

88 Third Realty, LLC v Stanley
2017 NY Slip Op 31506(U)
July 14, 2017
Supreme Court, New York County
Docket Number: 153632/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

88 THIRD REALTY, LLC,

Plaintiff,

-against-

INDEX NO. 153632/2016
MOTION DATE 06/14/17
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

BARRY STANLEY, CHANEL H. EDWARDS and
KING STREET CONSTRUCTION LLC,
Defendants.

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7 - 8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion for summary judgment pursuant to CPLR §3212, is granted in its entirety.

Plaintiff commenced this action on April 19, 2016 to recover legal fees from a previous action and for fixed rent and late charges owed by Defendants. On July 31, 2014 Defendant King Street Construction LLC (herein "King Street") entered into a lease for an apartment floor with Plaintiff, the owner, to be used for "General Office Use," with a term from August 1, 2014 to July 31, 2019 (Moving Papers Ex. D, herein "Lease"). The Lease was guaranteed by Defendants Barry Stanley and Chanel H. Edwards. The leased space is a second floor apartment located at 94 Third Avenue, New York, New York (herein "Premises"). King Street breached the Lease by using the Premises for activities not permitted by the Lease and for failure to procure appropriate insurance.

In October 2014 Plaintiff commenced a summary proceeding against Defendant King Street in New York County Civil Court (herein "First Action", *Id* at Ex. G). In an Order dated January 14, 2015 the court granted Plaintiff summary judgment for possession of the Premises while severing Plaintiff's claims for use and occupancy and attorneys' fees (*Id* at Ex. M). King Street secured a conditional stay (required payment of use and occupancy and perfection of the appeal by September 2015) from the Appellate Term of Supreme Court, First Department, pending its appeal (*Id* at Ex. N). This Order was vacated when King Street failed to make the required payments (*Id* at Ex. O). On May 21, 2015 King Street was evicted from the Premises (*Id* at Ex. P).

Plaintiff now moves pursuant to CPLR §3212 for summary judgment to grant three causes of action in the Complaint and to dismiss Defendants' Affirmative Defenses and Counter-Claims. Defendants oppose the motion.

To prevail on a motion for summary judgment, the proponent must make a prima

facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]; *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Paragraph 19 of the Lease and Paragraph 75 of the Rider to the Lease state:

If Tenant shall default in the observance or performance of any term or covenant on the Tenant's part to be observed or performed under, or by virtue of, any of the terms or provisions in any article of this lease...and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting... any actions or proceeding, and prevails in any such action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner...and if Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages (Moving Papers Ex. D).

If Owner, as a result of a default by Tenant of any of the provisions of this Lease, including the covenant to pay rent and/or additional rent, makes any necessary expenditure or incur any necessary obligations for the payment of money, including but not limited to attorneys' fees, in instituting, prosecuting... any action or proceeding, such sums so paid or obligations so incurred with interest and cost shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within five (5) days of rendition of any bill or statement to Tenant therefore, and if Tenant's lease term shall have expired at the time of making such expenditure or incurring such obligations, such sum shall be recoverable by Owner as damages (id).

Pursuant to the Lease and Rider to the Lease Plaintiff makes a prima facie showing of entitlement to judgment as a matter of law for attorneys' fees for the First Action. The Plaintiff prevailed in the First Action as the Civil Court granted summary judgment on the merits for possession of the Premises because King Street "breached the terms of the lease and remain[ed] in default" (Moving Papers Ex. M).

Plaintiff is entitled to summary judgment on liability for fixed rent and late charges pursuant to the Lease. Paragraph 18 of the Lease, states:

18 In any case of any such default...(a) the rent, and additional rent, shall become due thereupon and be paid up to the time of such re-entry, dispossess and/or expiration... (c) Tenant or the legal representatives of Tenant shall also pay Owner, as liquidated damages, for the failure of Tenant

to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or consented to be paid and the net amount, if any, of the rent collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease. The failure of Owner to re-let the demised premises or any part or parts thereof shall not release or affect Tenant's liability for damages (Moving Papers Ex. D).

The Lease unambiguously and clearly states in case of default, the Defendant would remain liable for the remainder of the rent for the duration of the Lease. Plaintiff had no obligation to re-let the Premises to another tenant to mitigate damages.

Defendants Stanley and Edwards remain jointly liable for damages as guarantors of Defendant King Street. The guarantees each Defendant signed, states:

...absolutely, unconditionally and irrevocably guarantees to Owner/Landlord...the full and prompt payment of all fixed and additional rent and other charges and sums (including, without limitation Landlord's reasonable attorneys' fees and disbursements and reasonable disbursements incurred by the Landlord) payable by Tenant... and the performance by Tenant of all other obligations arising under the Lease (Moving Papers Exs. E, F).

Identical parties in the prior proceeding are not required as the prior action not only binds the parties to that action, but those in privity with them (*Green v Santa Fe Indus., Inc.*, 70 NY2d 244, 519 NYS2d 793, 514 NE2d 105 [1987]) to the extent that persons who were not parties to the previous action are treated as if they were parties (*All Terrain Properties, Inc. v Hoy*, 265 AD2d 87, 705 NYS2d 350 [1st Dept. 2000]). Guarantors are in privity with the parties whose obligations they guaranty (*IG Second Generation Partners, L.P. v La Motta*, 133 AD3d 415, 21 NYS3d 2 [1st Dept. 2015]). As guarantors, Stanley and Edwards are in privity with Defendant King Street and as a result are liable for all damages incurred by King Street pursuant to the Lease.

Plaintiff is entitled to summary judgment for reasonable attorneys' fees in this action. Plaintiff has prevailed in this action in its entirety.

Defendants First and Second Affirmative Defenses and all Counterclaims, alleging fraud and inducement, are dismissed because the exact claims were raised in the First Action and rejected by the Civil Court. The doctrine of *Res Judicata* precludes a party and those in privity with them from re-litigating issues of fact and law decided in a prior proceeding (*Ryan v New York Telephone Company*, 62 NY2d 494, 478 NYS2d 823, 467 NE2d 487 [1984]).

Defendants Third Affirmative Defense is dismissed. Pursuant to the Lease and New York law, the Plaintiff was under no duty to mitigate its damages in the event of Defendant's breach (*Moving Papers Ex. D*, 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Association, Inc., 24 NY3d 528, 2 NYS3d 39, 25 NE2d 952 [2014]).

Since Plaintiff seeks rent prior to the eviction, a hearing is required to determine the full amount owed under the Lease. In addition, a hearing is required to determine whether the \$34,326.73 owed for attorneys' fees for the First Action is reasonable, and to determine reasonable attorneys' fees for this action.

Accordingly, it is hereby ORDERED, that Plaintiff's motion for summary judgment on all causes of action pursuant to CPLR §3212 is granted, and it is further,

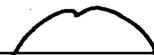
ORDERED, that plaintiff is granted summary judgment dismissing all of the Defendants affirmative defenses and counter-claims, and it is further,

ORDERED, that all of the Defendants' affirmative defenses and counter-claims, are dismissed, and it is further,

ORDERED, that Plaintiff is to serve a copy of this Order with Notice of Entry, in accordance with e-filing protocol upon the Defendants, and upon the Clerk of the Trial Support Office and the Special Referee Clerk, located in the General Clerk's Office (Room 119) who shall set this matter down for an inquest on damages to determine whether Plaintiff is entitled to the full amount of \$34,326.73 for attorneys' fees for the First Action, and for a hearing to determine the amount of fixed rent and additional rent due, and reasonable attorneys' fees due for this action .

ENTER:

Dated: July 14, 2017



MANUEL J. MENDEZ
J.S.C. MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE