KH 48 LLC v Muniak
2016 NY Slip Op 31501(U)
August 5, 2016
Supreme Court, New York County
Docket Number: 151606/13
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, IAS PART 11

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KH 48 LLC,

Index No.: 151606/13

Plaintiff,

-against-

SASHA MUNIAK,

Defendant.

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JOAN A. MADDEN, J.:

In this action seeking to recover monies based on a guaranty of obligations under a commercial lease, plaintiff KH 48 LLC ("KH") moves, by order to show cause, to strike defendant's jury demand (motion seq. 003). Defendant Sasha Muniak ("Muniak") opposes the motion, and separately moves, by order to show cause, for leave to reargue that portion of the court's decision and order dated April 24, 2014 ("the original decision") that dismissed his second, third, fifth, sixth and seventh affirmative defenses and, upon granting reargument, reinstating such defenses. Alternatively, Muniak moves to extend the sixty period to replead these defenses (motion seq. 004).[1] KH opposes the motion.

Background

KH is the owner of 16 East 48th Street in Manhattan ("the building"). KH, as landlord, and non-party MA Holding Corp., as tenant (hereafter "the Tenant"), entered into a commercial lease for the building ("the Lease"), which consisted of seven floors and a basement. In conjunction with the Lease, the Tenant obtained an easement from the adjacent property for a fee. A restaurant, Services Mangia Inc. d/b/a Mangia ("the restaurant"), an affiliate of the Tenant,

[1]Motion seq nos. 003 and 004 are consolidated for disposition.

occupied the first four floors and the basement. The Tenant subleased the fifth, sixth and seventh floors to three commercial subtenants. The ten-year term of the Lease commenced on May 1, 2008 and expires on 2018.

Under the Lease, the Tenant agreed to pay a monthly based rent of $57,000, subject to rent escalations. Muniak, who is the President of the Tenant, executed a "Good Guy Guaranty" (hereinafter "the Guaranty"), which guaranteed the performance of the Tenant under the Lease and the payment of the easement fee. When the Tenant fell behind in its rent payments during the Fall of 2010, KH commenced a non-payment proceeding in Civil Court, which was resolved by stipulation under which the Tenant agreed to make certain payments to KH. While the Tenant abided by the Stipulation, by the summer of 2012, the rent had risen to $61,657.20 per month which the Tenant could no longer afford.

In this action, KH seeks to recover from Muniak under the Guaranty based on the failure of the Tenant to pay the easement fee and unpaid rent for the unexpired portion of the Lease. Before discovery, KH moved for summary judgment on its claims and in opposition to the motion, Muniak submitted his affidavit in which he states that prior to making the last rent payment, he attempted to renegotiate the lease terms with KH's principal, Kim Hakim. and with KH's agent and manager, Ely Samuels, but they could not reach an agreement. Muniak states that on August 16, 2012, he personally delivered the "final" check to Mr. Samuels in the amount of $23, 794.90. The check was marked "Final Stipulation Payment from Dec 2011." According to Muniak:

> After handing the check to Mr. Samuels in his office, I reminded him that he had promised to discuss the situation after we [made] the final payment . He then asked what I had in mind. I told him if

> he didn't reduce the rent I had no choice but to leave. I told him I want to work out a deal to leave on good terms with no further obligation under the lease or the good guy guaranty. He asked if I was willing to pay two months required rent under the good guy guaranty ($123,000). I told him I was unable to do so. He thought for a minute and asked me what I was planning to do with all my restaurant equipment. I told him I was planning on removing it and leaving the space vacant. He then said he was expecting me to leave for some time and was in contact with several prospective tenants, one of which was a restaurant. He said that if I "get out" by September 15th and leave the kitchen equipment behind, he would let me out of the good guy guaranty. I said 'no problem.'.... I then repeated to the deal to him if the restaurant vacates the space by September 15 and leaves all of the kitchen equipment behind, I will owe you nothing further. He said "Yes." I asked him what he wanted to do about the tenants on the 5th, 6th and 7th floors. He said, "Don't worry, I'll take care of them." He did say, however, that he wanted copies of their leases–which were delivered to his offices by messenger the very next day. I shook his hand and left the office.

Muniak Aff. ¶ 6.

According to Muniak, he kept his promise and left behind the kitchen equipment, which he states is worth $144,220. In addition, Muniak states that KH has renovated the restaurant and re-let the space to a new tenant is collecting rent from the former subtenants.

In the original decision, this court denied KH's motion for summary judgment finding, *inter alia,* that there were triable issues of fact as to whether a surrender of the premises occurred as a matter of law based on the conduct of the parties, including the Tenant's leaving of valuable kitchen equipment at the restaurant and KH's re-letting the restaurant for its benefit and taking over the Tenant's subleases. While the Lease and easement contained provisions precluding oral modifications, the court wrote that "at the very least, there are issues of fact as to whether the provision was waived by KH and/or whether the doctrine of equitable estoppel applies based on Muniak's asserted reliance on the alleged oral agreement."

The court granted KH's motion to the extent that it sought to strike the following of Muniak's affirmative defenses on grounds that they were pleaded wholly conclusory fashion, and failed to include any supporting facts: first (failure to state a cause of action); second (KH has received payment or other valuable consideration in satisfaction of an alleged debt); third (the alleged guaranty has been discharged by virtue of acts or deeds of KH); fourth (the alleged debt is not evidenced by any writing which was duly subscribed by defendant); fifth (KH's claims are barred by the doctrine of waiver); sixth (KH's claims are barred by the doctrine of estoppel); seventh (KH's claims are barred by the doctrine of release); eighth (KH's claims are barred by the doctrine of fraud and/or unclean hands); and tenth (KH has failed to mitigate its damages). The court dismissed these affirmative defenses without prejudice to Muniak moving for leave to re-plead within 60 days of the date of the decision and order. Nonetheless, Muniak did not seek to replead within the 60 days or at any time before the close of discovery.

As for the ninth affirmative defense, which states that KH's "claims are barred due to a surrender in fact and/or a surrender by operation of law of the subject premises resulting in a termination of the landlord/tenant relationship and the lease on or about September 6, 2012," the court found that it was adequately pleaded.

On February 26, 2016, KH filed a note of issue requesting a trial without a jury. Muniak filed a jury demand on March 2, 2016, requesting a trial by jury regarding (I) whether the subject guaranty was rendered null and void due to surrender by operation of law; (ii) whether there was a fully performed oral modification of the guaranty, (iii) whether the doctrine of equitable estoppel bars enforcement of the subject guaranty; and (iv) whether the subject guaranty was waived, released and/or revoked by oral agreement and the conduct of the parties.

KH now moves, by order to show cause, to strike the jury demand based on a jury waiver clause in the Guaranty executed by Muniak, which states that "[a]s further inducement to Landlord (i.e. KH) to make and enter into the Lease, Guarantor (i.e. Muniak) covenants and agrees that in any action or proceeding brought in respect to this Guaranty, the undersigned hereby waives trial by jury."

Muniak opposes the motion, asserting that the jury waiver does not apply, when, as in this action, there are threshold issues as to whether the guaranty was revoked, rescinded or otherwise terminated, citing Bank of New York v. Royal Athletic Indus, 224 AD2d 380 (2d Dept 1996)(respondents entitled to jury trial on defense in their answer that they had validly revoked the guarantees containing the jury waiver clause according to the terms of the documents). Specifically, Muniak argues that it is entitled a jury trial on the threshold issues or whether there was a surrender of the premises and/or whether there was a fully performed oral modification, and whether equitable estoppel bars enforcement of the guaranty. Muniak contends that in the event the Guaranty were found to be valid, the jury waiver would apply, and plaintiff could proceed by nonjury trial Id, at 380.

In addition, while the motion to strike was pending, Muniak moved, by order to show cause, for leave to reargue the original decision to the extent it dismissed the second, third, fifth, six and seventh affirmative defenses and, upon reargument, to resinstate these defenses as set forth in a proposed amended complaint. In support of his motion, Muniak argues that the original decision was internally inconsistent insofar as its struck these affirmative defenses in light of its holding which explicitly recognized that there were material issues of fact as to surrender by operation of law, and waiver and estoppel. Specifically, it cites that part of the

original decision in which the court stated:

> Here, even assuming *arguendo* that KH has made a prima facie showing entitling it to summary judgment, Muniak has controverted this showing by raising triable issues of fact, including whether a surrender by operation of law can be "inferred from the conduct of the parties," which is "a determination to be made on the facts" (*Riverside Research Institute v. KMGA, Inc.*, 68 NY2d 689, 692 [1986]; *see also Deer Hills Hardware, Inc. v. Conklin Realty Corp.*, 292 A.D.2d 565 [2d Dept 2002][surrender occurred by operation of law where the tenant abandoned the premises during the lease term and the landlord's conduct indicated an intent to terminate the lease and use the property for his own benefit]). In particular, evidence that the Tenant left valuable kitchen equipment at the restaurant and that KH re-let the restaurant for its benefit, and took over the sub-leases of the Tenant's subtenants raise factual issues as to surrender and are sufficient to warrant further discovery as to the issue. In addition, while the lease ...contain[s] provisions precluding oral modifications, at the very least, there are issues of fact as to whether the provision was waived by KH and/or whether the doctrine of equitable estoppel applies based on Muniak's asserted reliance on the alleged oral agreement (citations).

In opposition, KH argues that the motion is untimely as it was made two years after the original decision, and that Muniak provides no justification for the delay in asserting the defense. KH also argues that the proposed amended answer would prejudice it, particularly as the affirmative defenses asserted in it are based on conclusory allegations.

argues

Discussion

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992) .

Under CPLR 2221 (d)(3) a motion to reargue is to be made "within thirty days after service of the order determining the motion and written notice of it entry."[2] Here, there is no dispute that Muniak failed to comply with the 30-day deadline, nor did he seek to replead within the 30 days provided under the decision.

However, it has been held that when a motion to reargue is untimely, the court may exercise its discretion to consider its prior interlocutory ruling. See Garcia v. Jesuits of Fordham, Inc., 6 AD3d 163, 165 (1st Dept 2004); see also, Liss v. Trans Auto Systems, Inc., 68 NY2d 15 (1986). Next, while a motion to reargue may not be based on facts not raised on the prior motion, such a motion may be treated as a motion to vacate a prior judgment or a motion to renew.[3] See Mejia v. Nanni, 307 AD2d 870 (1st Dept 2003); Petsako v. Zweig, 8 AD3d 355 (2d Dept 2004); 2 Carmody-Wait 2d New York Practice with Forms, §8.99 (2012). Moreover, it is well established that "the court has "discretionary power to vacate its own [order] for sufficient reason and in the interests of substantial justice."

Applying these standards, the court grants relief to Muniak to the extent of permitting him to assert defenses of waiver and estoppel consistent with the court's denial of summary judgment. That is Muniak may assert affirmative defenses based on waiver only insofar as such

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[2]The thirty-day limit is based on the time allotted for taking an appeal as a matter of right since, like an appeal, a motion to reargue challenges the legal basis of the underlying decision and order. See, McKinney's Consol. Laws of NY, Book 7B; C2221:8, at 183. As is the rule with an appeal, either party can start the thirty-day period running by service of the order with notice of entry. See Siegel, New York Practice, § 533, at 880.

[3]Unlike a motion to reargue, a motion to renew does not have a statutory time limit. See Tishman Const. Corp. of New York v. City of New York, 280 AD2d 374 (1st Dept 2001); Harrell v. Koppers Co, Inc., 154 AD2d 340 (2d Dept 1989); West's McKinney's Forms Civil Practice Law and Rules, § 5:49 ("no time limits, except for laches applies to a motion to renew").

defense alleges that based the parties' alleged oral agreement KH waived the lease provision precluding oral modifications, and equitable estoppel only with respect to whether it applies based on Muniak's asserted reliance on the alleged oral agreement. KH will not be prejudiced by these defenses since it had notice of them based on the arguments made on summary judgment and the court's decision.

With respect to Muniak's KH's motion to strike Muniak's jury demand, the court notes that in general, there is a right to a jury for actions at law and no such right for actions in equity. Chavin v Keniry, 216 AD2d 753 (3d Dept) lv dismissed, 87 NY2d 896 (1995). Here, there is no dispute that KH's claim to recover money damages based on the Guaranty are legal claims for which there is a right to a jury trial. At issue is whether defendant waived the right based on the jury waiver provision in the Guaranty.

Muniak does not deny that the that jury waiver provision is enforceable (See Chemical Bank v. Summers, 67 AD2d 856 [1st Dept 1979]). Instead, he argues that certain threshold issues raised in the defense of surrender by operation of law are not subject to the waiver provision, as they go to the validity of the Guaranty and thus the jury waiver provision. This argument is without merit, as the issues raised in the defense of surrender do not challenge the validity of the Guaranty but, instead, relate to the merits of Muniak's position that the surrender ended his obligation under the Guaranty. The same is true of the defenses of waiver and equitable estoppel as they relate to the provision in the lease precluding oral modifications. Thus, Bank of New York v. Royal Athletic Indus, supra on which Muniak relies, is not controlling as the issue in that case, involved the validity of the revocation allegedly in accordance with the terms of the relevant guaranty. Moreover ,Bank of New York v. Cheng Yu Corp, 67 AD2d 961 (2d Dept

1979), another case cited by Muniak, is inapplicable here as it concerned the issue of whether defendant was fraudulently induced to sign the guarantee containing a jury waiver provision.

In both Royal Athletic Indus, and Cheng Yu Corp, the crucial issue was whether the subject guarantees were void based, respectively, on the alleged revocation and fraudulent conduct. Here, even if Muniak succeeds on his claim of surrender by operation of law, such determination would not void the jury waiver provision, but would merely result in the provisions of the oral modification clause being rendered inapplicable. See Chestnut Realty Corp. v. Kaminski, 95 AD3d 1254 (2d Dept 2012); 4440 Equities, Inc. v Dhinsa, 52 AD3d 654 (2d Dept 2008).

Accordingly, it is

ORDERED that KH's motion to strike the jury demand is granted; and it is further

ORDERED that Muniak's motion to amend is granted only to the extent of permitting it to add affirmative defenses of waiver and equitable estoppel as they relate to the provision in the lease regarding oral modifications; and it is further

ORDERED that Muniak shall file the amended answer in accordance with the foregoing within 20 days of this decision and order .

DATED: August 5, 2016

HON. JOAN A. MADDEN
J.S.C.