

International Plaza Assoc., L.P. v Lacher
2012 NY Slip Op 31340(U)
May 11, 2012
Supreme Court, New York County
Docket Number: 110711/06
Judge: Debra A. James
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

INTERNATIONAL PLAZA ASSOCIATES, L.P.
Plaintiff,

Index No.: 110711/06

Motion Date: 12/02/11

- v -

Motion Seq. No.: 005

MICHAEL A. LACHER, LAW OFFICE of
MICHAEL A. LACHER, LLP d/b/a LACHER &
LOVELL-TAYLOR,

Motion Cal. No.: _____

Defendants

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits - Exhibits

1

Answering Affidavits - Exhibits

2

Replying Affidavits - Exhibits

3

FILED

MAY 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall consider herein plaintiff's motion for partial summary judgment (Motion Seq. No. 5) against defendant Michael A. Lacher and defendants' motion to vacate the note of issue (Motion Seq. No. 6).

Plaintiff is the owner and landlord of the building located at 750 Lexington Avenue, New York, NY. Defendant professional corporation Law Office of Michael A. Lacher, LLP d/b/a Lacher & Lovell-Taylor ("LLT") is a tenant in the building. Plaintiff alleges that by a written Guaranty dated April 29, 2003, defendant Michael A. Lacher("Lacher"), personally and

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

unconditionally guaranteed all of LLT's obligations to plaintiff under the Lease. Plaintiff alleges that because it has proven its prima facie entitlement to summary judgment on the underlying lease obligation, defendant Lacher as guarantor, is obligated to pay the debt. According to plaintiff, even if LLT has affirmative defenses in this action, defendant-guarantor Lacher expressly waived the right to assert any affirmative defenses belonging to LLT in any action brought to enforce the guarantee.

The Guaranty reads in pertinent part

Guarantor hereby unconditionally, irrevocably and as a primary obligor hereunder guarantees to Landlord, the full, prompt and faithful payment of all minimum rent, additional rent, and other sums due under the Lease as well as all sums payable under the Lease arising from the holding over by Tenant after expiration or sooner termination of the term of the Lease and all damages and expenses caused by or arising out of such holding over, including, without limitation, attorneys' fees and disbursements. . . .

This Guaranty is primary, absolute and unconditional and shall not be discharged, mitigated, or affected by (i) any modification of the Lease; (ii) any failure of Landlord to enforce any of the provisions of the Lease or by any extension of time or indulgence extended by Landlord to Tenant hereunder; (iii) any defense available to Guarantor; or (iv) any invalidity or unenforceability of all or any portion of the Lease; . . .

Landlord may proceed directly against Guarantor under this Guaranty without being required to proceed against Tenant under the Lease or to pursue or exhaust any other rights or remedies it may have against Tenant or against any other security or guaranty given to Landlord including, without limitation, the security deposit under the Lease, and the right to recover possession of the premises, and/or Guarantor may be joined in any action or proceeding commenced by Landlord against Tenant in connection with the Lease.

Defendants allege that Plaintiff has not made out a prima facie case for summary judgment and that pursuant to the terms of the Guaranty, the right to assert LLT's defenses challenging plaintiff's entitlement to alleged sums has not been waived by Lacher. Defendants also claim that the Guaranty does not relieve plaintiff of its obligation to prove the underlying debt owed to LLT, since the underlying debt has not yet been proven in court or acknowledged as established by defendants.

A plaintiff seeking summary judgment on a written guaranty must prove: 1) the existence of an absolute and unconditional guaranty; 2) the underlying debt; and 3) the guarantor's failure to perform under the guarantee. Kensington Home Co. v Oram, 293 AD2d 304 (1st Dept 2004); Davimos v Halle, 35 AD3d 270 (1st Dept 2006).

The Guaranty here by its very terms is unconditional and there is no dispute that the defendant Lacher has not performed under the Guaranty. Plaintiff's documentary evidence is sufficient to establish that there is an underlying debt that is the subject of the Guaranty despite defendants' argument to the contrary. The Guaranty covers only "full, prompt and faithful payment of all minimum rent, additional rent, and other sums due under the Lease as well as all sums payable under the Lease arising from the holding over by Tenant." Although Lacher argues that plaintiff has failed to establish the debt, defendants do

not submit any evidence to rebut the evidence submitted by plaintiff that the LLT failed to make timely rent payments in June 2006 and failed to replenish the security as required by the terms of the Lease.

Once LLT failed to timely remit the rent due under the Lease, Lacher's obligations under the Guaranty were triggered by the terms of the Guaranty which predicated the Guarantor's liability upon the failure of LLT to remit "full, prompt and faithful payment of all minimum rent, additional rent, and other sums due under the Lease." As stated by the Court, "[w]hile a guaranty is subject to the fulfillment of any condition precedent to the liability imposed therein, the instant guarant[y] predicated the guarantor['s] liability on the [lessee]'s default in making payment, not on its default on the legal obligation to do so; any other interpretation would render the greater portion of the guaranties meaningless." Reliance Const. Ltd. v Kennelly, 70 AD3d 418, 419 (1st Dept 2010) (citations omitted).

The Guaranty signed by Lacher contains no contingency and is effective solely upon LLT's failure to promptly pay its Lease obligations. Based upon the First Department's holding in Reliance Const., plaintiff is entitled to summary judgment on the Guaranty based upon the amounts due under the Lease independent of the LLT's legal obligation to pay amounts due under the Lease.

Lacher's attempt to distinguish Reliance Const. is unavailing as in that case the trial court denied summary judgment based upon "the key issue . . . whether [the creditor] is actually owed any money to which the guarantee agreements apply" because there were issues of fact as to that question. Reliance Const. Ltd. v Kennelly (Index No.: 601373/2008, Mot. Seq. 2, Sup Ct, NY County, December 16, 2008, Smith, J.). The Appellate Division reversed specifically distinguishing the right to payment upon a guaranty from the legal liability of a primary debtor to pay the underlying debt and granted summary judgment upon an unconditional guaranty of payment irrespective of any defenses to payment the primary debtor possessed. 70 AD3d at 419.

Therefore, the court shall grant plaintiff partial summary judgment upon the Guaranty against defendant Lacher with the amount of damages to be determined at trial of this action.

Defendants' separate motion to vacate the note of issue (Motion Sequence 06) on the basis that the certificate of readiness contained material misstatements as to whether discovery was complete shall be granted. Plaintiff filed the note of issue on June 1, 2011. Defendants assert that key previously unknown information was revealed when plaintiff served a supplemental response to defendants' first set of interrogatories along with the note of issue. According to

defendants, by waiting until the filing of the note of issue to disclose key information concerning plaintiff's alleged damages, plaintiff attempted to preclude discovery on those issues to the prejudice of the defendants. Defendants also claim that they served by hand-delivery a Notice of Deposition of Amy Chou on May 31, 2011, the day before the Note of Issue was served by Plaintiff.

Plaintiff opposes the motion to vacate the note of issue stating that Chou's name was disclosed in her affidavit regarding damages in support of plaintiff's motion for partial summary judgment dated March 25, 2011, and that defendants made no attempt to timely notice Chou's deposition in the months that followed. Plaintiff does acknowledge that it was served with a deposition notice for Ms. Chou on May 31, 2011, the day before serving the Note of Issue. Plaintiff also alleges that defendants had more than enough opportunity to timely notice a deposition of accounting personnel from plaintiff's managing agent, Cohen Brothers Realty Corporation, whose name was provided years before. According to plaintiff, defendants have waived their belated requests for discovery. The court disagrees.

Plaintiff received a notice for deposition for Chou at their counsel's office on May 31, 2011, one day before serving the note of issue. Therefore, its Certificate of Readiness asserting that there was no outstanding discovery was "blatantly false." Club

Italia v Italian Fashion Trading, Inc., 268 A.D.2d 219 (1st Dept. 2000). Pursuant to 22 NYCRR § 202.21(e), the court finds that a material fact in the certificate of readiness is incorrect and the Note of Issue must be vacated.

Finally, because the LLT's defenses in this action turn upon the contractual relationship between the parties and facts essential to plaintiff's claims, and therefore LLT's defenses, are in the exclusive possession of the accounting department of plaintiff's managing agent, the defendants are entitled to seek discovery thereupon. Defendants have a right to depose Chou or someone with personal knowledge of the facts in the Cohen Brothers Realty Corporation's accounting department. With respect to defendant Lacher, discovery shall be limited to determining the amounts owed upon the Guaranty.

Accordingly, it is

ORDERED that the plaintiff's motion for partial summary judgment is GRANTED on liability only with respect to defendant MICHAEL A. LACHER; and it is further

ORDERED that defendants' motion to vacate the note of issue is GRANTED and the Clerk of the Trial Support Office is hereby directed to vacate the note of issue and strike the case from the trial calendar pending the completion of outstanding discovery; and it is further

ORDERED that the parties are directed to attend a status conference in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013, on June 5, 2012, at 2:30 P.M. to set a schedule for the completion of outstanding discovery; and it is further

ORDERED that, within 15 days from completion of discovery as hereinabove directed or before such date as set by the court in any further order, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and statement of readiness and payment of the fee therefor.

This is the decision and order of the court.

Dated: May 11, 2012

ENTER:

~~Robert J. James~~
J.S.C.

DEBRA JAMES
FILED
MAY 21 2012
NEW YORK
COUNTY CLERK'S OFFICE