

370 8th Ave. Group, LLC v Burke

2023 NY Slip Op 34309(U)

December 4, 2023

Supreme Court, New York County

Docket Number: Index No. 656675/2022

Judge: Suzanne J. Adams

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE J. ADAMS PART 39TR

Justice

-----X

370 8TH AVENUE GROUP, LLC,

Plaintiff,

- v -

CHRISTOPHER BURKE, OLEKSIY SHAPOVAL, ALFRED TARANTINO

Defendant.

-----X

INDEX NO. 656675/2022

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that plaintiff's motion is granted in part as described hereinbelow. Plaintiff in this matter is the owner of the building at 370 Eighth Avenue, New York, New York, and leased the building to a non-party tenant by agreement dated January 16, 2016. Each defendant executed guaranties of the lease dated the same date. The tenant defaulted in rent and other payments under the lease and was evicted from the premises on October 20, 2020. Plaintiff commenced this action in June 2022 seeking judgment under the guaranties for tenant's unpaid monetary obligations. By decision and order dated April 3, 2023, this court granted plaintiff's default motion as to defendants Oleksiy Shapoval and Alfred Tarantino and directed the Clerk to enter judgment against them in plaintiff's favor. Plaintiff now moves pursuant to CPLR 3025 to amend the Verified Complaint, and pursuant to CPLR 3212 for summary judgment against defendant Christopher Burke on the First and Fourth Causes of Action and dismissing his affirmative defenses and counterclaims. Defendant Burke opposes the motion.

Pursuant to CPLR 3025(b), “[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.” Leave to amend pleadings is generally freely given, absent prejudice and surprise resulting from the delay. *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983); *Antwerpse Diamantbank N.V. v. Nissel*, 27 A.D.3d 207, 208 (1st Dep’t 2006). To the extent plaintiff seeks to amend the complaint to add damages that accrued subsequent to the commencement of this action through the date the tenant was evicted from the premises, such relief is granted. However, plaintiff in the initial moving papers offers no explanation or justification for the removal from the action of the two defendants against whom a default judgment was already granted. Plaintiff in reply states that the other defaulting defendants reached certain unspecified “agreements” with plaintiff, but in light of the default judgments, any such agreement would be in lieu of plaintiff’s enforcing the judgment. Plaintiff does not address defendant Burke’s assertion in opposition that the other named defendants continue to work in the building. Burke and the other defendants all signed the same guaranty, and plaintiff obtained a judgment against two guarantors, yet at this juncture plaintiff appears to be choosing to hold only Burke liable under the guaranty. Removal of the defaulting defendants from the action would thus be prejudicial to Burke and as such this branch of plaintiff’s motion is denied.

With respect to the remainder of plaintiff’s motion, “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.” *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). The party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it, and summary judgment will only be granted if there are

no genuine, triable issues of fact. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521-22 (1st Dep't 1989). Here, there is no issue of fact with respect to Burke's liability under the guaranty. Burke does not challenge the validity of the guaranty or the assertion that the tenant defaulted in payment of certain monies. The Ninth Affirmative Defense asserting N.Y.C. Administrative Code § 22-1005 (the "Guaranty Law") merits dismissal because a Federal court in New York has held that the Guaranty Law violates the Federal Contracts Clause. *Melendez v. City of New York*, 2023 WL 2746183 (S.D.N.Y. March 31, 2023). The *Melendez* court evaluated the constitutionality of the Guaranty Law and found that it was "not reasonable in [its] design" for a variety of reasons. *Melendez*, WL 2746183 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. In addition, the First, Second, Third, and Fourth Affirmative Defenses merit dismissal as a matter of law, as they contain no factual bases and only bare legal conclusions, and the opposing papers do not proffer any further facts or law that would defeat summary dismissal. *Robbins v. Growney*, 229 A.D.2d 356, 358 (1st Dep't 1996).

However, there is no *prima facie* showing of plaintiff's entitlement to summary judgment as to damages. The record before the court reflects that various questions of fact exist regarding the underlying tenant's financial liability to plaintiff under the lease, which in turn will affect Burke's responsibilities under the guaranty. It follows that the remaining affirmative defenses and

counterclaims, which challenge the amounts purportedly owed by the tenant, survive summary dismissal.

Accordingly, it is

ORDERED that plaintiff's motion is granted only to the extent that the Verified Complaint is amended to reflect the damages that allegedly accrued subsequent to the commencement of this action through the date the tenant was evicted from the premises, and that partial summary judgment on the issue of Burke's liability only is granted to plaintiff, and the First, Second, Third, Fourth, and Ninth Affirmative Defenses are dismissed; and is otherwise denied.

This constitutes the decision and order of the Court.

12/4/2023

DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: