

Forty Seventh Fifth Co. LLC v Abraham

2023 NY Slip Op 33297(U)

September 18, 2023

Supreme Court, New York County

Docket Number: Index No. 651753/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

affirmative defense and amending the complaint to include all rent, additional rent and use and occupancy through the date of judgment pursuant to CPLR 3025(c).

Plaintiff argues that defendant, as the guarantor of the lease, owes the principal sum of \$70,259.49 representing base rent, additional rent and use and occupancy billed through September 30, 2021, plus interest and late fees from April 1, 2020, until tenant surrenders possession of the premises (NYSCEF Doc. No. 12, *memo of law*, pg. 5-6). Plaintiff contends that the complaint should be deemed amended to conform to the proof submitted and to accurately reflect the current amounts due and owing for unpaid rent due to plaintiff through the date of judgment pursuant to CPLR 3025(c). Plaintiff asserts that doing so will not unduly prejudice defendant as he has not made any payments to plaintiff from the date of the complaint, and moreover, judicial economy will be served by not compelling plaintiff to commence successive actions against defendant for additional periods in which defendant has failed to pay the amount due under the lease (*id.*, at pg. 9-10). Moreover, plaintiff maintains that it is entitled to summary judgment in its favor on the first cause of action for breach of guaranty because defendant unconditionally guaranteed all of tenant's obligations and tenant has failed to pay rent and continues to use and occupy the premises. To this point, plaintiff attaches the affidavit of its leasing manager, Svetlana Fridman ("Fridman"), in which she reiterates that both tenant and defendant have failed to pay all rent and use and occupancy due to plaintiff including statutory interest (NYSCEF Doc. No. 6, *Fridman affidavit*, ¶31). Plaintiff likewise tenders an updated rent ledger detailing the monies billed by the plaintiff, through September 30, 2021, including base rent and additional rent due under the lease and use and occupancy (NYSCEF Doc. No. 8, *current rent ledger*).

Concerning attorney's fees and expenses, plaintiff contends that defendant agreed to pay such fees under the unambiguous language of the guaranty, and that a hearing on the legal fees should be held (NYSCEF Doc. No. 12, *at pg. 19*). Lastly, plaintiff posits that dismissal of defendant's affirmative defenses is warranted as he has failed to plead all the material elements of each affirmative defense with sufficient particularity in contravention of CPLR 3013, and thus, affirmative defenses are alleged in a boilerplate, wholly conclusory manner, and contain no factual support.

In opposition, defendant argues that the amount of money sought by plaintiff is based on inaccurate numbers, and that for almost a year, plaintiff offered rent discounts to all tenants. Defendant further contends that plaintiff stopped accepting rent money from tenant to bolster the claim for breach of lease and guaranty (NYSCEF Doc. No. 17, *opposition*, ¶1). Moreover, defendant asserts that he has previously submitted a Hardship Declaration to the Court, and that a clause in the lease upon which plaintiff's claim is based was held in abeyance during the COVID-19 pandemic. Lastly, defendant argues that plaintiff brought this action in bad faith because the parties were negotiating an amicable resolution, and that summary judgment should be precluded because there are material issues of fact.

In reply, plaintiff sets forth that defendant does not oppose its request for the complaint to be deemed amended to conform it to the evidence. Plaintiff articulates that since defendant has failed to refute any of the amounts listed on the rent ledger, it must therefore be deemed as an admission that the amount represented on the rent ledger is accurate (NYSCEF Doc. No. 20,

reply, pg. 7). Plaintiff asserts that defendant's dispute of the amount sought premised on the argument that plaintiff allegedly offered all tenants a discount should be rejected because both the lease and guaranty do not permit any modification to either agreement except in writing subscribed to by the parties. Plaintiff adds that in the case at bar, there was never an agreement in writing modifying the lease or the guaranty. Furthermore, plaintiff maintains that even if all tenants received a discount, such discount should not apply to defendant because defendant is a guarantor, not a tenant. Plaintiff contends that paragraph 2(a) of the guaranty prohibits defendant from raising any defense to the guaranty that the tenant would be permitted to assert. Plaintiff maintains that it is entitled to judgment for breach of guaranty because defendant unconditionally guaranteed all of tenant's obligations, including, without limitation, to pay rent, additional rent and/or use and occupancy to the plaintiff. Lastly, plaintiff posits that paragraph 1 of the guaranty provides that "the guarantor must reimburse the plaintiff if the plaintiff makes any expenditure or incurs any obligation for the payment of money, including, but not limited to, attorneys' fees, costs and disbursements" (*id.*, at pg. 13).

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated" (CPLR 3212[f]; see *Zuckerman*, 49 NY2d at 562).

A landlord seeking summary judgment against a guarantor satisfies its *prima facie* evidentiary burden by proving the existence of a guaranty agreement with an absolute and unconditional guaranty, a debt owed by tenant to landlord, and guarantor's failure to pay under the agreement (See *L. Raphael NYC C1 Corp. v Solow Bldg. Co., L.L.C.*, 206 AD3d 590, 592-593 [1st Dept 2022]).

As an initial matter, the court grants that portion of plaintiff's motion seeking to amend the complaint to conform the pleadings to the proof. Pursuant to CPLR 3025(c), the court "may permit pleadings to be amended before or after judgment to conform them to the evidence." It has also been held that "[a]pplications to amend pleadings are within the sound discretion of the court" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]). The operative factor considered upon a motion to conform pleadings is prejudice to the nonmoving party (see *1414 Holdings, LLC v BMS-PSO, LLC*, 167 AD3d 425, 426 [1st Dept 2018]; *Gonfiantini v Zino*, 184 AD2d 368, 369 [1st Dept 1992].) Here, while plaintiff seeks to amend the complaint to conform to the proof, the proof only establishes liability through September 2021. No opposition is raised with respect to this branch of the motion. However, the motion seeking to conform the pleadings to the proof is granted to the extent it seeks to reflect an outstanding balance through September 30, 2021, and it is otherwise denied.

Addressing now plaintiff's motion for summary judgment, the court finds that plaintiff has established its *prima facie* entitlement to summary judgment on its breach of guaranty claims asserted insofar as it has attached both the lease and guaranty bearing defendant's signature in

which he agreed to be absolutely and unconditionally responsible for the tenants' financial responsibilities (NYSCEF Doc. Nos. 6; 7, *commercial lease; guaranty*). Plaintiff also proffers an updated rent ledger reflecting the \$70,259.49 due and sought constituting the base rent and additional rent billed through September 30, 2021. Although plaintiff also seeks rent and additional rent for the period after September 30, 2021, through December 31, 2021, the ledger and documentation proffered only establish outstanding amounts through September 2021; thus, the remaining branch of the motion is denied.

Plaintiff also seeks late fees and paragraph 48 of the lease which provides for late fees states that “[i]n the event any payment of Basic Rent and/or Additional Rent required to be made hereunder shall not be made within ten (10) days after the date it is due under the provisions of this Lease, Tenant shall pay to Owner a sum equal to FIVE (\$.05) CENTS for each and every dollar of Basic Rent and/or Additional Rent so overdue”.

Although the burden shifts to defendant to raise the existence of a material issue of fact precluding summary judgment on the breach of guaranty claim, defendant has failed to do so. Defendant has not adduced any evidentiary proof in admissible form sufficient to establish that either the lease or guaranty was modified to reduce tenant's rent due during the COVID-19 pandemic. Furthermore, defendant does not specify any law that absolves him from liability as a guarantor during the COVID-19 period. Based on the foregoing, the court grants that branch of plaintiff's motion seeking a money judgment in its favor and against defendant for \$70,259.49 through September 30, 2021, plus interest from July 1, 2020.

Plaintiff also seeks dismissal of the remaining affirmative defenses, arguing that they are all boilerplate and conclusory. This court agrees. Insofar as defendant has not addressed that branch of plaintiff's motion seeking dismissal of those affirmative defenses, they are deemed abandoned (see *Wing Hon Precision Indus. Ltd. v Diamond Quasar Jewelry, Inc.*, 154 AD3d 550, 551 [1st Dept 2017]; *Carey & Assoc. LLC v 521 Fifth Ave. Partners, LLC*, 130 AD3d 469, 470 [1st Dept 2017]). Based on the foregoing, defendants' affirmative defenses are dismissed.

Turning next to that branch of the motion seeking attorneys' fees and expenses, “[u]nder the [general] rule, attorney's fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule” (*Sage Sys., Inc. v Liss*, 39 NY3d 27, 30-31 [2022], quoting *Hooper Assoc. v AGS Computers.*, 74 NY2d 487, 491 [1989]). Here, the guaranty provides for plaintiff's recovery of attorney's fees and disbursement (NYSCEF Doc. No. 7, *Limited Guaranty*, ¶1). Thus, the issue with respect to attorney's fees shall be referred to a special referee for determination. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that that branch of plaintiff's motion seeking to amend the complaint to conform to the proof is granted in accordance with this decision and order; and it is further

ORDERED that that branch of plaintiff's motion seeking dismissal of defendant's affirmative defenses is granted; and it is further

ORDERED that that branch of plaintiff’s motion seeking the principal sum of \$70,259.49, interest from July 1, 2020, plus late fees in the amount of \$3,512.97, costs and disbursements (first cause of action) is granted, and the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that that branch of plaintiff’s motion seeking rent and additional rent after September 30, 2021, through December 31, 2021, and continuing use and occupancy after December 31, 2021, is denied; and it is further

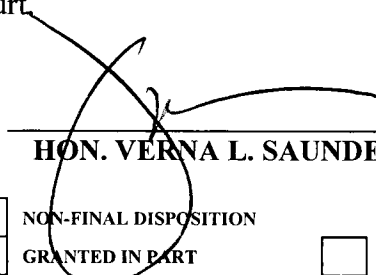
ORDERED that the branch of plaintiff’s motion for summary judgment seeking attorney fees and other expenses incurred in this action (second cause of action) is referred to a special referee to hear and determine; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant, as well as upon the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court and the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this court.

September 18, 2023



HON. VERNA L. SAUNDERS, JSC

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