

ESRT 1350 Broadway, L.L.C. v Kors

2023 NY Slip Op 30921(U)

February 9, 2023

Supreme Court, New York County

Docket Number: Index No. 650136/2022

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART 07

Justice

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ESRT 1350 BROADWAY, L.L.C.,
Plaintiff,

- v -

ALEX KORS,
Defendant.

INDEX NO. 650136/2022
MOTION DATE 04/14/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 30, 31, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOIND)

Plaintiff-landlord, ESRT 1350 Broadway, L.L.C., moves for summary judgment in lieu of complaint under CPLR 3213 against defendant-guarantor, Alex Kors. The motion is granted in part and denied in part.

Defendant's absolute and unconditional guarantee of the rent obligations of nonparty Jean Pierre Hair Salon, under a lease between plaintiff and Jean Pierre, qualifies as an instrument for the payment of money only under CPLR 3213.1 Plaintiff has submitted copies of the guaranty and lease agreement (NYSCEF Nos. 4, 5), an affidavit from its Chief Controller (NYSCEF No. 3), and documents establishing the amount of arrears under the lease and under a 2017 settlement between plaintiff and Jean Pierre. (See NYSCEF Nos. 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27.)

The guaranty provides that defendant is obligated to plaintiff for Jean Pierre's payments "through and including the date (the 'Outside Guarantee Date') which is thirty (30) days after the date that Tenant vacates the demised premises and delivers vacant possession thereof to Landlord." (NYSCEF No. 4 at § 3.1 [a].) Plaintiff contends that although Jean Pierre vacated the premises on July 10, 2019, it failed to "leave the Premises broom clean and remove its property" as required under ¶ 21 of the lease. (NYSCEF No. 3 at 4, 4 n.2; see also NYSCEF No. 5 at 5 ¶ 21.) Given this asserted failure, plaintiff claims, the Outside Guarantee Date was never

1 Defendant's guaranty includes separate paragraphs guaranteeing both the payment of rent and other charges owed by the tenant (NYSCEF No. 4 at § 3.1 [a]) and the performance of tenant's other obligations under the lease (id. at § 3.1 [b]). The guaranty provides that these two obligations of the guarantor are independent: The guarantee of performance is made "[w]ithout limiting the Guarantor's obligations pursuant to" the guarantee of payment. (Id.) The presence of a guarantee of performance thus does not foreclose CPLR 3213 treatment for the unconditional guarantee of payment. (See iPayment, Inc. v Silverman, 192 AD3d 586, 587 [1st Dept 2021].)

reached, leaving defendant liable for rent-based liquidated damages through the end of the lease term.

To support this claim, plaintiff submits a number of photographs of the premises after Jean Pierre vacated. (*See* NYSCEF No. 10.) But plaintiff's affidavit in support of the motion does not describe or explain those photographs. And they are not self-interpreting: It is not clear from the photographs, for example, whether the furnishings appearing in the photos, such as salon chairs and washing stations, were Jean Pierre's property, or had been instead trade fixtures that were present when Jean Pierre took over the lease. For that matter, the record does not disclose whether, if the furnishings did constitute trade fixtures belonging to Jean Pierre, the landlord had exercised its option under the lease to claim those fixtures for itself as abandoned property (*see* NYSCEF No. 5 at 27 ¶ 59 [a]); and, if so, whether the landlord's claiming of the fixtures would be sufficient to satisfy the property-removal requirement of ¶ 21 of the lease (thereby triggering the Outside Guarantee Date).

In short, on this record plaintiff has not established as a matter of law that defendant is responsible for liquidated damages in the form of rent and additional rent accruing after August 10, 2019 (*i.e.*, 30 days after Jean Pierre vacated the premises).² Plaintiff's claim for those damages is converted into a plenary action, and plaintiff's motion papers are deemed a complaint with supporting exhibits.

With respect to damages accruing through August 10, 2019, plaintiff has established entitlement to \$667,399.21 in damages for unpaid rent and additional rent (*see* NYSCEF No. 14 at 24 [lease ledger reflecting outstanding balance as of August 10, 2019]), and \$47,164.11 in unpaid amounts owed by Jean Pierre under its 2017 settlement with plaintiff (*see* NYSCEF No. 3 at ¶¶ 26-30).

Plaintiff also seeks attorney fees incurred in this action and in a related summary nonpayment proceeding in Housing Court. Plaintiff's request is granted only with respect to the fees reasonably incurred so far in this action, and otherwise denied: "[E]nforcement of the prohibition against the splitting of causes of action requires that such fees be sought within the action in which they are incurred, and not in a subsequent action." (*Wavertree Corp. v 136 Waverly Assoc.*, 258 AD2d 392, 392 [1st Dept 1999].)

Accordingly, it is

² Additionally, even if plaintiff's motion papers *were* to have established that defendant is liable for damages accruing after August 10, 2019, plaintiff has not proven damages for rent and additional rent accruing after April 1, 2020. The lease ledger relied on by plaintiff does not list any charges after that date. (*See* NYSCEF No. 14 at 25.) According to plaintiff, it stopped recording recurring charges and sending monthly invoices to Jean Pierre when it determined that Jean Pierre "was clearly not going to pay any of the rent or additional rent due under the Lease." (NYSCEF No. 3 at ¶ 34.) But without a record of these charges in the ledger, plaintiff has not put forward evidence on this motion that it is entitled to liquidated damages corresponding to those charges.

ORDERED that plaintiff's motion under CPLR 3213 for summary judgment in lieu of complaint is granted only with respect to plaintiff's claims for damages accrued through August 10, 2019, and plaintiff's claim for reasonable attorney fees incurred in bringing this motion, and the motion is otherwise denied; and it is further

ORDERED that plaintiff is awarded a judgment against defendant for (i) \$667,399.21, with interest at the statutory rate running from the reasonable intermediate date of December 1, 2018; plus (ii) \$47,164.11, with interest running at the statutory rate from March 10, 2018; plus (iii) costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff is granted leave to enter a supplemental judgment for reasonable attorney fees incurred in bringing this motion, with the amount of those fees to be determined by motion brought on notice within 30 days of entry of this order; and it is further

ORDERED that plaintiff's claim for damages accruing after August 10, 2019 (and any corollary attorney fees), is severed, and shall continue as a plenary action, with plaintiff's motion papers deemed to be a complaint and supporting exhibits; and it is further

ORDERED that defendant may serve an answer with respect to plaintiff's claim for damages accruing after August 10, 2019 (plus attorney fees), on or before 30 days from entry of this order; and it is further

ORDERED that plaintiff serve a copy of this order with notice of its entry on defendant by certified mail, return receipt requested, directed to defendant's last-known address; and on the office of the County Clerk, which shall enter judgment accordingly.

2/9/2023
DATE


HON. GERALD LEBOVITZ
J.S.C.

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