

Mark Propco LLC v Noro

2023 NY Slip Op 33068(U)

August 30, 2023

Supreme Court, New York County

Docket Number: Index No. 157131/2021

Judge: Suzanne J. Adams

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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. SUZANNE J. ADAMS PART 39TR

Justice

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INDEX NO. 157131/2021

MARK PROPCO LLC

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

GIOVANNI NORO,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is ordered that plaintiff's motion is granted. Plaintiff in this action is the owner of the property and building located at 25 East 77th Street in Manhattan. Pursuant to a lease agreement dated as of November 7, 2011, plaintiff's predecessor in interest leased the ground floor retail space of the premises to non-party PO USA Corporation (the "Tenant") for the period November 11, 2011, through November 30, 2021. Defendant signed an unconditional guaranty of the lease dated November 7, 2011. The Tenant did not surrender possession of the premises at the lease' expiration, but remained a holdover tenant until March 3, 2022. Plaintiff commenced a separate action against the Tenant in this court under Index No. 152892/2021 (the "Tenant Action"). By order of this court in said action dated July 21, 2022, plaintiff was granted summary judgment against the Tenant in the amount of \$533,869.47, together with costs and disbursements, and reasonable attorneys' fees, and this court's order dated January 3, 2023, confirmed the award, after inquest, of attorneys' fees in the amount of \$90,725.71 plus

interest. In this action, plaintiff's complaint seeks certain rental arrears against defendant as guarantor of the Tenant's obligations, as well as a declaration that NYC Administrative Code § 22-1005 (the "Guaranty Law") is unconstitutional. Defendant's answer contains the First Affirmative Defense that plaintiff's claims are barred, in whole or in part, by the Guaranty Law, which, *inter alia*, renders unenforceable a personal guaranty of a commercial real estate lease if the tenant under the lease was required to close to the public pursuant to Executive Order No. 202.7, and the default occurred between March 7, 2020, and June 30, 2021. The Second Affirmative Defense asserts that plaintiff's claims are barred, in whole or in part, by a material alteration of the underlying debt, and the Third Affirmative Defense is the adoption and incorporation of all affirmative defenses asserted by the Tenant in the separate action described above.

Plaintiff now moves pursuant to CPLR 3212, 3211(b), and § 3013 to dismiss defendant's affirmative defenses; pursuant to CPLR 3025(c) for leave to amend its complaint to conform to the evidence proffered on the motion; and pursuant to CPLR 3212 for summary judgment and a hearing to determine attorneys' fees. Defendant does not challenge plaintiff's contentions as to the Second and Third Affirmative Defenses (the latter having been adjudicated in the Tenant Action). Rather, defendant's opposition to the motion solely addresses – and disputes – plaintiff's contention that the Guaranty Law is unconstitutional because it violates the Contracts Clause of the U.S. Constitution. Earlier this year, and subsequent to full submission of the instant motion, a Federal court in New York held that the Guaranty Law does violate the Contracts Clause. *Melendez v. City of New York*, 2023 WL 2746183 (S.D.N.Y. March 31, 2023). The *Melendez* court, on remand from the Second Circuit, evaluated the constitutionality of the Guaranty Law according to the guidelines set forth in *Sullivan v. Nassau Cty. Interim Fin. Auth.*, 959 F.3d 54,

64 (2d Cir. 2020), asking: “(1) whether the contractual impairment is substantial and, if so, (2) whether the law serves a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and necessary.” *Melendez*, WL 2746183 at *8. The District Court found that the contractual impairment imposed by the Guaranty Law on the plaintiff landlords was substantial, and that the City’s passage of the law in response to the economic impact of the Covid-19 pandemic was a legitimate public purpose. WL 2746183 at *9. However, the court further made a detailed finding that the Guaranty Law was “not reasonable in [its] design,” because it was not a temporary impairment of a contract, but rather permanently and entirely extinguished a party’s contract rights; the record did not support an assumption that was the basis of the law (the City “could have fashioned a more targeted law to address its stated purpose”); the law’s burden was placed exclusively on landlords; application of the law was not based on need; and the law did not compensate the landlords for unpaid rent. *Id.* at *10-15.

Although the Appellate Division has yet to rule on the Guaranty Law’s constitutionality, the reasoning in *Melendez* has already been adopted by the Supreme Court. *See Kensington House NY LLC v. Nicholas Emil Accardi* (Sup. Ct., New York County, May 17, 2023, Bluth, J., Index No. 651365/2022); *see also Robert T. Iannucci et ano. v. Prime Four Inc. d/b/a Forno Rosso, et al.* (Sup. Ct. Kings County, July 27, 2023, Boddie, J., Index No. 527321/2021). This court agrees that the reasoning in *Melendez* is thorough and sound, and should apply to the instant action.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted and defendants’ affirmative defenses are dismissed, and pursuant to CPLR 3025(c) the complaint herein is amended to conform to the evidence; and it is further

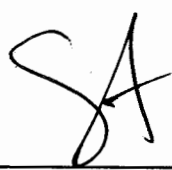
ORDERED that the Clerk shall enter judgment in favor of plaintiff Mark Propco LLC and against defendant Giovanni Noro in the amount of \$875,598.27, with interest thereon at the statutory rate from today's date through the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk, and attorneys' fees as determined by a Special Referee as set forth hereinbelow; and it is further

ORDERED that the amount of attorneys' fees to be assessed as against defendant is referred for determination to a Special Referee, and that within 60 days from the date of this order plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) to arrange a date for a reference to determine pursuant to CPLR § 4317(b); and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in accordance with the aforesaid award of damages with interest, costs, and disbursements, and the report of the Special Referee, without any further application.

This constitutes the decision and order of the court.

8/30/2023
DATE



SUZANNE J. ADAMS, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input 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