Daper Realty, Inc. v Pizzimenti

2023 NY Slip Op 33673(U)

October 19, 2023

Supreme Court, New York County

Docket Number: Index No. 155325/2020

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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DAPER REALTY, INC.

Plaintiff,

- v –

CHRISTOPHER PIZZIMENTI
a/ka CHRIS PIZZIMENTI

Defendant.

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INDEX NO. 155325/2020

MOTION DATE 6-2-23

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 59, 61

were read on this motion to/for SUMMARY JUDGMENT/STRIKE DEFENSES.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 60, 62

were read on this motion to/for AMEND/SUMMARY JUDGMENT.

I. BACKGROUND

This is an action commenced by the plaintiff landlord, Daper Realty, Inc., in July 2020 to recover unpaid rent and additional rent from the defendant, Christopher Pizzimenti, president of the commercial tenant, Al Horno Lean Mexican 57, Inc. (Al Horno Lean), and personal guarantor on the lease, for arrears accrued by the tenant through March 6, 2020, the day before the effective date of the NYC Guaranty Law (New York City Admin. Code § 22-1005). The plaintiff, owner of the subject real property at 189 Second Avenue in Manhattan, moves pursuant to CPLR 3212 for summary judgment on the complaint, pursuant to CPLR 3211(b) for dismissal of the defendant's affirmative defenses and counterclaim, and for use and occupancy and other relief by Order to Show Cause (MOT SEQ 001). The defendant moves to amend his answer to add an affirmative defense that the plaintiff is a foreign business not authorized to bring an action In New York under Business Corporation Law (BCL) §1312(a), and for summary judgment dismissing the complaint on that ground (MOT SEQ 002). The matter was reassigned several times thereafter.

In the meantime, in August 2021, the plaintiff commenced a separate action against the now former commercial tenant, Al Horno Lean, which operated a restaurant on the premises, seeking an ejectment, money damages and other relief (Index No. 655100/2021). The plaintiff claimed that the tenant had not paid rent since February of 2020, was served with a default notice and cancellation of the lease, but did not surrender possession until sometime after the action was commenced. In November 2021, the plaintiff moved for summary judgment on that complaint, striking of the affirmative defenses, use and occupancy and other relief (MOT SEQ 001). The defendant cross-moved to dismiss the complaint on the ground that the plaintiff was not registered to do business in New York as required by BCL §1312(a).

By an order dated October 5, 2022, the court granted the plaintiff's motion in part and denied the defendant's cross-motion (MOT SEQ 001). Specifically, the plaintiff's motion was granted "to the extent that (1) the plaintiff is awarded judgment on the first cause of action sounding in ejectment to the extent provided herein, (2) the plaintiff is awarded judgment on the issue of liability on the second [breach of contract], third [use and occupancy, or contractual holdover rent], and fifth causes of action [attorney's fees], (3) the court refers the issue of damages on the second, third, and fifth causes of action to a Judicial Hearing Officer (JHO) or Special Referee to hear and report, and (4) the affirmative defenses asserted by the defendant Al Horno Lean Mexican 57, Inc., are dismissed, and the motion is otherwise denied." In denying the defendant's cross-motion, the court found that the defendant had waived any defense under BCL § 1312(a). In the same order, the court noted that consolidation of that action with the instant action was "not warranted in light of the disposition of substantially all of the claims" in that action. Also in the action against the tenant, the court, by an order dated October 7, 2022, *inter alia*, denied a separate motion by the plaintiff for use and occupancy as academic in light of the ejectment granted on the prior motion (MOT SEQ 002).

The Special Referee conducted a hearing in May 2023 wherein the plaintiff requested total damages of $1,007,253.98 from the defendant tenant, which includes a credit of the tenant's security deposit, plus attorney's fees of $73,825.54, for a total of $1,081,079.52. The Referee's decision is *sub judice*.

As stated, in the instant action, the plaintiff moves for summary judgment on liability as against the guarantor with damages to await the decision of the Referee in the related action,

and dismissal of the defendant's affirmative defenses and counterclaim (MOT SEQ 001) and the defendant moves for leave to amend the answer to add BCL §1312(a) as an affirmative defense and for summary judgment dismissing the complaint on that ground (MOT SEQ 002). Both motions are opposed. The plaintiff's motion is granted in part. The defendant's motion is denied.

II. DISCUSSION

A. MOT SEQ 001

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. The plaintiff met its burden and the defendant has not raised any triable issue.

All five causes of action are essentially for breach of the guaranty agreement, seeking unpaid rent and additional rent through March 6, 2022. The plaintiff submits the pleadings, the subject lease and rider, the subject guaranty agreement, a notice of default, a notice of cancellation and an affidavit of David Simon, president of Draper Realty, Inc., who alleges that tenant last paid rent in February 2020, but that checked bounced and was not repaid, and that no amount has been paid by the tenant or guarantor since, even though the restaurant continued to operate on a take-out basis at least through 2021 and the defendant tenant received PPP loans upon the representation that it would be applied to rent arrears. Simon alleges that the defendant, as guarantor, is liable for the following unpaid amounts – $37,449.53 for rent, $12,392.08 for real estate taxes, $3,142.50 for water and sewer charges, $5,217.78 for late fees and $25.00 for a bounced check fee, for a total of $47,226.89. These amounts do not include any amounts accrued after the Guaranty Law expired.

The plaintiff's proof demonstrates (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st

Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). The plaintiff proof further demonstrates that the guaranty "is clear and unambiguous on its face and, by its language, absolute and unconditional, [and thus that] the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446–47 (1st Dept. 2012) (quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 [1st Dept. 1991]). The defendant has not made any showing of fraud, duress, or other wrongful conduct by the plaintiff in regard to the guaranty, nor raised any triable issue of fact. Therefore, the plaintiff's motion is granted as to the five causes of action in the complaint in the sum of $47,226.89, with statutory interest from February 1, 2020.

Interest is computed "from the earliest ascertainable date the cause of action existed". CPLR 5001(b). In a breach of contract action, interest "accrues from the time of an actionable breach." Kellman v Mosley, 60 AD3d at 457 (1st Dept. 2009); see generally Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256 (1998); Love v State of New York, 78 NY2d 540 (1991). As such, the plaintiff is entitled to statutory interest from February 1, 2020, in this action and in any amount awarded by the Referee in the related action. Furthermore, the court need not refer the damages calculation here to a Referee nor await a decision from the Referee in the related action, as the plaintiff has established its entitlement to the $47,226.89 awarded here, and any amount recovered pursuant to this judgment can be deducted from any amount awarded to the plaintiff in the related action upon a motion to confirm the Referee's report.

As in the related action, any application for use and occupancy *pendente lite* is denied as moot in light of the tenant's vacatur of the premises. Any grant of past use and occupancy is unnecessary as the plaintiff was awarded summary judgment against the defendants in both actions and will be awarded an appropriate sum of money damages. See Booston LLC v 35 W. Realty Co., LLC, 194 AD3d 609 (1st Dept. 2021).

The plaintiff is also entitled to dismissal of the defendant's 12 affirmative defenses and counterclaim alleging tenant harassment pursuant to CPLR 3211(b) for the reasons stated in the plaintiff's motion papers. The plaintiff met its burden of demonstrating that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d

541 (1st Dept. 2011). Indeed, some are nonsensical. As to the counterclaim, the guarantor expressly waived all defenses and counterclaims unless and until "all obligations of tenant that are guaranteed under this guaranty are fully performed." See Citibank, N.A. v Plapinger, 66 NY2d 90 (1985); Sterling Nat. Bank v Biaggi, 47 AD3d 436 (1st Dept. 2008). In any event, the complaint alleges no conduct resembling "commercial tenant harassment" (New York City Administrative Code § 22-903) as it states only that the plaintiff "threatened defendant [sic] life, liberty and livelihood", made "implied threats" and prevented an invitee from entering the subject property. Moreover, section 22-903 expressly provides that the any harassment claim does not relieve the tenant of its obligation to pay rent and does not extend to any invitee of the tenant.

B. MOT SEQ 002

On March 28, 2022, the defendant moved to amend his answer to add an affirmative defense that the plaintiff is a foreign business not authorized to bring an action In New York under Business Corporation Law (BCL) §1312(a), and for summary judgment dismissing the complaint on that ground. The defendant tenant asserted the same argument in the related action, seeking to dismiss the complaint on that ground. However, several months later, in the order dated October 5, 2022, the court, in denying the defendant tenant's cross-motion to dismiss, expressly rejected that argument, finding that the defendant waived it by not asserting it earlier, stating as follows:

> No party disputes that the plaintiff was unregistered to do business in New York when it commenced this action and that it remains unregistered, in contravention of BCL § 1312(a). However, the defendant is not entitled to dismissal of the complaint on this ground inasmuch as the defendant failed to raise the issue of registration on a pre-answer motion to dismiss or in its answer, filed on September 8, 2021. Thus, any lack of capacity defense is waived. CPLR 3211(e). The defendant's insistence that its belated invocation of BCL § 1312(a) is not a lack of capacity defense is both nonsensical and directly contradicted by controlling appellate authority. To be sure, it is well-settled that "[a] defense that a corporate plaintiff has failed to comply with the requirements of Business Corporation Law § 1312 is based on the premise that plaintiff is without legal capacity to sue, and this defense is waived unless raised either by motion to dismiss or in the responsive pleading." RCA Records v Wiener, 166 AD2d 221, 221 (1st Dept. 1990); see also Household Bank (SB), N.A. v Mitchell, 12 AD3d 568, 568 (2nd Dept. 2004); FBB Asset Mgrs. v Freund, 2 AD3d 573, 574 (2nd Dept. 2003).

The same reasoning and result applies here under the doctrine of collateral estoppel, or issue preclusion. This doctrine "precludes a party from relitigating an issue which has previously been decided against [it] in a proceeding in which [it] had a fair opportunity to fully litigate the point." Kaufman v Eli Lilly & Co., 65 NY2d 449 (1985). Collateral estoppel requires two distinct elements: "that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue." Allied Chem. v. Niagara Mohawk Power Corp., 72 NY2d 271 (1988); In re Hofmann, 287 AD2d 119 (1st Dept. 2001). Since both elements are present here, the defendant's motion to amend is denied.

The court has considered the defendant's remaining contentions and finds them to be without merit.

III. CONCLUSION

Accordingly, upon the forgoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment as against the defendant (MOT SEQ 001) is granted on all five causes of action, without prejudice, and the motion is otherwise denied, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, Daper Realty, Inc., and against the defendant, Christopher Pizzimenti, in the sum of $47,226.89, plus costs and statutory interest from February 1, 2020, and it is further

ORDERED that the defendant's motion pursuant to CPLR 3025(b) and 3212 to amend the complaint to add a defense and for summary judgment dismissing the complaint on that ground (MOT SEQ 002) is denied.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

10/19/2023
DATE

CHECK ONE:							
	CASE DISPOSED		NON-FINAL DISPOSITION				
	GRANTED		DENIED	X	GRANTED IN PART		OTHER