3868 Broadway Realty, LLC v Burger Joint N.Y. II, LLC

2023 NY Slip Op 31344(U)

April 18, 2023

Supreme Court, New York County

Docket Number: Index No. 653307/2020

Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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3868 BROADWAY REALTY, LLC,

Plaintiff,

- v –

BURGER JOINT NEW YORK II, LLC and
THE JACK PARKER CORPORATION

Defendant.

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INDEX NO. 653307/2020

MOTION DATE 11-15-22

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover unpaid rent, additional rent and attorney's fees allegedly due under a commercial lease and guaranty agreement, the plaintiff landlord, owner of property at 33 West 8th Street in Manhattan, moves (1) pursuant to CPLR 3025 for leave to amend the complaint to increase the amount of damages, and (2) pursuant to CPLR 3212, in effect for full summary judgment, as against defendants Burger Joint New York II, LLC, a former tenant, and The Jack Parker Corporation, corporate guarantor on the lease. The defendants oppose the motion. The motion is denied without prejudice.

It is well settled that leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). However, the plaintiff's original complaint is thin and it has not submitted a proposed amended complaint to support its application to amend. Thus, the plaintiff has not demonstrated, on these papers, that the proposed amendments are meritorious. Therefore, that branch of the motion is denied.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851 (1985); O'Halloran v City of New York, supra). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Recovery under breach of contract requires (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). 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). To recover under a breach of guaranty theory, the movant must demonstrate that the subject "guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional.." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991).

In support of its motion the plaintiff submits the pleadings, the subject lease, which was for a ten-year term running from January 2013 through January 2023, the subject guaranty agreement, two subsequent leases with new tenants, cancelled checks purportedly showing

expenses incurred in re-letting the premises after the defendant tenant vacated, a rent ledger and an affidavit of Jonathan Ruhl, managing agent for the plaintiff, who asserts, inter alia, that the defendants did not vacate the premises until October 31, 2018, and did so without the permission of the plaintiff, and were also liable thereafter through the end of the lease term for any sums due thereafter that were not covered by any subsequent tenant. The plaintiff's submissions show that in February 2019 it re-let the premises to a new tenant, Rogue Lobo, at a lower rent than the defendant, starting in February 2019 until that tenant vacated in December 2020. The premises were then re-let to yet another tenant, Yucatan Kitchen, Inc., starting January 2021. The plaintiff seeks to recover from the defendants $442,463.72 for rent and additional rent from January 2014 to December 2021, plus interest from January 1, 2014, and an additional $100,500.00 in "re-rental fees" purportedly incurred in securing the new tenants. In support of these fees, the plaintiff submits only illegible copies of ten checks in various amounts. A ledger submitted as an attachment to the complaint shows a balance due of $109,558.33 as of October 1, 2018. However, the ledger submitted in support of the motion covers only the period from October 2018 through December 2021 and shows an outstanding balance of $442,463.72 as of December 1, 2021, with no amount accruing prior to October 2018, suggesting that there was full rent waiver or abatement in effect from January 2013 through September 2018, notwithstanding the terms of the parties' lease, without explanation. The notably brief guaranty agreement provides, *inter alia*, that the guarantor's liability would terminate after the tenant has given 180 days written notice of surrender, the tenant leaves the premises in broom clean condition and all rent due to the plaintiff is paid. The guaranty is less than clear, unambiguous and unconditional. See Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., supra. The plaintiff submits no Memorandum of Law in support of its motion.

In addition to a Memorandum of Law, the defendants' opposition includes an affidavit of Cynthia Wong, who signed the guaranty on behalf of The Jack Parker Corporation, in which she alleges that the tenant served its 180-day notice of its intent to surrender the premises by notice dated April 5, 2018, paid all rent due for the next 180 days even though it was no longer in possession and was not operating its business, and also left a $96,000 security deposit with the plaintiff. The defendants also submit the surrender notice dated April 5, 2018, and nine cancelled checks dated from January through September 2018, each in an amount of approximately $19,000.00, as provided in the parties' lease.

On the papers it submitted to the court, the plaintiff failed to meet its burden on the motion in the first instance, making it unnecessary to determine the sufficiency of the opposing papers. Even assuming that the plaintiff's submissions established some breach of the lease or guaranty, the defendants' submissions raise triable issues, *inter alia,* as to the effective date of surrender of the premises under the terms of the lease and the extent, if any, of the liabilities of both defendants. Nor do the plaintiff's reply papers, consisting only of an attorney affirmation, eliminate all issues of fact. See Zuckerman v City of New York, supra; Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012). To the extent the plaintiff seeks summary judgment on its cause of action for an account stated, that is also denied as the plaintiff fails to submit any invoices or statements sent to the defendants, and thus did not demonstrate that the defendants "received [and] retained without objection" the invoices sent by the plaintiff. Scheichet & Davis, P.C. v Nohavicka, 93 AD3d at 478 (1st Dept. 2012), *quoting* Gamiel v Curtis & Reiss-Curtis, P.C., 60 AD3d 473, 474 (1st Dept. 2009). Because no discovery has been conducted, the plaintiff's motion is denied without prejudice to renew after the completion of discovery.

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the branch of the plaintiff's motion seeking to amend the complaint pursuant to CPLR 3025(b) is denied without prejudice, and it is further

ORDERED that the branch of the plaintiff's motion partial summary judgment pursuant to CPLR 3212 is denied without prejudice to renewal after completion of discovery; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 29, 2023, at 12:00 p.m., to be conducted via Microsoft Teams.

This constitutes the Decision and Order of the court.

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

4/18/2023
DATE

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