

174 Second Equities Corp. v Biamonte

2025 NY Slip Op 31207(U)

April 8, 2025

Supreme Court, New York County

Docket Number: Index No. 650656/2024

Judge: Arthur F. Engoron

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

-----X

174 SECOND EQUITIES CORP.,
Plaintiff,

- v -

REMO BIAMONTE, ROLANDO BIAMONTE,
Defendants.

INDEX NO. 650656/2024
MOTION DATE 09/13/2024
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 33, 34,

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and for the reasons stated hereinbelow, plaintiff's motion for summary judgment is granted.

Background

In July 2019, plaintiff, 174 Second Equities Corp., as landlord, entered into a commercial lease with non-party La Meridiana I Ltd., as "Tenant", for the storefront and partial basement of the building known as 176 Second Avenue, NY, NY (the "Premises"). NYSCEF Doc. No. 15. The term of the lease (the "Lease") is ten years, commencing on July 1, 2019 and ending on June 30, 2029. Id. Pursuant to the Lease, rent per month started at \$16,500 in 2019, and gradually increased each year. Other monthly charges included real estate taxes, water and sewer charges, service charges, and when applicable, late fees. NYSCEF Doc. No. 19.

On July 12, 2019, defendant, Remo Biamonte, executed an "absolute and unconditional" guaranty for the full and timely payment of all fixed rent, additional rent and other payments due pursuant to the Lease (the "Remo Guaranty"). NYSCEF Doc. No. 16. On the same date, defendant Rolando Biamonte also executed an "absolute and unconditional" guaranty of the Lease (the "Rolando Guaranty"; collectively, the "Guarantees"). NYSCEF Doc. No. 17.

The Lease, pursuant to Articles 19 and 25, and the Guarantees, pursuant to Article 5.2, provide for an award of legal fees to plaintiff in the event that plaintiff is the prevailing party in an action.

Plaintiff alleges that Tenant failed to pay rent and additional charges, defaulting under the Lease and continuing in possession of the Premises without plaintiff's permission. NYSCEF Doc. No. 1. The guarantors did not cure the Tenant's default. Id.

On April 13, 2022, plaintiff commenced a summary eviction nonpayment proceeding against Tenant in New York City Civil Court, New York County, entitled 174 Second Equities Corp., v.

La Meridiana 1 LTD. d/b/a Numero 28 Pizzeria and ABC Corp., Index No. LT-305205-22/NY (the "Eviction Proceeding"). On November 1, 2022, pursuant to a Stipulation of Settlement (the "Stipulation"), the Eviction Proceeding was settled. NYSCEF Doc. No. 24.

On December 11, 2023, Tenant defaulted under the Stipulation and was evicted by a City Marshal. NYSCEF Doc. No. 18.

On February 7, 2024, plaintiff commenced the instant action against defendants, by filing a summons and verified complaint with two causes of action: (1) \$598,930.34 in outstanding rent, plus interest and without prejudice to any rent and additional charges that may come due for any period subsequent to February 2024; and (2) for attorney's fees. NYSCEF Doc. No. 1.

On July 3, 2024, defendants filed a verified answer, with a general denial and fourteen affirmative defenses. NYSCEF Doc. No. 8.

On September 15, 2024, plaintiff moved, (1) pursuant to CPLR 3212, for summary judgment and to dismiss defendants' affirmative defenses; (2) pursuant to CPLR 3025(c), deeming the complaint amended to conform to the proof, reflecting the amount due to be \$741,973.94; and (3) for attorney's fees. NYSCEF Doc. No. 10.

Plaintiff notes that Article 5.9 of the Guarantees includes a 'Good Guy' provision, pursuant to which defendants' liability was to be limited to the date of a proper surrender. Plaintiff, however, attests that defendants' liability is not so limited here, because Tenant failed to satisfy the eight conditions set forth in Article 5.9. NYSCEF Doc. No. 11 at 27. Article 5.9 stipulates that the guarantors shall be released from liability *only* in the circumstances that the aforementioned conditions are met. NYSCEF Doc. Nos. 16, 17. Furthermore, "[i]f Tenant has not strictly complied with all of the requirements as set forth in this Article 5.9, on or before the Final Day, then Guarantor agrees and acknowledges that the provisions of this Article 5.9 shall be null and void and of no force and effect[.]" Id.

Plaintiff attests that neither Tenant nor defendants have made any rental payments "since June 2023" (NYSCEF Doc. No. 11 at 16), citing its rent ledger. NYSCEF Doc. No. 19.

In opposition to plaintiff's motion, defendants contend, inter alia, that there should be "a trier of fact" to "determine whether [d]efendants are entitled to a set-off or mitigation of damages." NYSCEF Doc. No. 26.

In reply, plaintiff's note, inter alia, that the branch of its motion to deem the Complaint amended to conform to the pleadings is unopposed. NYSCEF Doc. No. 28. As of October 15, 2024, plaintiff rented the Premises to an entity known as 2nd Ave Pizza Palace Corp., giving the new tenant a rent credit through March 14, 2025. NYSCEF Doc. No. 30. Plaintiff requests that this Court "deem the Complaint amended to include rents due through February 2025 in the amount of \$837,614.59." NYSCEF Doc. No. 28. Plaintiffs argue that the defendants' opposition is insufficient to defeat summary judgment, and that defendants did not dispute that the rent was due during the Eviction Proceeding. Id.

Discussion

This Court grants the branch of plaintiff's motion, pursuant to CPLR 3025(c), deeming the complaint amended to conform to the proof.

Pursuant to CPLR 3212, "[t]he 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 eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "As to guarantor's liability, a landlord seeking summary judgment against a guarantor satisfies its initial evidentiary burden by proving the existence of an absolute and unconditional guaranty, a debt owed by tenant to landlord, and guarantor's failure to pay under the agreement." 1140 LLC v Meis Studio Inc., 225 AD3d 516, 516 (1st Dept 2024). Once that burden is met, the opponent must tender evidence in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim ... mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Zuckerman v City of New York, 49 NY2d 447, 562 (1980).

This Court finds that defendants' answer failed to raise any triable issues of material fact.

Here, plaintiff has made a prima facie showing of its entitlement to summary judgment, for a judgment declaring that defendants are liable and owe the outstanding rent and other charges through October 15, 2024, by submitting, inter alia: the summons and verified complaint (NYSCEF Doc. No. 14); the Lease (NYSCEF Doc. No. 15); the absolute and unconditional Guarantees of the Lease by defendants (NYSCEF Doc. Nos. 16, 17); the Stipulation (NYSCEF Doc. No. 24); the September 30, 2023, notice to Tenant to vacate/surrender due its default of the Stipulation (NYSCEF Doc. No. 25); the December 11, 2023 eviction by the City Marshal (NYSCEF Doc. No. 18); the rent ledger (NYSCEF Doc. No. 31); plaintiff's lease with the new tenant, commencing on October 15, 2024 (NYSCEF Doc. No. 30); and an attorney affirmation in support of the motion, attesting to the facts of the instant action, including the Guarantees, the debt owed by Tenant, defendants' failure to pay, and Tenant's failure to satisfy the conditions required under Article 5.9 of the Guarantees, illustrating that defendants liability is not limited to the December 11, 2023 surrender of the Premises but extended until the Premises was relet on October 15, 2024. (NYSCEF Doc. No. 11).

This Court has considered defendants' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, the motion of plaintiff, 174 Second Equities Corp., for summary judgment is granted, and the Clerk is hereby directed to enter judgment against defendants, Remo Biamonte and Rolando Biamonte, jointly and severally, in the amount of \$751,259.44 (\$741,973.94 in missed rent and additional charges through September 2024, plus \$9,285.50 in pro-rated missed rent from October 1 until October 15, 2024, the date that the new tenant moved in), plus statutory interest from the date of this Decision and Order.

It is further ordered that plaintiff's request for attorney's fees is hereby severed, and plaintiffs may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of

Inquest, a copy of this Decision and Order, and any necessary fees. Plaintiffs must file such Note of Issue within 30 days from the date of this Decision and Order, or this case will be automatically marked "disposed." Plaintiffs are further directed to contact chambers at SFC-Part37@nycourts.gov, within 15 days of filing the Note of Issue, to schedule the inquest.

HON. ARTHUR F. ENGORON

4/8/2025

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE