Frey v Albany Regal Dry Cleaning & Coin Laundry, LLC
2024 NY Slip Op 35610(U)
December 20, 2024
Supreme Court, Albany County
Docket Number: Index No. 902297-23
Judge: Denise A. Hartman
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ERIC R. FREY, JUDITH LANGLOIS, MARCIA POST,

Plaintiffs,

-against-

ALBANY REGAL DRY CLEANING & COIN LAUNDRY, LLC, CHONG JUSINO, AND FRENCH BRADY,

Defendants.

DECISION AND ORDER ON MOTION #2

Index No. 902297-23

December 20, 2024

APPEARANCES

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No appearance on this motion.

Hartman, J.

By decision and order dated March 28, 2024, the Court granted, in part, the unopposed motion for summary judgment (Motion #1) of plaintiffs, Eric R. Frey, Judith Langlois, and Marcia Post (collectively, "plaintiffs"), as to liability only for pre- and post-eviction unpaid rent and pre-eviction unpaid taxes, on their sole cause of action for breach of a commercial lease agreement and personal guarantees against defendants Albany Regal Dry Cleaning & Coin Laundry, LLC ("Albany Regal"), Chong Jusino ("Jusino"), and French Brady ("Brady") (collectively, where appropriate, "defendants"). But the Court denied plaintiffs summary judgment on the issue of liability for post-eviction taxes on the ground that the Lease and Lease Rider did not provide for such. The Court also denied summary judgment as to damages on the ground that plaintiffs failed to proffer sufficient evidence to establish the amounts owed under the Lease.

Now pending before the Court is plaintiffs' unopposed motion (Motion #2) to establish damages. Plaintiffs seek damages for unpaid pre-eviction rent and pre-eviction taxes, plus interest, totaling $350,004.49. Included in this total, they seek $205,088.08 for unpaid pre-eviction rent inclusive of interest at a rate of 9% through September 23, 2024, as well as pre-judgment statutory interest from that date through the date of judgment. They also seek $144,916.41 for unpaid real estate taxes inclusive of interest at a rate of 9%

through September 23, 2024, as well as 9% pre-judgment statutory interest from that date through the date of judgment. And they seek costs of $1,324.03.

For the reasons that follow, plaintiffs' motion (Motion #2) is granted, in part. Plaintiffs shall have judgment against defendants jointly and severally for $205,088.08 in pre-eviction missed payments and underpayments during the lease term, inclusive of 9% pre-judgment interest as of September 23, 2024, with interest at a rate of 9% from September 23, 2024, forward to the date of judgment. Plaintiffs shall also have judgment against defendants jointly and severally for $109,822.94 in pre-eviction unpaid taxes as of April 21, 2023, with pre-judgment interest at a rate of 9% on that amount forward to the date of judgment. And they are awarded statutory costs of $1,324.03.

Background

As set forth in the Court's March 28, 2024 decision and order, the parties entered into a five-year commercial lease agreement on December 31, 2015, to expire on December 31, 2020, pursuant to which defendants rented a premises located at 1410 Central Avenue, Colonie, New York 12205 (the premises) for the purpose of operating a dry-cleaning store and coin laundry (*see* NYSCEF Doc No. 24 [the Lease and Lease Rider] at 5, 13 ¶ 40). Defendants Jusino and Brady executed personal guarantees under which they agreed to joint and several liability for all of Albany Regal's obligations under the Lease and Lease Rider (*see* NYSCEF Doc No. 26). On June 30, 2020, defendants renewed the

Lease for a second five-year term, from January 1, 2021, until December 31, 2026. Defendants' annual and monthly rent obligations were set forth in the Lease Rider.

In addition to rent, the Lease required tenant to "pay all property and school taxes assessed against the demised premises" as follows:

> Commencing with the school tax bill on or before September 30, 2016, the Tenant shall pay the school and property taxes on the premises, the bills for which come due on or before the end of the term of the Lease. The tax bills for the tax years in which this Lease or any renewal hereof shall also be prorated so that the apportionment provided by this paragraph shall only be for the period prior to the expiration of this Lease. Tenant shall then pay the bill prior to the date on which the bill is payable without penalty. If Tenant fails to pay the taxes when due, Tenant shall be liable for all interest and penalties due.

(Lease Rider at ¶ 37). And the Lease Rider expressly provided for defendants' post-eviction liability, including "subsequent to re-entry by the Landlord" (Lease Rider at ¶ 28), provided, however, that following dispossession of the premises, "the Landlord shall use its best efforts to mitigate its damages" (NYSCEF Doc No. 24 at ¶ 44).

Plaintiffs obtained a judgment and warrant of eviction in town court, which permitted defendants to remove their equipment and personal property from the premises, and defendants ultimately vacated the premises on December 28, 2023.

Analysis

In support of their present motion, plaintiffs proffer the affidavit of plaintiff Eric R. Frey (Frey), one of the landlords under the lease along with the following exhibits: the Lease and Lease Rider; defendants' lease renewal; the personal guarantees; a ledger of defendants' rent payments under the Lease between January 2017 through December 2023; hand-written ledgers of defendants' rent payments from 2016 through 2023; a November 15, 2017 Latham Water District Bill[1]; a May 3, 2018 delinquency notice for an unpaid tax bill for the premises; a spreadsheet containing a breakdown of defendants' rent payments, remainder balance, and accrued interest between January 1, 2017, and April 1, 2023; and a County of Albany Real Estate Tax Statement for the premises with a payment receipt dated August 27, 2024 (*see* NYSCEF Doc No. 37). Frey explains that April 21, 2023, is the date the warrant of eviction was executed in town court (*see* NYSCEF Doc No. 36 at ¶ 18). And Frey states that the documents submitted as exhibits to his affidavit are kept in the ordinary course of plaintiffs' rental business.

[1] Although the Lease and Lease Rider obligated defendants to pay utilities, including water charges (*see* Lease Rider at ¶ 32), plaintiffs do not include the amount owed in the water bill as part of their requested damages.

Pre-eviction Rent

Plaintiffs seek damages for pre-eviction unpaid rent inclusive of 9% interest for the period of November 1, 2017, to April 21, 2023, the date when defendants obtained a warrant of eviction, with statutory pre-judgment interest forward to the date of judgment. Among other things, plaintiffs submitted a rental payment ledger and spreadsheet in support of their claim for pre-eviction damages for unpaid rent and interest.[2]

Plaintiff's ledger of defendant's rental payments shows the monthly rental obligations set forth in the Lease Rider and defendants' payment history. Specifically, the rental payment ledger shows that defendants failed to pay any rent on November 1 and December 1, 2017; December 1, 2018; December 1, 2019; May 1 through December 1, 2020; March 1, 2021, through December 1, 2021; and May 1, 2022, through December 1, 2022; that defendants paid less than the monthly rental obligation under the Lease on many occasions; and, on other occasions, paid amounts in excess of their monthly rental obligation. In 2023, the rent ledger indicates that defendants paid no rent between January and June 2023, but paid $4,000 on July 10, 2023; $4,000 on August 2, 2023; $3,000 on August 14, 2023; and $5,000 on September

[2] Plaintiffs have submitted no evidence to support entitlement to unpaid rents after April 21, 2023, and, therefore, appear to have abandoned any request for post-eviction rent.

1, 2023. The September 1, 2023, payment was defendants' last rental payment; they made no further payments between October 2023 until December 27, 2023, when they vacated the premises (*see* NYSCEF Doc No. 37 at 25). In all, the ledger shows unpaid and underpaid pre-eviction rent of $148,008.00, without interest, for the period of January 2017, through December 2023, "prorated to 12/27/23" (the day prior to the date defendants vacated the premises) (NYSCEF Doc No. 37 at 25).

Plaintiff also submits a spreadsheet that incorporates the same unpaid rents (both whole missed payments and remainder balances on partial payments) but inclusive of interest that accrued without cure on such unpaid amounts for the duration of the lease period through September 23, 2024. The spreadsheet therefore establishes pre-eviction rent through April 1, 2023, inclusive of accrued interest through September 23, 2024, on all missed and underpayments for a total amount of $205,088.08.[3] Plaintiffs are entitled to additional prejudgment interest on $205,088.08 at a rate of 9% (*see* CPLR 5001, 5004) from September 23, 2024, forward to the date of judgment.

[3] The spreadsheet condenses 2023 to four months, January through April, and indicates that the only payments defendants made that year were the payments on July 10, August 2 and 14, and September 1, 2023, which the spreadsheet shows as having been applied to defendants' January through April 2023 rental obligations (*see id.* at 46).

Pre-eviction taxes

Plaintiffs also seek damages for unpaid pre-eviction taxes, interest and penalties through April 1, 2023. The Lease Rider expressly provides that, "[i]f Tenant fails to pay the taxes when due, Tenant shall be liable for all interest and penalties due" (Lease Rider at ¶ 37). In support of its claim for pre-eviction unpaid tax damages, plaintiffs submit the Albany County Real Estate Tax Statement for the premises for 2018 through 2024, which includes an itemized breakdown of all principal and interest due in taxes for each of those years, totaling $137,777.57 (*see* NYSCEF Doc No. 37 at 48-49). Plaintiffs also submit a 2018 delinquency notice for unpaid taxes on the premises (*see id.* at 41). In addition, plaintiffs submit their receipt for payment of the $137,777.57 to the Albany County Division of Taxes on August 27, 2024, in satisfaction of all unpaid taxes, which is inclusive of all principal and interest, for the premises (*see id.* at 50).

In his affidavit, Frey explains that, as of April 21, 2023, the date plaintiffs obtained an eviction warrant, "[d]efendants were liable for the sum of $128,418.97 for Real Estate Taxes that were due and not paid" (NYSCEF Doc No. 36 at ¶ 24). This amount, Frey explains, was calculated based on the principal and interest accrued on property and school taxes from 2018 to 2023, and that the total for tax year 2023 was calculated pro rata from January 1, 2023, to April 21, 2023, for a "total sum for 2023 for taxes [of] $4,813.35" (*id.* at 26).

The Albany County Tax Statement indicates that, as of December 31, 2022, $105,009.59 in principal and interest for unpaid tax was owed on the premises (*see* NYSCEF Doc No. 48-49). Using the $105,009.59 owed as of December 31, 2022, as contained in the Albany County Tax Statement, and applying Frey's prorated amount for 2023, of $4,813.35, the total unpaid taxes inclusive of principal and interest as of April 1, 2023, is $109,822.94. This figure does not support Frey's asserted amount of tax liability of $128,418.97 as of April 21, 2023. The Court concludes, based on this record, that plaintiffs have established prima facie entitlement to damages for pre-eviction taxes and interest in the amount of $109,822.94 through April 21, 2023. As this amount already includes unpaid interest to that date, plaintiffs are entitled to additional, statutory interest (*see* CPLR 5001, 5004) on $109,822.94 from April 21, 2023, forward to the date of judgment.

Finally, as the Court concluded in its March 28, 2024 decision and order, plaintiffs have not established where, under the Lease, Lease Rider, or otherwise, they are entitled to recoup post-eviction—i.e. post-lease-termination—tax payments relative to the premises. Plaintiff's, therefore, are not entitled to any amount for unpaid taxes after termination of the lease, for which they have chosen for purposes of the present motion to use April 21, 2024, the date they obtained a warrant of eviction. Consequently, plaintiffs are not entitled to damages for unpaid taxes after April 21, 2023.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion (Motion #2) is, without opposition, granted, to the extent set forth herein; and it is further

ORDERED, ADJUDGED, and DECREED, that plaintiffs shall have judgment against defendants Albany Regal Dry Cleaning & Coin Laundry, LLC, Chong Jusino, and French Brady, jointly and severally, in the amount of $205,088.08 in pre-eviction unpaid rent inclusive of accrued interest on all missed and underpayments during the lease term through September 23, 2024, with prejudgment interest on $205,088.08 at a rate of 9% from September 23, 2024, to the date of judgment; and it is further

ORDERED, ADJUDGED, and DECREED, that plaintiffs shall have judgment against defendants Albany Regal Dry Cleaning & Coin Laundry, LLC, Chong Jusino, and French Brady, jointly and severally, in the amount of $109,822.94 for pre-eviction unpaid taxes, with pre-judgment interest at a rate of 9% from of April 21, 2023, to the date of judgment; and it is further

ORDERED, ADJUDGED, and DECREED, that plaintiffs are awarded statutory costs of $1,324.03 (*see* CPLR 8101).

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County

Clerk. Upon such entry, counsel for plaintiffs shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
December 20, 2024

Denise A. Hartman

HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court

Papers Considered

NYSCEF Doc Nos. 33-38

12/23/2024