BB Retail LLC v Gourmand Table, LLC
2017 NY Slip Op 30978(U)
May 11, 2017
Supreme Court, New York County
Docket Number: 152175/2016
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

----------X

BB Retail LLC,

Plaintiff,

Index Number:
152175/2016

-against-

Gourmand Table, LLC, Rakesh Aggarwal, West 50 Times Corp., and Vino Chand,

Defendants.

----------X

Gerald Lebovits, J.:

Defendants West 50 Times Corp. (West 50) and Vino Chand (Chand, together, the Initial Tenants) move to strike or preclude plaintiff's complaint and defendants Gourmand Table (Gourmand) and Rakesh Aggarwal's (Aggarwal, together the Subsequent Tenants) answer, pursuant to CPLR 3126, for failure to serve a bill of particulars or to respond to discovery demands. The Initial Defendants' motion has been withdrawn as against plaintiff, pursuant to a stipulation dated November 11, 2016 (the Stipulation). Plaintiff has moved for summary judgment, pursuant to CPLR 3212, against all defendants. The Initial Defendants have cross-moved, pursuant to CPLR 3124, to compel plaintiff to produce a supplemental bill of particulars and additional discovery responses, and for other relief, including the denial of plaintiff's motion, based upon the lack of discovery at this stage of the proceedings.

Motion sequences 1 and 2 are consolidated for disposition and decided as noted below.

Underlying Allegations and Procedural Background

Plaintiff alleges that it is the owner of the condominium units known as retail unit 1 and retail mezzanine unit (the Premises) in a building (the Building) located at 37 West 43rd Street, New York, New York (Boyle affidavit, ¶ 1). It states that it entered into a lease (the Lease) for the rental of the Premises with 50 West for a term commencing on February 1, 2011 and ending January 31, 2026 (*id.*, ¶ 3). The Lease included a clause (the Acceleration Clause) (paragraph 82) that provided, in pertinent part, as follows:

> "Should Landlord, at any time, terminate this Lease for any breach, in addition to any other remedies it may have, it may recover from Tenant all damages it may incur by reason of such breach as damages . . . including the cost of recovering the Demised Premises, reasonable attorneys fees and the then present value, at the time of such termination, of the amount of Minimum Rent

> reserved in this Lease for the remainder of the stated term, all of which shall be immediately due and payable from Tenant to Landlord. . . . Landlord shall not be liable for failure to relet the Premises."

Plaintiff states that the Acceleration Clause provides that it is not obligated to re-let the Premises, that it is entitled to recover attorneys' fees and that, upon any breach, it is entitled to accelerate all outstanding minimum rent for the remainder of the Lease term and obtain this amount, discounted to present value, as liquidated damages (Boyle affidavit, ¶¶ 3-4, 18-19). It further states that, in connection with execution of the Lease, Chand executed a personal and unconditional guaranty (the Chand Guaranty), guaranteeing 50 West's payment of the rent (*id.*, ¶ 7).

Plaintiff contends that, on or about February 16, 2012, 50 West executed an assignment (the Assignment), assigning its rights under the Lease to Gourmand (*id.*, ¶ 10). The Assignment provided that 50 West's obligations under the Lease would "continue to be binding" and that both 50 West and Gourmand "shall be jointly and severally liable and responsible . . . for the payment of the fixed rent" (*id.*, ¶¶ 11-13; Assignment, ¶¶ 6, 8). In connection with execution of the Assignment, Aggarwal executed a personal and unconditional guaranty (the Aggarwal Guaranty), guaranteeing Gourmand's payment of the rent (Boyle affidavit, ¶¶ 13-14).

Plaintiff states that, on July 13, 2015, it served a notice to cure on Gourmand regarding certain work permits filed with the New York City Department of Buildings (DOB) (*id.*, ¶ 15). It further states that, while Gourmand agreed to cure these defaults, it failed to do so and that plaintiff commenced an action to recover possession of the Premises in the Civil Court of the City of New York, New York County, entitled *BB Retail v Gourmand Table LLC*, L & T index number 79505/2015 (the Holdover Action) (*id.*, ¶¶ 16-17). It further states that it obtained a judgment of possession (the Holdover Judgment) (*id.*, ¶ 17).

Plaintiff asserts that, at the time Gourmand was evicted, the outstanding rent due through December 15, 2015, amounted to $146,463.63 (*id.*, ¶ 18). It further asserts that, pursuant to the Acceleration Clause, defendants owe the minimum rent balance for the remainder of the rent term, through January 31, 2026, which is $1,846,951.00, discounted by 4% to the present value of $1,481,578.00, less a security deposit of $87,203.09, for a total of $1,394,374.91 (*id.*, ¶ 19).

Plaintiff commenced this action on March 16, 2016 and defendants interposed their answers in May 2016. Plaintiff brought its motion for summary judgment on November 4, 2016. It seeks summary judgment against Gourmand and 50 West, based upon the Lease and the Assignment, and against Chand, based upon the Chand Guaranty and against Aggarwal, based upon the Aggarwal Guaranty.

The Initial Defendants assert that the Lease was entered into with the mutual understanding that 50 West "would be operating a fast food restaurant" (Chand affidavit, ¶ 5; Lease, Paragraph 81). They also state that the Lease required the Landlord to "provide duct work

and an exhaust fan . . . [and] a sprinkler system" (*id.*, ¶ 98), but that plaintiff did not do so and that plaintiff did not approve applications to DOB for permits to perform this work, thereby breaching its obligations under the Lease (Chand affidavit, ¶¶ 5-7). They also state that since plaintiff has re-let the Premises at a substantially higher rent, $20,000, compared to the monthly rent of $11,000 due under the Lease, that plaintiff has not suffered any damages (*id.*, ¶ 4).

Similarly, the Subsequent Tenants assert that plaintiff interfered with their attempts to modify the Premises, so that it could be used for its intended purpose as a restaurant (Aggarwal affidavit, ¶¶ 3-5).

Both the Initial Tenants and the Subsequent Tenants note that issue was joined in May 2016, but that discovery is outstanding, including depositions of the parties. They contend that this discovery is necessary to defend the action, based upon their claims that plaintiff breached its obligations under the Lease, that it interfered with their ability to operate a restaurant as contemplated by the Lease and that the Acceleration Clause is operating as a penalty since plaintiff is currently receiving rent for the Premises. The Subsequent Tenants state that they are willing to provide the bill of particulars and discovery demanded by the Initial Tenants. Finally, while plaintiff has submitted a reply affirmation of counsel, it has not submitted a reply by a party with personal knowledge controverting defendants' assertions.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Bill of Particulars

A bill of particulars' purpose is "to amplify the pleadings, limit the proof and prevent surprise at trial" (*Miccarelli v Fleiss*, 219 AD2d 469, 470 [1st Dept 1995]). A party is required to particularize its pleading in a bill of particulars where it has the burden of proof (*Vermont Morgan Corp. v Ringer Enters.*, 92 AD2d 1020, 1021 [3d Dept 1983]; *Hydromatics v County Natl. Bank*, 23 AD2d 576 [2d Dept 1965]). It need not set forth evidentiary matters, which are

considered to be more appropriately obtained through discovery devices such as depositions, expert witness disclosure and document demands (*Harris v Ariel Transp. Corp.*, 37 AD3d 308, 309 [1st Dept 2007]). However, this "rule is not an inflexible one [and where the] information sought ... is undisputably information which normally would be obtainable through discovery ... [a] rigid adherence ... would only result in additional meaningless time-consuming motion practice" (*Twiddy v Standard Mar. Transp. Servs.*, 162 AD2d 264, 265 [1st Dept 1990]).

Discovery

Generally, CPLR 3101 (a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (*see e.g. Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]). Moreover, "a broad interpretation of the words 'material and necessary' is proper [and they are] to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]; *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009]). This includes not only admissible material, but also "matter that may lead to the disclosure of admissible proof" (*Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611, 612 [2d Dept 2011]; *Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175-176 [1st Dept 1996]). Also, "the party seeking to preclude discovery . . . [has] the burden of proving that the material was not discoverable" (*Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452, 452-453 [2d Dept 1994]; *see also Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 40 [1st Dept 1998]). Finally, "[t]he drastic sanction of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery directives was willful, contumacious or the result of bad faith" (*Banner v New York City Hous. Auth.*, 73 AD3d 502, 503 [1st Dept 2010]; *see also Delgado v City of New York*, 47 AD3d 550, 550 [1st Dept 2008]).

Contract Interpretation

Generally, "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records,* 98 NY2d 562, 569 [2002]).

Generally, "parties are free to agree to a liquidated damages clause 'provided that the clause is neither unconscionable nor contrary to public policy'" (*172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528, 536 [2014], quoting *Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 424 [1977]). In commercial real estate, there is no duty that "obligate[s] the landlord to re-rent the premises so as to offset any liabilities to which [the tenant] may be subject due to its material breach of the lease" (*New 24 W. 40th St. LLC v XE Capital Mgt., LLC*, 104 AD3d 513, 514 [1st Dept 2013]; *see also Holy Props. v Cole Prods.*, 87 NY2d 130 [1995]; *172 Van Duzer*, 24 NY3d at 535). However, the amount the landlord actually collected from a new tenant to which the premises were re-let is properly reduced from the

damages a landlord can collect, since otherwise it would be obtaining damages twice for the same underlying breach (*see Dresses For Less v Lenroth Realty Co., Inc.*, 260 AD2d 220, 221 [1st Dept 1999]; *see also BG Records v Ancona*, 71 AD3d 561, 562 [1st Dept 2010]). Even when a landlord is entitled to summary judgment, "[t]he tenants, however, have a valid claim against the undertenants to recover the damages suffered by virtue of the undertenants' failure to vacate as promised" (*11 Park Place Assoc. v Barnes*, 202 AD2d 292, 293 [1st Dept 1994], lv dismissed 86 NY2d 887 [1995]).

Discussion

First, the Initial Tenants moved to compel plaintiff and the Subsequent Tenants to provide a responsive bill of particulars and responses to discovery demands. The portion of this motion directed against plaintiff was withdrawn by the Stipulation. The Subsequent Tenants have not objected to providing this discovery and the Initial Tenants have not claimed that the failure to provide discovery was either wilful or contumacious. Therefore, the portion of the Initial Tenants' motion that seeks to compel the Subsequent Tenants to provide a responsive bill of particulars and the demanded discovery is granted and the Subsequent Tenants are directed to provide said discovery within 30 days after service of a copy of this order with notice of entry.

Plaintiff has sought summary judgment, based upon the Acceleration Clause, contending that the Subsequent Tenants' breach that resulted in the Holdover Judgment, warrants application of this contractual provision and that the Initial Tenants remain liable, pursuant to the Assignment. As noted above, in commercial real estate, generally, there is no obligation on a landlord to mitigate damages (*see Holy Props.*, 87 NY2d at 133; *New 24*, 104 AD3d at 514). However, in this case, defendants have stated that plaintiff has re-let the Premises. Defendants argue that "the [A]cceleration [C]lause permits [the landlord]to hold possession *and* immediately collect all rent due, the damages are grossly disproportionate to [the landlord's] actual damages . . . . [T]his is a windfall that allows [the landlord] to double dip-get the full rent now and hold the property" (*172 Van Duzer*, 24 NY3d at 536). This argument was termed "compelling," since it permits a landlord to potentially recover more than the amount of losses flowing from the purported breach (*id.*). Put another way, plaintiff may not have suffered any losses, if it re-let the Premises for a significantly greater sum than the rent it was collecting under the Lease. Alternatively, the amount it seeks under the Acceleration Clause may be "disproportionate to [its] actual losses, notwithstanding that the landowner had possession [of the Premises], and [had] no obligation to mitigate" and it may, therefore, constitute an unenforceable penalty (*id.* at 537). Additionally, defendants have asserted that plaintiff breached its obligation under the Lease to perform certain work and to assist with the DOB permits to permit operation of the Premises as a restaurant, as contemplated by the Lease. Plaintiff's performance of its obligations under the Lease is, therefore, a disputed factual issue that warrants denial of summary judgment. Discovery, including the depositions of the parties, may bring forth evidence to elucidate the circumstances. Consequently, plaintiff's motion for summary judgment must be denied.

The Initial Tenants' cross motion for a supplemental bill of particulars and discovery is granted to the extent of directing plaintiff to supply a responsive supplemental bill of particulars

and the demanded discovery within 30 days after service of a copy of this order with notice of entry.

Accordingly, it is hereby

ORDERED that the motion of West 50 Times Corp. and Vino Chand (sequence 1), pursuant to CPLR 3126, is granted to the extent of directing Gourmand Table, LLC and Rakesh Aggarwal to serve a responsive bill of particulars and discovery responses within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's motion for summary judgment (sequence 2), pursuant to CPLR 3212, is denied; and it is further

ORDERED that the cross motion of West 50 Times Corp. and Vino Chand, pursuant to CPLR 3126, is granted to the extent of directing plaintiff to serve a supplemental bill of particulars and discovery responses within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference on August 2, 2017, at 11:00 a.m., Part 7, at 60 Centre Street, room 345.

Dated: May 11, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.