

404 Park Partners, LP v Lerner

2013 NY Slip Op 33160(U)

December 9, 2013

Sup Ct, New York County

Docket Number: 601145/10

Judge: Richard F. Braun

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. RICHARD F. BRAUN Justice
J.S.C.

PART 23

Index Number : 601145/2010
404 PARTNERS LP
vs.
LERNER, JACK, et al.
SEQUENCE NUMBER : 004
STRIKE JURY DEMAND

INDEX NO. _____
MOTION DATE 7/18/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to for strike jury demand and
as the to wrong that called
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is granted to the extent of
striking the jury demand of Defendants Anita Grossberg,
and it is further

ORDERED that Plaintiff is awarded \$100
motion costs against said Defendant, to abide the
court.

This constitutes the decision and order
of the Court. See separate Opinion.

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

FILED

DEC 11 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York, December 11, 2013

ENTERED, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

----- X
404 PARK PARTNERS, LP,

Index No. 601145/10

Plaintiff,

OPINION

-against-

JACK LERNER, BRUCE FEFFER as executor of the
estate of Steven Allen Miller and ANITA GROSSBERG,

Defendants.
----- X

FILED

DEC 11 2013

NEW YORK
COUNTY CLERK'S OFFICE

RICHARD F. BRAUN, J.:

In two actions consolidated for joint trial to recover rent due under guarantees of a tenant's obligation under a lease,¹ plaintiff moves to strike the jury demand and restore "the matter" to the nonjury trial calendar. Defendant Anita Grossberg (Grossberg) moves for summary judgment dismissing the claims against her. Defendant Grossberg and the other defendants signed guarantees in connection with the leasing of the subject premises.

Plaintiff previously moved for summary judgment and a default judgment against the various defendant guarantors. The court granted that motion, but the First Department reversed as to Defendant Grossberg. The First Department held in *404 Park Partners, L.P. v Lerner* (75 AD3d 481, 482 [1st Dept 2010]) that:

A guaranty of a tenant's obligations under a lease must be strictly interpreted in order to assure its consistency with the lease terms to which the guarantor actually consented. Since Grossberg did not sign the 2005 guaranty, and the increase in rent and additional financial terms changed the risk assumed in her 2003 guaranty, the IAS court erred in concluding, as a matter of law, that her obligation under the 2003 guaranty continued through the term of the 2005 lease (*Lo-Ho LLC v Batista*, 62 AD3d 558 [2009]). Whether that obligation

¹The first action (600605/2009) seeks rent and other amounts accruing between August 2008 and February 2009, while the second action (601145/2010) seeks rent and other amounts accruing between March 2009 and May 2010.

survives the most recent lease extension, under the terms of Grossberg's original guaranty, remains an issue of fact for trial (*cf. White Rose Food v Saleh*, 99 NY2d 589 [2003]).

The Appellate Division's holding that there is an issue of fact is the law of the case, and thus this court must follow that (*see Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 405 [1986]). Defendant Grossberg has not shown that, after the Appellate Division ruled, facts came to light in discovery that establish that there is no issue of fact (*cf. Fielding v Environmental Resources Mgt. Group*, 253 AD2d 713 [1st Dept 1998] [summary judgment motions were granted where discovery uncovered new information after the earlier round of motion practice]; *Freeze Right Refrig. & A.C. Servs. v City of New York*, 101 AD2d 175, 181 [1st Dept 1984] ["the policy against multiple summary judgment motions has no application where, as here, the first motion, made before discovery, is denied on the ground of the existence of a factual issue which, through later uncovering of the facts, is resolved or eliminated"]). Thus, the summary judgment motion has to be denied.

The jury demand must be stricken. The fact that plaintiff seeks to enforce her guaranty is sufficient to implicate the jury waiver in that guaranty (*see A. J. Armstrong Co. v Nechamkin*, 55 AD2d 520 [1st Dept 1976]; *Bonnie-Lassie Sportswear, Inc. v Century Factors, Inc.*, 283 App Div 702, 703 [1st Dept 1954] ["the sense and spirit of the jury waiver clause are that disputes of the parties as to the interpretation and application of the agreement and their rights thereunder are not to be submitted to a jury"]). This action cannot be restored to the nonjury trial calendar because the action was never on that calendar, but should be placed on that calendar now that the jury demand has been stricken.

Accordingly, by separate decisions and orders, dated December 4, 2013, the motion for summary judgment was denied, and the motion to strike the jury demand was granted. Pursuant to

CPLR 8106 and 8202, motion costs were granted in favor of the plaintiff and against the defendant,

to abide the event.

Dated: New York, New York
December 9, 2013



RICHARD F. BRAUN, J.S.C.

FILED
DEC 11 2013
NEW YORK
COUNTY CLERK'S OFFICE