

LF E. 21 Prop. Co., LLC v Moini
2013 NY Slip Op 33269(U)
December 16, 2013
Supreme Court, New York County
Docket Number: 102375/11
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

LF EAST 21 PROPERTY CO., LLC,
Plaintiff,

Index No.: 102375/11

Motion Date: 08/24/12

- v -

Motion Seq. No.: 01

IRADJ MOINI and MOINI & MOINI, INC.,
Defendants.

Motion Cal. No.: _____

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1	_____
2	_____
3, 4	_____

FILED

Cross-Motion: Yes No DEC 18 2013

Upon the foregoing papers,

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COUNTY CLERK'S OFFICE

The court shall grant the defendants' cross-motion for summary judgment dismissing this action only as against defendant Iradj Moini and shall otherwise deny the cross-motion and in parallel shall grant plaintiff's motion for summary judgment as against Moini & Moini, Inc., and shall otherwise deny the motion in this dispute over amounts allegedly due to the plaintiff following defendants' early termination of a commercial lease of plaintiff's premises.

Plaintiff is the landlord of the subject premises and the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

first cause of action in the complaint seeks outstanding rent and other charges allegedly due under a lease from the tenant, the corporate defendant, following the termination of the lease by the corporate defendant. The second cause of action seeks to collect amounts owed by the tenant from the individual defendant under a guaranty agreement pursuant to which the individual defendant agreed to assume the obligations of the tenant if the tenant defaulted thereupon.

The plaintiff notes that in this action it is seeking damages under the lease through the termination date, February 28, 2011, and that it reserves the right to seek damages accruing after that date including, and up to the end of the lease term which is September 30, 2016. The court holds that the decision herein only applies to amounts due on or before February 28, 2011 without prejudice to any claims or defenses the parties have for subsequent periods under the lease.

Plaintiff argues that pursuant to a Stipulation of Settlement dated March 22, 2010, the tenant was required to pay a reduced base rent for the 12 months following the execution of the agreement plus repay on a monthly basis a negotiated portion of the arrears. The agreement provided that if the tenant defaulted on the payments or any other terms of the settlement, the plaintiff's waiver of a portion of the arrears would be revoked and the entire amount of the arrears would become

immediately due and any reduction in the base rent would be forfeited and the full rent as set forth in the Lease would be due and payable. The settlement also provided that "there are no modifications whatsoever to the Good Guy Guaranty executed by Iardj Moini on September 21, 2006, which provides for a personal guaranty by Iardj Moini of the lease agreement by and between the parties."

The Good Guy Guarantee provided in pertinent part that Moini

unconditionally guarantee[d] to Landlord and its executors, administrators, heirs and successors, and assigns the full and timely payment, performance and observance of, and compliance with all of Tenant's obligations under the Lease, including, without limitation; the full and prompt payment of all fixed annual rent, Additional Rent and all other charges and sums due and payable by Tenant under the Lease (including, without limitation, Landlord's reasonable attorneys' fees and disbursements) (collectively, the "Obligations") from the Commencement Date (as such term is defined in the Lease) through and including the date that Tenant and its assigns and sublessee, if any, shall have completely performed all of the following: (i) provide written notice to Landlord (pursuant to the notice requirements in the Lease) of Tenant's intention to vacate and surrender the Demised Premises to Landlord no more than one hundred twenty (120) days and no less than ninety (90) days prior to the date Tenant actually vacates and surrenders the Demised Premises; (ii) vacated and surrendered the Demised Premises to the Landlord pursuant to the terms of the Lease; (iii) delivered the keys to the Demised Premises to Landlord; and (iv) paid to Landlord all Obligations to and including the date which is the later of (x) the actual receipt by Landlord of the Obligations, (y) the surrender of the Demised Premises, or (z) receipt by Landlord of the keys to the Demised Premises.

Therein the Guaranty provides an illustration of the interpretation of this provision stating

By way of example only and not intended to change or modify any terms of this Guaranty, assuming Tenant (i) provides written notice to Landlord (pursuant to the notice requirements in the Lease) of Tenant's intention to vacate and surrender the Demised Premises to Landlord on October 31, 2008 and provided said date is no more than one hundred twenty (120) days and no less than ninety (90) days prior to the date Tenant actually vacates and surrenders the Demised Premises; (ii) vacates and surrenders the Demised Premises to the Landlord pursuant to the terms of the Lease on October 31, 2008, (iii) pays all fixed annual rent, Additional Rent and all other charges and sums due and payable by Tenant under the Lease through and including October 31, 2008 and (iv) delivers the keys to the Demised Premises on October 31, 2008, then the Guarantor would have no liability whatsoever under the Guaranty or the Lease (including the right to accelerate rent payments that may be due under the Lease) even though the Lease term may expire on July 31, 2016.

Defendants fail to raise any triable issue of fact in opposition to plaintiff's argument that the corporate defendant is liable for breach of the Settlement Agreement by the uncontested failure to pay the amounts due thereunder from March through June 2011. In accordance with the terms of the Settlement Agreement, the corporate defendant is therefore deemed to have waived, and is thereby liable for, the negotiated reduction in its prior back rent of \$27,766.84 and is deemed to have forfeited any negotiated reduction in the base rent for the period of April 2010 through March 2011. Any amounts due under the Lease through the commencement date of this action are properly offset, under the terms of the Lease, by any payments made by the defendants

thereunder. Therefore, the court grants judgment to the plaintiff against the corporate defendant in an amount to be determined by trial or reference in accordance with the foregoing.

However, with respect to the individual defendant Iardj Moini, the court finds that liability was discharged under the terms of the Good Guy Guaranty. There is no dispute that the defendants sent written notice by letter dated November 17, 2010, that they intended to surrender the premises on February 28, 2011. Nor is there any dispute that the defendants vacated the premises and surrendered the keys on February 28, 2011, as set forth in the acknowledgment signed by plaintiff's managing agent.

The only contested issue with respect to the safe harbor provided by the Guaranty is whether the defendants "paid to Landlord all Obligations to and including" the date of the surrender. The evidence submitted by defendants set forth that they remitted to the plaintiff the balance claimed to be owed as of February 28, 2011, on that same date. Plaintiff counters that because the corporate defendant breached the Settlement Agreement by failing to remit the stipulated amounts due after March 1, 2011, the balance due on February 28, 2011, known as the "Obligations" under the Guaranty, should be adjusted to reflect the rescission of the waiver of the rent arrears reflected in the Stipulation. Plaintiff further argues that based upon its Notice

to Cure dated January 26, 2011, defendants' November 17, 2011 letter constituted an anticipatory repudiation of the Lease and Settlement Agreement and therefore plaintiff is entitled under the Guaranty to payment of all amounts due without any of the waivers or discounts contained within the settlement.

Plaintiff's argument is directly contradicted by the terms of the Guaranty and the interpretive example set forth therein. The Guaranty explicitly states that the individual defendant will "have no liability whatsoever under the Guaranty or the Lease" for any amounts incurred after the date of termination including any amounts of accelerated rent due by reason of early termination of the lease. Thus the terms of the Guaranty clearly reflect the parties' agreement that only those amounts payable at the time of the surrender are subject to the Guaranty and that any amounts that become due because of the early termination of the lease, such as the rescinded rent arrears and base rent discounts, are not included in the amount of "Obligations" due from the individual defendant in order to escape liability under the Guaranty.

Therefore, the court finds that the individual defendant has satisfied the obligations under the Guaranty and has no further liability to the plaintiff.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is GRANTED only as to defendant MOINI & MOINI, INC. on the first cause of action in the complaint and is otherwise DENIED; and it is further

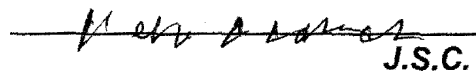
ORDERED that defendants' cross-motion for summary judgment dismissing the complaint is GRANTED only as to defendant IRADJ MOINI and is otherwise DENIED; and it is further

ORDERED that the parties' are directed to attend a preliminary conference at IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013, on January 14, 2014 at 2:30 PM.

This is the decision and order of the court.

Dated: DEC 16 2013

ENTER:


J.S.C.

DEBRA A. JAMES

FILED

DEC 18 2013

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