C. Park (the guarantor) pursuant to a commercial lease (the lease) and a guaranty agreement (the guaranty) the defendants executed on October 24, 2017, and a stipulation of settlement (the settlement agreement) between the plaintiff and the tenant dated December 17, 2019. The tenant vacated the premises on December 24, 2019.

By decision and order dated March 8, 2021, the court granted the plaintiff's motion for summary judgment on the complaint and to dismiss the defendants' counterclaims to the extent it awarded the plaintiff judgment against the defendants, jointly and severally, in the sum of $391,928.00, plus statutory interest from December 24, 2019, and dismissed the defendants' counterclaims. The court otherwise denied the plaintiff's motion without prejudice. On June 13, 2022, the plaintiff filed the instant motion again pursuant to CPLR 3212 for summary judgment on the balance of its claims, those accruing after December 24, 2019, in the sum of $1,269,749.64, and an award of attorneys' fees. The defendants oppose the motion. The motion is granted to the extent provided herein.

While successive summary judgment motions are ordinarily prohibited, exceptions to the rule are permitted where sufficient cause for the subsequent motion exists. Sufficient cause may be shown where the subsequent motion corrects certain defects and its disposition enhances judicial efficiency. See Landmark Capital Investments, Inc. v Li-Shan Wang, 94 AD3d 418, 419 (1st Dept. 2012); Varsity Transit, Inc. v Board of Educ. of City of New York, 300 AD2d 38, 39 (1st Dept. 2002). Where, as here, the first motion for summary judgment was partly

denied without prejudice and the court identified particular deficiencies in connection with the first motion that "were such that they could have been explained or corrected in a subsequent motion," the court can properly exercise its discretion to entertain the subsequent motion. U.S. Bank Nat'l Ass'n as Tr. for Residential Asset Mortg. Prod., Inc., Mortg. Asset-Backed Pass-Through Certificates, Series 2005-EFC5 v Shaughnessy, 178 AD3d 1324, 1326 (3rd Dept. 2019). Further, since the defendants do not oppose the plaintiff's motion on the ground that it is an improper successive summary judgment motion, they do not claim any prejudice.

It is well settled that the movant on a summary judgment motion "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." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of the instant motion, the plaintiff submits, *inter alia*, the pleadings; an attorney's affirmation; the affidavit of Dennis Dart, the plaintiff's general corporate counsel; the subject ten-year term lease and guaranty agreement dated October 24, 2017, and signed by the defendants; the December 17, 2019, settlement agreement between the plaintiff and the tenant resolving a non-payment summary proceeding in the Civil Court of the City of New York, New York County, and an action brought by the tenant in this court in August 2019, captioned Cast Iron Pot v UD 31st Street, LLC, Index No. 654909/2019; a rent ledger showing base rental amounts and "violation fees" due from the tenant under the lease; three "OATH/ECB Violation Details" printouts from the New York City Department of Buildings (the DOB) attributable to violations and fines imposed against the subject premises during the tenant's occupancy; receipts showing that the plaintiff paid the fines imposed by the DOB; and the deposition transcript of the guarantor.

The plaintiff's submissions establish entitlement to relief on the remainder of the first cause of action of the complaint, seeking to recover rent arrears incurred under the lease after the tenant's surrender of the premises. It is well settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff'd 88 NY2d 716 (1996). Article 18 of the lease at issue here expressly provides that, in the event of any "default, reentry, expiration, or dispossession by summary proceedings or otherwise," the tenant is required to pay both rent amounts due at the time of vacatur and, as liquidated damages, "any deficiency between the rent [covenanted to be paid in the lease] and the net amount, if any, of the rents collected on account of [a] subsequent lease or leases of the [premises] for each month of the period which would otherwise have constituted the balance of the Term of [the] [l]ease." Pursuant to the

December 17, 2019, settlement agreement executed by the parties, the tenant would have been excused from paying rent in accordance with this provision "[u]pon…compliance with the terms of [the settlement] agreement." However, as the court previously determined in its decision and order dated March 8, 2021, the defendant failed to comply with the settlement agreement. Accordingly, as referenced in the settlement agreement, the plaintiff is entitled to "additional base rent that accrued since the surrender of the [p]remises, and any other charges collectible under the [l]ease that would have accrued." The plaintiff submits proof that $1,246,035.00 in base rent became due from the tenant between January 1, 2020, and June 1, 2022.

The plaintiff further contends that, pursuant to Article 3 and Article 19 of the lease, it is entitled to reimbursement from the tenant for money it paid to the DOB to cure violations issued in connection with alterations the tenant made to the premises. However, the plaintiff has not submitted proof sufficient to establish such entitlement. The DOB OATH/ECB Violation Details are devoid of any affirmative indication that the violations described were incurred due to the tenant's alterations. Nor does the plaintiff submit an affidavit of anyone with knowledge of the factual circumstances underlying the violations.

As to the balance of the second cause of action, the plaintiff's submissions demonstrate entitlement to additional relief against the guarantor inasmuch as they establish "the existence of the guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro, 25 NY3d 485, 492 (2015) (internal quotation marks omitted) (citing Davimos v Halle, 35 AD3d 270, 272 [1st Dept. 2006]). To be sure, there is no dispute that the guarantor signed an absolute and unconditional guaranty of the commercial lease, that the tenant is in arrears in payment of base rent, as discussed above, and that the guarantor has not paid any of the arrears. See Moon 170 Mercer, Inc. v Vella, 122 AD3d 544, 544 (1st Dept. 2014). Further, the plaintiff correctly states that NYC Administrative Code 22-1005 (L.L. 2020/55, 5/26/2020), which barred enforcement of personal guaranties on commercial leases under certain conditions and if the alleged liability arose between March 7, 2020, and September 30, 2020, the period of onset of the COVID-19 public health emergency, is inapplicable since the tenant vacated the premises prior to March 2020. The defendants do not argue otherwise.

The plaintiff has also demonstrated entitlement to judgment on the issue of liability on its third cause of action, seeking attorney's fees. Both the lease and the guaranty expressly provide for such fees to the extent incurred in connection with the tenant's default under the lease. The plaintiff may submit documentation evidencing the amount of fees to which it is entitled within 60 days.

The defendants fail to raise a triable issue of fact in opposition to the plaintiff's showing of entitlement to base rent accruing since the date of the tenant's vacatur and to reasonable attorney's fees under the lease and guaranty. Contrary to the defendants' assertions, the plaintiff's submissions, which include the lease, a rent ledger kept in the ordinary course of business, and an affidavit of the plaintiff's custodian of records, Dennis Dart, suffice to evidence the amount of the tenant's debt under the lease. That the plaintiff has, after June 1, 2022,

entered into a new lease with rent payments to begin in June 2023, does not alter the amount of the defendants' debt. Nor have the defendants provided any other non-speculative reason why the debt should be reduced.

The defendants' allegations regarding pre-existing unresolved DOB violations in other parts of the premises and the resulting delay in obtaining permits from the DOB for extensive renovations on the premises are not sufficient to relieve the defendants from performance of their payment obligations under the terms of their agreement. As the court noted in its March 8, 2021, decision and order, those allegations occurred prior to the parties' settlement and were known to all prior to the execution of the settlement agreement. Nonetheless, the tenant agreed in the settlement agreement to release the plaintiff "from any and all claims" it may have had against the plaintiff "arising from the [l]ease, their Landlord-Tenant relationship or of any nature." The tenant also agreed in the settlement agreement to discontinue with prejudice its pending action against the plaintiff, wherein it made assertions related to the alleged DOB violations.

Finally, the plain language of the settlement agreement presents no impediment to the plaintiff's recovery of attorney's fees incurred in the prosecution of the instant action, in addition to those incurred in the prior actions. The court has considered the defendants' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3212 is granted to the extent that the plaintiff is awarded an additional judgment in the sum of $1,246,035.00 on the first and second causes of action, and on the issue of liability on the third cause of action, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter an additional judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sum of $1,246,035.00; and it is further

ORDERED that the plaintiff may submit supplemental documentation in support of its claim for attorneys' fees on the third cause of action within 60 days of the date of this order by filing the same on e-courts and notifying the Part 42 Clerk at SFC-Part42-Clerk@nycourts.gov of any such filing.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/28/2022
DATE

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER