

Second Ave. & 50th St. Realty LLC v Tomas
2022 NY Slip Op 34109(U)
December 5, 2022
Supreme Court, New York County
Docket Number: Index No. 161236/2015
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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SECOND AVENUE & 50TH STREET REALTY LLC

Plaintiff,

- v -

JURE TOMAS,

Defendant.

-----X

INDEX NO. 161236/2015

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff, Second Avenue & 50th Street Realty LLC (plaintiff), commenced this action to recover money damages from defendant, Thomas Jure (defendant), stemming from the alleged breach of a guaranty of a lease for the premises located at 939 Second Avenue, Apt. 5, New York, New York (premises). Plaintiff now moves pursuant to CPLR 3212 for summary judgment on his claim for breach of the guaranty in the amount of \$31,465.00, plus interest from December 1, 2014, and pursuant to CPLR 3211(b) for dismissal of defendant's affirmative defenses and counterclaims. Defendant now cross-moves pursuant to CPLR 3212 for summary dismissal of plaintiff's complaint. The motions are opposed. For the following reasons, the motion is granted in part, and the cross-motion is denied.

According to the complaint, plaintiff is the owner of the premises. On October 10, 2012, plaintiff and non-party Croatia Realty, LLC d/b/a Croatia Realtors (tenant), entered into a lease agreement wherein the tenant agreed to pay a monthly base rent of \$3,895.00. The lease included a late fee of \$100.00 for rent not paid within five days of being due. The lease expired by its terms on November 30, 2014. On the same day, defendant executed the guaranty, which by its terms extended to any renewals and extensions of the lease. The tenant's lease term was extended pursuant to the lease renewal and extension agreement dated August 25, 2014. Pursuant to the lease renewal, the tenant agreed to pay a monthly base rent of \$4,295.00 each month during the lease term. All other terms, provisions and conditions contained in the initial lease agreement remained in full force and effect. The lease expired by its terms on November 30, 2016.

Plaintiff now claims that tenant ceased making any rent payments due under the lease on December 1, 2014, and vacated the premises on or about June 15, 2015. Plaintiff further claims that tenant owes the sum of \$31,465.00 for its non-payment of rent and late fees due under the lease through the month of June 2015, plus interest from December 1, 2014. Plaintiff alleges that

defendant is personally liable to plaintiff for the unpaid balance in the amount of \$31,465.00 plus interest from December 1, 2014, under the terms of the guaranty.

Plaintiff filed complaint alleging claims for breach of contract, attorneys' fees, and for breach of the guaranty. Defendant thereafter filed his answer with affirmative defenses and counterclaims, including plaintiff's failure to mitigate, the lease agreement is null and void pursuant to CPLR § 4544, lack of privity, that plaintiff's claim is barred by the statute of frauds, that the lease agreement violates the laws of the City of New York, and for attorneys' fees.

In support of its motion, plaintiff contends there is no dispute that tenant ceased making any rent payments due under the lease on December 1, 2014. Plaintiff further contends that it is entitled to the sum of \$30,065.00 for unpaid rent charges at the agreed monthly rent of \$4,295.00, plus \$1,400.00 in total late fee charges. Under paragraph fifty (50) of the Lease, Tenant is responsible to pay additional rent for late fees of \$100.00 per month if it failed to remit any rent or additional rent payment within five (5) days from when due.

In opposition and in support of his cross-motion, defendant argues that he was not a party to either the lease or lease renewal. Defendant further argues that purported guaranty is void because it lists nonparty "9300 Realty," and not plaintiff, as the owner of the premises. Defendant further argues that plaintiff erred in calculating the total amount of rent and fees due. Specifically, defendant argues that the unpaid rent amounts to \$29,665.00, which defendant calculated as being the rent due from December 2014 through June 2015. Defendant also argues that plaintiff also held a security deposit of \$3,895 which was not credited, reducing the total amount owed to \$25,770.00.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N. Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Reslani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Here, plaintiff makes a prima facie showing of entitlement as to liability on its claim for breach of the guaranty. Specifically, plaintiff submits the affidavit of Jasmine Batista, plaintiff's managing agent, wherein she states that the tenant failed to pay monthly rent under the lease renewal in the amount of \$4,295.00 from December 2014 through June 2015 and that the tenant also owes late fees in the amount of \$100.00 per month for the same time period. The managing agent also states that defendant agreed to guarantee the rent due under the renewal lease pursuant to the guaranty.

While the guaranty refers to the lease as between the tenant and non-party "9300 Realty," plaintiff's entitlement to judgment is not diminished, as the lease is otherwise accurately described in the guaranty. Notably, the guaranty was a rider to the lease, the guaranty refers to the date the lease was signed as the effective lease, and the guaranty refers to the premises as the

property at issue. Thus, the Court finds that the identification of “9300 Realty” as the owner of the premises on the guaranty does not warrant the denial of plaintiff’s motion (*see Barnaba Realty Grp., LLC v Solomon*, 121 AD3d 730, 731 [2d Dept 2014] [“Moreover, under the circumstances of this case, a typographical error in the guaranty with respect to the plaintiff’s name did not vitiate the plaintiff’s right to enforce the agreement”], citing *Didco Urb. Renewal Co. v Mann Mgmt., Inc.*, 224 AD2d 195 [1st Dept 1996] and *Sforza v Health Ins. Plan of Greater New York, Inc.*, 210 AD2d 214 [1st Dept 1994]).

Defendant’s argument that he could be the subject of a second proceeding by 9300 Realty to enforce the guarantee is without merit, since defendant does not indicate that he had a rental agreement, or any other underlying agreement with 9300 Realty (*see City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998] [“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”]).

However, a dispute exists as to the amount of unpaid rent owed by defendant to plaintiff. While plaintiff’s managing agent indicates that the tenant’s security deposit was applied to the July 2015 rent, it remains unclear why the tenant was charged rent in July 2015 if it vacated the premises in June, and further, the tenant ledger documenting rent charges and payments does not reveal any credit to the tenant’s account.

Plaintiff also seeks the dismissal of defendant’s affirmative defenses. “When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is ‘without merit as a matter of law’ ” (*Gonzalez v Wingate at Beacon*, 137 AD3d 747 [2d Dept 2016]). Defendant’s first affirmative defense for failure to mitigate fails because plaintiff seeks damages until defendant vacated the premises, as opposed to the remainder of the lease. The second affirmative defense under CPLR 4544 also fails because the initial lease, lease renewal and extension agreement and guaranty all contain clear and legibly printed terms, and the text appears to follow CPLR § 4544 requirements. The third and fourth affirmative defenses for lack of privity and statute of frauds also fails, as plaintiff seeks to enforce the guaranty, which the parties agreed to in writing. Defendant’s fifth affirmative defense for and first counterclaim that the lease agreement is void is also without merit, as there is no indication that the lease agreement violated the law of the City or State of New York. Finally, the second counterclaim for attorneys’ fees is also dismissed, as there is no basis to find that plaintiff breached the lease.

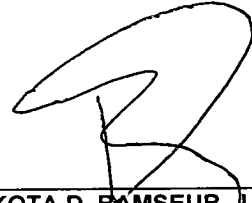
Accordingly, it is hereby

ORDERED that the branches of plaintiff’s motion for summary judgment on its claim for breach of the guaranty and for dismissal of defendant’s affirmative defenses and counterclaims and defenses is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff on the issue of liability only as against defendant; and it is further

ORDERED that an inquest shall take place as to the damages owed to plaintiff by defendant.

This constitutes the decision and order of the Court.



12/5/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	