

2261 Realty LLC v Cai Ping Wang

2023 NY Slip Op 34080(U)

November 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 530870/2022

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 14th day of November 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
2261 REALTY LLC

Index No: 530870/2022

Plaintiff(s)

-against-

ORDER

CAI PING WANG and NY PDK TRADING, INC
-----X
Defendant(s)

The following e-filed papers read herein:
Notice of Motion/Petition/Affidavits Annexed
Exhibits Annexed/Reply.....
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....

NYSCEF Nos.:
1-3; 5-11; 19
4; 16-18

In this action, 2261 Realty LLC ("Plaintiff") moves (Motion Seq. 1) for summary judgment against Cai Ping Wang ("Wang") and NY PDK Trading, Inc. ("NY PDK") (Collectively "Defendants") seeking a monetary judgment in the amount of \$105,365.55 for rent and additional arrears owed by Defendants, plus costs, disbursements, legal fees and to dismiss all affirmative defenses raised by Defendants in their answer. Defendants have opposed the motion on the grounds that triable issues of fact exist warranting a trial.

This action was brought by Plaintiff, a property owner, seeking to recover rents allegedly due and unpaid by Defendant NY PDK, a former commercial tenant at the property. Pursuant to the Lease Agreement, Defendant Wang, the principal of NY PDK executed a personal guaranty to pay in the event the tenant defaults.

In support of its motion, Plaintiff argues that it is entitled to summary judgment because Defendants have only provided unsubstantiated assertions without any evidentiary support in response to the facts alleged by Plaintiff and that none of the affirmative defenses raised in their answer defeat Plaintiff's motion. Plaintiff states that the Defendants' default has resulted in a breach of their contract, which they do not dispute. Furthermore, Plaintiff argues that Defendants have failed to raise any issues of material facts and only make conclusory statements that their performance under the Lease Agreement was excused because Plaintiff allowed them to pay reduced rent and terminate the agreement early, which Plaintiff denies and states is in violation

of the Lease Agreement which does not permit oral modification of its terms. Additionally, Plaintiff argues that Defendants do not have any factual basis or support that their business was subject to closure and/or in person limitations to a degree that would void the guaranty agreement pursuant to NY Administrative Code 22-1005. Plaintiff submits an affidavit of John Bennardo (“Bennardo”), a member of 2261 Realty LLC, who asserts a nearly identical version of events.

In opposition, Defendants argue that issues of material facts are present precluding Plaintiff from summary judgment. Defendants claim that its business was a non-essential retail establishment that was forced to close and/or limit its capacity due to the COVID-19 pandemic, and that based on the Governor’s Executive Order and NY Administrative Code 22-1005, the guaranty cannot be enforced. Additionally, Defendants argue that the alleged default was not actually a default because the sums which Plaintiff seeks to recover had effectively been waived by Plaintiff through promises made that the Defendants relied on. Defendants state that Plaintiff promised that if Defendants declined to exercise the termination clause in section 75 of the Lease Agreement, that it could remain at the property by just paying whatever it was able to which created its promissory estoppel affirmative defense. In support of its opposition, Defendants submit an affidavit of Wang who asserts a nearly identical version of events.

It is well established 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.” *Ayotte v. Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]. Once a prima facie demonstration 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. *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. *Elzer v. Nassau County*, 111 A.D.2d 212, (2nd Dept. 1985); *Steven v. Parker*, 99 AD2d 649, (2nd Dept. 1984); *Galeta v. New York News, Inc.*, 95 AD2d 325, (1st Dept. 1983). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving

party. *Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept. 1990); *Rebecchi v. Whitmore*, 172 AD2d 600 (2d Dept. 1991).

Where a lease contains a clause requiring any modification of the terms of such lease to be in a writing signed by the landlord, an oral modification is generally precluded (see General Obligations Law 15-301[1]; *Singh v Benzina, Inc.*, 189 A.D.3d 1494 [2d Dept. 2020]; *99 Realty Co. v Eikenberry*, 242 AD2d 215 [1st Dept. 1997]). However, an alleged oral modification is enforceable if there is partial performance that is unequivocally referable to the oral modification (*Singh* at 1496; *Vogel v Vogel*, 128 AD3d 681 [2d Dept. 2015]). Once a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification (*Id.*; *Rose v Spa Realty Assoc.*, 42 NY2d 338 [1977]). A party relying on promissory estoppel must demonstrate that there was a clear and unambiguous promise upon which it reasonably and detrimentally relied (*Weaver v Town of North Castle*, 153 AD3d 531 [2d Dept. 2017]; *Schwartz v Miltz*, 77AD3d 723 [2d Dept. 2010]).

NY Administrative Code 22-1005 bars enforceability against a natural person of that person's guarantee of commercial-lease obligations if two conditions are satisfied: (i) The tenant's operations were halted or restricted under March 2020 COVID-related executive orders; and (ii) the default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive. The period for determining whether Administrative Code § 22-1005 applies is the time of the event causing guarantor to become liable (*3rd & 60th Assoc. Sub LLC v Third Ave M & I, LLC*, 199 A.D.3d 601 [1st Dept. 2021]).

Here, the Defendants have failed to raise a triable issue of fact or establish an affirmative defense based on promissory estoppel. Pursuant to section 71 of the Lease Agreement, any modifications made must be in writing and signed by the party against whom enforcement of the change, modification, discharge, or abandonment is sought. Defendants only submit an affidavit of Wang stating in a conclusory fashion that Plaintiff promised that the Defendants could pay a reduced rent if it declined to exercise the termination clause. Furthermore, Defendants have failed to proffer documentation or admissible evidence establishing that there was a clear and unambiguous promise upon which it reasonably and detrimentally relied, nor have Defendants demonstrated any partial performance that was unequivocally referable to the oral modification.

Thus, Defendants have not raised triable issues of fact as to whether its partial performance rendered the parties' oral modification enforceable and as to whether the Plaintiff is estopped from denying that such a modification occurred.

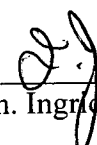
With respect to Defendant Wang's guaranty, pursuant to the Arrears Report submitted by Plaintiff, Defendants arrears began on February 28, 2019, through September 1, 2022. Here, the default giving rise to Wang's liability took place outside the statutory period, thus the exemption of NY Administrative Code 22-1005 is inapplicable.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion for summary judgment in the amount of \$105,365.55 for rent and additional arrears owed by Defendants, plus costs, disbursements, legal fees is granted, and it is further,

ORDERED, that Defendants' first, second, fourth, fifth, sixth, and seventh affirmative defenses are dismissed.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**