SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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26 COURT ASSOCIATES LLC,

Plaintiff, Decision and order

- against - Index No. 513029/2023

MARTIN TENENBAUM ESQ.,

Defendant, September 6, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #2 & #3

The plaintiff has moved seeking summary judgement and to strike the affirmative defenses of the defendant. The defendant has cross-moved seeking to add another affirmative defense. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On April 23, 2009 the plaintiff and an entity called Wishful Thinking Inc., entered into a lease extension concerning rental space located at 26 Court Street in Kings County. The defendant Martin Tenenbaum and David Berger both guaranteed to lease rental payments. The lease expired on September 30, 2020. On September 3, 2020 Mr. Berger sent an email to the defendant which indicated that rental checks for half of July and half of August were mailed and that "this concludes my rental obligations for the penthouse, and the lease (and my guarantee) for Wishful Thinking Realty is terminated. Rent for September, and going forward, is to be a flat $4,000 and billed only to Tenenbaum & Shivers LLP" (see, Email dated September 3, 2020 sent 4:32 PM [NYSCEF Doc. No.

12]). A few days later a representative of the defendant sent a return email to Mr. Berger which stated "correct" (see, Email dated September 8, 2020 sent 10:40 AM [NYSCEF Doc. No. 13]). A few weeks later the defendant sent the plaintiff an email which included a lease amendment for the rental space. The amendment was never executed between the parties and while the defendant paid the rent through the end of 2020 he did not pay any rent thereafter until his departure in February 2022.

The plaintiff argues that the original lease remained in effect and that consequently the defendant as guarantor remains liable for the rent owed. The defendant asserts that the lease terminated upon the departure of Wishful Thinking and thus a new lease was entered into between the parties. The defendant concedes that while it may be true no rental payments were made during the time the defendant remained a tenant, such non-payment can be the subject of a lawsuit against him but should not implicate his status as a guarantor which terminated when the lease terminated.

Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v.Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]). Thus, to succeed on a motion for summary judgement it is necessary for the movant to make a prima facie showing of an entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a movant cannot succeed upon a motion for summary judgement by pointing to gaps in the opponents case because the moving party must affirmatively present evidence demonstrating the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

The entire case hinges on whether the lease continued upon the departure of Wishful Thinking. The plaintiff concedes the email dated September 3, 2020 terminated Mr. Berger's obligations under the lease but that "of course, at no time did this absolve Defendant of his own rental obligations, and his own personal liability for the Wishful Thinking Lease" (see, Affirmation of Joseph Schachter, ¶12 [NYSCEF Doc. No. 29]). However, there are

surely questions of fact whether the acknowledgment the lease was terminated rendered it terminated as to the defendant as well. Indeed, it is difficult to imagine a lease that is terminated as to one party but remains viable to other parties. Further, the request the rental payments should be billed to a new entity not part of the original lease raises additional questions whether an entirely new lease was contemplated. There mere fact Mr. Tenenbaum was a guarantor of the original lease and also a member of the concern that assumed a new lease does not mean the original lease and its accompanying guaranty still bound the defendant. In any event, there are questions of fact in this regard. In addition, the existence of an amendment to the lease which was never executed does not mean the parties reverted back to the original lease and the guaranty of the defendant. Rather, the amendment was intended to concretize a new lease entered between a new tenant. These questions are further supported by an email sent by the defendant on October 3, 2020. During the negotiations regarding the new lease the defendant wrote "can you please tell me what is [sic] the Clause- "all other terms of the lease remain in full force" means. The lease expired and it was not personal to me" (see, Email dated October 3, 2020 sent 8:59 AM [NYSCEF Doc. No. 37]).

These facts demonstrate there are significant questions regarding the status of the new tenant and any lease contemplated

by the parties. At this juncture it cannot be said there are no questions of fact the defendant must guaranty the lease payments in question. Therefore, the motion seeking summary judgement is denied.

Turning to the motion seeking to amend the answer to assert a further affirmative defense that the complaint must be dismissed based upon documentary evidence, it is well settled that a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). The affirmative defense is duplicative of the second affirmative defense which states that "the Plaintiff's acceptance of the primary lessee vacature [sic] along with that of its co-guarantor and acceptance of a new tenancy absolved the Defendant from liability rendering the guarantee void" (see, Proposed Amended Answer, ¶20 [NYSCEF Doc. No. 45]). Surely, in support of that defense the defendant will be able to produce any documents thereby. Thus, the proposed affirmative defense is duplicative of an already existing defense. Therefore, the motion seeking to amend the answer is denied.

So ordered.

ENTER:

DATED: September 11, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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