Abarrotes Mixteca Corp., Inc. v Brisk
2023 NY Slip Op 31931(U)
June 6, 2023
Supreme Court, New York County
Docket Number: Index No. 651199/2017
Judge: Louis L. Nock

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ABARROTES MIXTECA CORP., INC.,

Plaintiff,

- v -

ELIOT BRISK and 5000 GRAND, LLC,

Defendants.

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5000 GRAND, LLC,

Counterclaimant,

- v –

GUILLERMO IGLESIAS,

Additional Counterclaim Defendant.

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INDEX NO. 651199/2017

MOTION DATE 09/09/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, and 70

were read on this motion and cross-motion for SUMMARY JUDGMENT, etc.

Defendant/Counterclaimant 5000 Grand, LLC (the "Landlord"), moves for summary judgment against plaintiff Abarrotes Mixteca Corp. (the "Tenant") and against additional counterclaim defendant Guillermo Iglesias ("Guarantor"), on Landlord's first, second, fourth, and fifth counterclaims. Tenant cross-moves for summary judgment on its complaint.

Background

In this commercial-landlord tenant action, Tenant sues to recover its security deposit, which it asserts Landlord improperly withheld after it vacated the subject premises. Landlord counterclaims for various items of unpaid additional rent and damages, specifically, Tenant's

pro-rata share of real estate tax escalations (first counterclaim), water charges (second counterclaim), damage to the premises upon vacatur (third counterclaim), and attorneys' fees (fourth counterclaim). Landlord also asserts these counterclaims against Guarantor, as guarantor of the leases on the subject premises.

By agreement of lease dated June 1, 2006, Landlord leased section E of the ground floor of 5000 Grand Avenue, Maspeth, New York, to Tenant (first lease, NYSCEF Doc. No. 50). The term of the first lease was for five years, expiring on May 31, 2011, with an option to renew for an additional five-year term, provided Tenant was up to date on rent payments (*id.* at 1). The first lease provided that tenant would pay 12% of any real estate tax escalations (*id.*, ¶ 47), metered water charges (*id.*, ¶ 29), and, in the event of Tenant's default, reasonable attorneys' fees (*id.*, ¶ 60). In addition, the first lease contains a "No Waiver" clause, providing that any failure of Landlord to pursue any remedy under the lease in the event of Tenant's violation of the provisions thereof, or the receipt of rent by Landlord with knowledge of Tenant's breach, does not operate to waive any of Landlord's claims against Tenant (*id.*, ¶ 25). Guarantor agreed to guaranty Tenant's obligations under the first lease (*id.* at 16).

By a second agreement of lease dated January 1, 2009, Tenant expanded its leasehold into section D of the ground floor (second lease, NYSCEF Doc. No. 53). The term of the second lease ended on May 31, 2022, but could be extended for another five years as with the first lease (*id.*, ¶ 59). The second lease also provides for additional rent in the form of 17% of any real estate tax escalations (*id.*, ¶ 47) and reasonable attorneys' fees in the event of Tenant's default (*id.*, ¶ 57).[1]

[1] The court notes that the copy of the second lease in the record appears to be incomplete.

The leases were both extended, and expired on their own terms on May 31, 2016 (Brisk aff., NYSCEF Doc. No. 46, ¶ 6). Tenant vacated the premises after the leases expired, and allegedly left damage to the premises (*id.*). Presently, Landlord asserts that there remain due and owing the sum of $95,871.32 in unpaid real estate tax increases (real estate tax history, NYSCEF Doc. No. 52) and the sum of $103,228.57 in unpaid water charges (NYC Department of Environmental Protection invoices NYSCEF Doc. No. 54).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361 [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 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [citation omitted]). Moreover, 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]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

Landlord has established *prima facie* entitlement to summary judgment on its first and second counterclaims for unpaid real estate tax escalations and water charges by submission of "the existence of the lease . . . the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498 [1st Dept 2016]).

In opposition, Tenant fails to raise a triable issue of fact. Tenant argues that Landlord commingled its security deposit with Landlord's own funds and failed to return it following the expiration of the lease, which Landlord effectively concedes. However, while such concession entitles Tenant to summary judgment on its claim for breach of contract, Tenant provides no authority for the proposition that Landlord's mishandling of the security deposit is a complete defense to all liability under the lease. Further, the amount sought on the counterclaims far exceeds the amount of the security deposit. At best, if, as seems apparent, both parties are entitled to judgment on their respective claims, then Tenant's judgment will be offset against Landlord's.

Tenant also argues that Landlord has waived the right to collect the unpaid real estate tax escalations and water charges because Landlord failed to provide Tenant with a notice that the real estate tax escalations were due, and also failed to provide Tenant with a notice of default. Tenant is effectively arguing that providing notice of the tax escalations is a condition precedent to payment. No such requirement is present, however, in the text of either lease (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC,* 171 AD3d 189, 195 [1st Dept 2019] ["Courts are reluctant to interpret a contractual clause as a condition precedent in the absence of such unmistakable conditional language"]). Moreover, both leases require that the rent be paid when due without

demand (first lease, NYSCEF Doc. No. 50, ¶ 55; second lease, NYSCEF Doc. No. 53, ¶ 53), obviating any claim that prior notice was required. The case of *Mount Sinai Hosp. v 1998 Alexander Karten Annuity Trust* (110 AD3d 288 [1st Dept 2013]), cited by Tenant, is unavailing. There, unlike the instant case, the lease specifically required notice to the Tenant for payment of additional rent. Additionally, the court imposed a constructive condition precedent because the additional rent in question, specifically the respective shares of operating expenses of the tenant and landlord, became difficult to calculate as time elapsed from the time the expenses were incurred, prejudicing the tenant due to the landlord's delay (*id.* at 314-315). Here, by contrast, the share of real estate tax escalations owed is fixed and known to both parties. Without express language requiring a condition precedent, if the additional rent has accrued, the failure to provide notice is not a waiver of Tenant's obligation to pay (*Goldstein v City of N.Y.*, 159 AD2d 313, 315 [1st Dept 1990]; *Square Block Assocs., Inc. v Grekos Restaurant, Inc.*, 8 Misc 3d 128[A], 2005 WL 1536771 at *2 [App Term, 1st Dept, 2005] ["we agree that any delay by landlord in billing for the real estate tax escalation increases undisputedly incurred does not support tenant's claims of waiver or laches"]). To the extent that Tenant is attempting to argue laches, such an equitable defense is not available in an action for damages (*Cadlerock, L.L.C. v Renner*, 72 AD3d 454 [1st Dept 2010]).

Landlord has also established *prima facie* entitlement to its claims for reasonable attorneys' fees, and against Guarantor as guarantor of the first lease. Landlord seeks summary judgment only as to liability on its claims for attorneys' fees, and the same is granted without any meaningful opposition. As to the claim against Guarantor, only the first lease includes his personal guaranty, and, accordingly, he is only liable for amounts due under the first lease. The invoices for the water charges attached to the moving papers do not delineate which charges are

attributable to the premises demised under the first lease as opposed to those under the second lease. Since there remains an issue of fact in this regard, summary judgment against Guarantor is also granted at this time as to liability only.

Tenant cross-moves to conform the pleadings to the proof by alleging new claims for conversion and breach of fiduciary duty. That cross-motion is denied. Leave to amend should be freely given, but a court must first examine the merits of the proposed amendment (*Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 AD3d 363, 365-66 [1st Dept 2007]). Leave to amend should be denied if "the proposed amendment is palpably insufficient or patently devoid of merit" (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2d Dept 2015]). Here, the proposed claims for conversion and breach of fiduciary duty arise out of the same facts and seek the same damages, and, therefore, are subject to dismissal as impermissibly duplicative of the breach of contract claim (*Village of Kiryas Joel v County of Orange*, 144 AD3d 895, 898 [2d Dept 2016] [breach of fiduciary duty]; *Richbell Information Services, Inc. v Jupiter Partners, LP*, 309 AD2d 288, 306 [1st Dept 2003] [conversion]). Plaintiff does not successfully allege a duty collateral to the contract that could give rise to tort liability (*Brown v Brown*, 12 AD3d 176 [1st Dept 2004]), or a fiduciary relationship between the parties (*Village of Kiryas Joel*, 144 AD3d at 898).

Accordingly, it is hereby

ORDERED that the motion by defendant/counterclaimant 5000 Grand, LLC, for summary judgment is granted in part, to the extent of granting summary judgment in favor of 5000 Grand, LLC, and against plaintiff Abarrotes Mixteca Corp., Inc., and against additional counterclaim defendant Guillermo Iglesias on the first, second, fourth, and fifth counterclaims as follows, and so much of the cross-motion of plaintiff and of Guillermo Iglesias for summary judgment dismissing those counterclaims is denied; and it is further

ORDERED that so much of plaintiff's cross-motion for summary judgment on its claims for return of its security deposit is granted, and the amount of the judgment to which plaintiff would be entitled ($36,000.00) shall be set off from the amount to which 5000 Grand, LLC, is entitled; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of 5000 Grand, LLC, and against plaintiff, on the first and second counterclaims in the principal amount of $163,099.89, with interest thereon at the statutory rate from June 1, 2016, through entry of judgment, as calculated by the Clerk, and continuing to so accrue thereafter through satisfaction of judgment; and it is further

ORDERED that the complaint and the first and second counterclaims are severed, and the balance of the counterclaims are continued; and it is further

ORDERED that plaintiff and Guillermo Iglesias are found liable to 5000 Grand, LLC, on the fourth and fifth counterclaims and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the action shall continue as to the third through fifth counterclaims; and it is further

ORDERED that so much of plaintiff's cross-motion seeking to conform its pleadings to the proof is denied; and it is further

ORDERED that this matter is respectfully referred to the Clerk of the Trial Assignment Part to be assigned for trial.

This constitutes the decision and order of the court.

6/6/2023
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE