

547 Rogers LLC v Dynov

2023 NY Slip Op 31971(U)

May 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 512982/22

Judge: Karen B. Rothenberg

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against the defendants seeking a money judgment in the sum of \$104,652.51, plus interest, costs and legal fees^{1 2}. In their answer, the defendants assert six affirmative defenses, including an affirmative defense based upon an oral modification of the lease. 547 Rogers now moves for summary judgment to dismiss the defendants' affirmative defenses and for entry of a monetary judgment in its favor.

In support of its motion, 547 Rogers submits the affidavit of its member, Justin Homapour, in which he states that pursuant to the lease agreement (Exhibit C), Redefined was required to pay basic rent in the amount of \$5,200 per month for the period July 1, 2020 through June 30, 2021, \$5,408 per month for the period July 1, 2021 through June 30, 2022, and \$5,625 per month for the period July 1, 2021 through June 30 2022. Mr. Homapour also states that Redefine failed to make full payment of the rents due and owing starting in or about February, 2020, as reflected in its tenant ledger (Exhibit D), which he asserts is kept by 547 Rogers in the regular course of its business. Mr. Homapour further states that Redefined vacated the premises on January 4, 2022, prior to the expiration of the lease, without 547 Rogers' permission, but that 547 Rogers was able to mitigate its damages by re-leasing the premises to another tenant in March 2022, with the new tenant commencing rent payments on May 1, 2022.

Mr. Homapour states that Redefined is indebted under the lease agreement for the total sum of \$104,652.51, representing (a) \$103,646 in basic rents, and (b) \$10,906.51 in additional rent (\$3,937.50 in late charges, \$2,500 in legal fees in connection with a summary non-payment proceeding brought against defendants in housing court, \$3,322.76 in Real Estate Escalation Charges, \$70.00 in bounced check costs and \$1067.75 in garbage removal and cleaning fees), less the application of Redefined's \$10,000 security deposit towards the rent arrears. Mr. Homapour further states that both Dynov and Checkelnitsky executed a Good Guy Guaranty of Payment and Performance dated July 18, 2018 (Exhibit H), guarantying performance of all obligations under the lease and are liable for the sum of \$69,356.51, representing the rents and additional rents due and owing outside of the excluded period March 7, 2020 through June 30, 2021.

¹ 547 Rogers originally sought the entry of one judgment against the defendants, jointly and severally, in the amount of \$104,652.51, for the unpaid base and additional rents due under the lease. 547 Rogers, now, for the purposes of this motion, waives enforcement of the personal guarantees for the period between March 7, 2020 and June 30, 2021, in view of the defendants' claim that the NYC Administrative Code §22-1005 bars enforcement of such personal guarantees during that period of the COVID-19 pandemic. Therefore, 547 Rogers seeks to enter one judgment against Redefined, Dynov, and Chechelnitsky, jointly and severally, in the sum of \$69,356.51 (representing the sums due and owing under the lease during the no-waiver period), and a second judgment solely against Redefined in the sum of \$35,296.00 (representing the sums due and owing during the waiver period).

² The Court will not consider 547 Rogers' letter dated April 3, 2023, seeking to rescind its earlier waiver of the enforceability of the personal guarantees during the period March 7, 2020 through June 30, 2021, which was e-filed after the motion was marked fully submitted on the return date of March 23, 2023.

In opposition, defendants submit the affidavit of Avi Dynov, an officer of Redefined, stating that the parties orally modified the lease during COVID-19, reducing the rent to \$3000 per month, which is reflected in 547 Rogers' own ledger showing the reduced payments were made from June 2020 until July 2021. Mr. Dynov claims that the agreement occurred shortly after he sent text messages to Charlie Homapour, a member of 547 Rogers, expressing his desire to reduce the rent based on the hardship COVID caused on Redefined's business. Mr. Dynov further claims that he and Charlie Homapour then had an in-person meeting, where they shook hands and orally agreed to the reduced rent of \$3000 per month for the duration of the pandemic. Mr. Dynov states that 547 Rogers never sought to enforce the difference, and then commenced an eviction proceeding over a year later in August 2021, in retaliation related to a different real estate transaction.

In reply, 547 Rogers submits the affidavit of its member, Shahriar (Charlie) Homapour, in which he states that there was never an agreement to reduce the rent, and the lease did not permit oral modifications. Any modification to the rental provisions of the lease, would have been reduced to a writing. Mr. Homapour also points out that the first \$3000 payment was made in June, prior to the texts messages and meeting in late July, and that 547 Rogers accepted partial payments as they were entitled to do pursuant to the lease. Mr. Homapour further states that the ledger shows a continuing balance upon the deficient payments, and that if there had there been an agreement to a reduced rent, Redefined would have been credited in full for each month.

547 Rogers' submissions establish its prima facie entitlement to judgment as a matter of law on the issue of Redefined's liability by establishing that Redefined violated the provisions of the lease by vacating the property, and failing to pay the basic rent and additional rent that was due and owing (*see Joseph Rustin's, Inc. v Manzo's Furniture City, Inc.*, 155 AD3d 848 [2d Dept 2017]). 547 Rogers' submissions also establish its prima facie entitlement to judgment as a matter of law on the issue of the guarantors' liability by demonstrating that Dynov and Chechelnitsky guaranteed all terms and rent payments of the lease, and breached their obligations under the guarantees (*see 82-90 Broadway Realty Corp. v New York Supermarket, Inc.*, 154 AD3d 797 [2d Dept 2017]).

Although defendants' argue that 547 Rogers' motion for summary judgment should be denied as it fails to include evidence in admissible form, the fact affidavits are admissible as the factual assertions made in the affirmation by Jeffrey R. Homapour, Esq., a member of 547 Rogers, is based upon personal knowledge (*cf. Prince v. Accardo*, 54 AD3d 837 [2d Dept 2018]).

Turning to defendants other arguments, their submissions fail to establish that there was an oral modification to the lease, which reduced their rent obligations during the lease term (*see W6 Gacility X, LLC v West 6 Care Ctr., Inc.*, 169 AD3d 958 [2d Dept 2019]). The parties' lease agreement contained a provision prohibiting modifications

except by a writing executed by the parties, such that the lease was governed by the Statute of Frauds (see General Obligations Law § 15–301[1]). Without a written agreement signed by 547 Rogers, defendants must prove an exception to the Statute of Frauds such as waiver, estoppel, or partial performance (*see 310 S. Broadway Corp. v Barrier Gas Serv.*, 224 AD2d 409, 410 [2d Dept 1996]). Here, defendants fail to establish that the principle of partial performance applies. Redefined’s reduced rent payments were not unequivocally referable to the oral modification nor incompatible with the written lease agreement, which provided that the landlord could accept a lesser amount than the basic rent without prejudice to its rights to recover the balance (*see Rose v Spa Realty Assoc.*, 42 NY2d 338 [1977]).

Further, although defendants raised several other affirmative defenses in their answer, those affirmative defenses must be dismissed since defendants did not oppose their dismissal. Regardless, those affirmative defenses are without merit (*see Starkman v City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]).

Finally, defendants fail to make any showing that discovery might lead to relevant evidence, or that facts essential to justify opposition to the motion are exclusively within the knowledge and control of 547 Rogers (*see Winzelberg v 1319 50th Street Realty Corp.*, 114 AD3d 674 [2d Dept 2014]).

Accordingly, it is

Ordered, that 547 Rogers’ motion pursuant to CPLR 3211(b) dismissing the affirmative defenses contained in the defendants’ answer; and, pursuant to CPLR 3212 for summary judgment in its favor on the issue of liability under the lease and guarantees is granted; and it is further

Ordered, 547 Rogers is awarded a monetary judgment against Redefined, Dynov, and Chechelnitsky, jointly and severally, in the sum of \$50,598.01 (representing \$42,000 in basic rent for the period of June 2021 through February 2022, and additional rent of \$3937.50 in late fees, \$3322.76 in real estate escalation fees, \$1267.75 in garbage removal and cleaning fees, and \$70.00 in bounced check fees)³, plus interest; and it is further

³ Although 547 Rogers seeks basic rent for February 2020, the tenant ledger indicates that the rent was paid for that month. Moreover, while 547 Rogers also seeks basic rent for March and April 2022, its submissions indicate that the subject premises was rented to a new tenant beginning in March 2022, thereby alleviating Redefined’s rent obligations under the lease as of that date, regardless of the rent concessions made to the new tenant. Further, the Court is not awarding 547 Rogers’ attorneys’ fees for the voluntarily discontinued summary non-payment proceeding.

Ordered, that 547 Rogers is further awarded a monetary judgment against Redefined in the sum of \$35,296.00 (representing basic rent for the period of March 2020 through June 2021), plus interest; and it is further

Ordered, that 547 Rogers is entitled to an award of costs and reasonable legal fees; and it is further

Ordered, that the issue of the reasonable legal fees to be paid to 547 Rogers shall be referred to a special referee for hearing and determination.

This constitutes the decision/order of the court.

Dated: May 30, 2023

Enter,



Karen B. Rothenberg, J.S.C.