Strathspey Crown Holdings, LLC v Tower 570 Co., L.P.
2018 NY Slip Op 33213(U)
December 13, 2018
Supreme Court, New York County
Docket Number: 157161/16
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X **DECISION/ORDER**

STRATHSPEY CROWN HOLDINGS, LLC

Plaintiff,

Index no. 157161/16
Motion seq. No. 004

-against-

TOWER 570 COMPANY, L.P.,

Defendant.

----------X

TOWER 570 COMPANY, L.P.

Index No. 654552/16
Motion seq. No. 001

Plaintiff,

-against-

VIKRAM MALIK & ROBERT GRANT,

Defendant.

----------X

HON. CAROL R. EDMEAD, J.S.C.:

In these consolidated actions, both stemming from the same commercial lease, landlord Tower 570 Company, L.P. (Tower) moves for summary judgment against its former tenant Strathspey Crown Holdings, LLC (Strathspey). Specifically, Tower seeks an order: (1) granting it summary judgment on its counterclaims against Strathspey, under index No. 157161/16 (Strathspey Action), for breach of a commercial lease and attorney's fees; (2) striking Strathspey's affirmative defenses to the counterclaims; (3) granting it summary judgment on its claims, under index No. 654552/16 (Tower Action), against defendants Vikram Malik (Malik) and Robert Grant (Grant), Strathspey's guarantors, for reimbursement of security deposit moneys

and defaulted rental payments, as well as attorney's fees;[1] and (4) striking Malik and Grant's affirmative defenses. The motions are consolidated for disposition.

BACKGROUND

These consolidated actions arise from a rental dispute in one of the great old dames of the midtown skyline. Located at the corner of 51st Street and Lexington Avenue, it was built in 1931, and has been known variously as the RCA Victor Building, The GE Building, and, simply, 570 Lexington Avenue. Tower owns it.

The 2013 Lease

In 2013, Strathspey entered into a lease with Tower to rent the 26th floor (The Initial Lease, or The 2013 Lease) (NYSCEF doc No. 67 under the Tower Action). In its organizing documents, filed in Delaware that same year, Strathspey described itself as a "physician practice-base group acquisition and licensing organization primarily focused on the ophthalmic and medical aesthetic areas of the cash-pay, lifestyle healthcare sector" (NYSCEF doc No. 85). That is, it seems that Strathspey was an investment group that invested, among other things, in the field of luxury medicine and luxury medicine devices. In April 2017, Strathspey changed its name to Sch-aeon.

In 2013, Malik and Grant signed "good guy guarantees" pursuant to the initial lease (NYSCEF doc No. 68 under the Tower Action). These guarantees expressly apply to amendments of the Initial Lease (*id.*, ¶ 3) and state that Malik and Grant personally guarantee all rent and other charges due under the lease (*id.*, ¶ 1), and that they are jointly and severally liable for all obligation under the lease (*id.*, ¶ 3).

[1] Tower asks the court to determine, on this motion, the amount of damages on all if its claims and counterclaims, except for those for attorney's fees, on which it seeks an "immediate" hearing.

Amendment of Lease and Storage Agreement

Strathspey and Tower, in August 2015, executed an amendment of the Initial Lease (Amendment of Lease) (NYSCEF doc No. 69 under the Tower Action). Under the terms of the Amendment of Lease, Strathspey was to rent three floors in the building in addition to the 26th floor (the 27th, 28th and the 35th floors). The term of lease ran until January 31, 2016. The Amendment of Lease also sets out a plan for construction projects on the three newly rented floors, adding, among other things, an interior stairwell between the two contiguous floors and luxury finishes. Tower agreed, to a capped amount, to pay the construction fees and, past that amount, Strathspey agreed to pay (see *id.*, Articles V and VII). Moreover, Strathspey was to pay its share of the construction bill within 30 days of receiving notice of the final construction costs (*id.*).

Finally, the parties entered into a storage agreement dated September 2, 2015 (Storage Agreement) (NYSCEF doc No. 71 under the Tower Action). Like the Amendment of Lease, the term for the Storage Agreement ran until 2026 and permitted Strathspey to use certain storage space in the building.

End of Tenancy, Litigation

On April 2016, Tower noticed Strathspey of its obligation to pay for its share of the construction work done on the 35th floor.[2] Strathspey, apparently experiencing financial difficulties (Malik dep at 141 ["we were in a financially, you know, tight situation"), did not pay within the period provided for in the Amendment of Lease. In May 2016, Tower invoiced

[2] $315, 113.63 was the amount due for the 35th-floor renovation.

Strathspey for the amount due on the construction on the 35th floor.[3] Again, Strathspey did not pay.

In June 2016, Tower applied, pursuant to paragraphs 34 and 56 of the Initial Lease, $929,122.63, the total amount owed from the renovation work, to the Strathspey's security deposit. Tower demanded that Strathspey replenish the security deposit, but it did not.

Thus, in July 2016, Tower 570 initiated a nonpayment proceeding against Strathspey in Civil Court and in August 2016, Tower sent Strathspey a Fifteen Days' Notice of Default, which stated that Strathspey could cure by paying the default amount of $929,122.63. Instead of curing, Strathspey sought a *Yellowstone* injunction in this court. This is what the court has referred to as The Strathspey Action. As noted above, 570 counterclaimed for breach of the lease agreements and sought damages including the amount required to replenish the security deposit, rent, and other charges.

In August of that year, Tower commenced its action against Malik and Grant, seeking to enforce their guarantee. The following month, Strathspey gave notice to Tower that it intended to vacate the premises. It also stipulated to withdraw its application for a *Yellowstone* injunction. In October 2016, Strathspey vacated 570 Lexington Avenue.

As the *Yellowstone* application has been withdrawn, all that remains of these consolidated actions is Tower's counterclaims and its application to enforce the guarantees signed by Malik and Grant. In its opposition, Strathspey tacitly abandons its affirmative defenses against the counterclaims for breach against it, only arguing that Malik and Grant's liability is capped at 30 days of rent. Thus, as an initial matter, the branch of Tower's motion that seeks dismissal of Strathspey's affirmative defenses is granted (see *see Perez v Folio House, Inc.*, 123 AD3d 519,

[3] $614,009.00 was the amount due for the 27th-28th-floor renovation.

520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]). Similarly, Malik and Grant's affirmative defenses should be dismissed as they do not raise them in opposition. While Malik and Grant argue that their liability should be capped, they do so on contractual interpretation argument, rather than any affirmative defense. As all of Strathspey, Malik, and Grant's affirmative defenses are dismissed, three issues remain: (1) whether Strathspey is liable for breaching the lease agreements; (2) whether, and to what extent, the guarantees are enforceable against Malik and Grant; and (3) attorney's fees.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Breach of the Lease Agreements

While Strathspey concludes, in passing, that Tower's application of the fee was impermissible "self-help," it does not actually challenge Tower's showing that it was entitled to apply the security deposit to defaults under paragraphs 34 and 56 of the Initial Lease. Finally, it is plain that Strathspey violated the Amendment of Lease by failing to pay its share of the construction costs. Thus, Strathspey was in default when it vacated the premises and Tower is entitled to summary judgment as to liability on its counterclaims against Strathspey for breach of the lease agreements.

While Tower seeks damages of $3,200,289.27 against Strathspey, CPLR 3212 (c), as this court noted in *274 Madison Co. LLC v Ramsundar*, "directs immediate trial before a court or referee if the only remaining triable issue of fact relate to damages" (2016 NY Slip Op 30530 at 15 [Sup Ct, NY County 2016]). As liability has been determined, the court will refer the remaining issue of damages to a referee.

II. Enforcement of the Guarantees

The guarantees expressly apply to amendments of the Initial Lease. Malik and Grant do not contest this point. Instead, they argue that the guarantees cap their liability at 30 days of rent. In support of this position, defendants submit an affidavit from Malik, in which he opines on the scope of the guarantees: "the Good Guy guarantees," Malik concludes, "did not cover the Security Deposit for the Lease or its replenishment in the event of a draw down" (NYSCEF doc No. 87, ¶ 3).

Malik and Grant personally guaranteed:

> "to Owner the payment of all Annual Rent and additional rent and other charges due to Owner under the Lease or otherwise, which accrues up to and until the date on which the Demised Premises are vacated and the keys and possession of the Demised Premises are turned over to Owner ...:"

(NYSCEF doc No. 8).

Defendants argue that the term "other charges" should not include replenishment of the security deposit for the amount construction charge default. In support, defendants cite to caselaw, such as *White Rose Food v Saleh*, that holds that guarantees must be construed "in the strictest manner" (99 NY2d 589, 591).

However, here it is plain that the construction charge, as well as the subsequent and coterminous, amount applied from the security deposit are "other charges" that were due under the lease agreements at the time that Strathspey vacated. As such, the Malik

and Grant's liability is not capped to exclude the amount of the construction cost that was applied from the security deposit. Accordingly, Tower is entitled to summary judgment as to Malik and Grant's liability on their guarantees.

While Tower seeks $1,029,811.59 in damages, the court will once again refer the issue of damages to a referee to determine consistent with this decision.

III. Attorney's Fees

Under the lease agreements and the guarantee, Strathspey, Malik, and Grant owe reasonable attorney's fees. The amount of such fees will also be referred to a referee.

CONCLUSION

Accordingly, it is hereby

ORDERED that, under index No. 157161/16, defendant Tower 570 Company (Tower) is entitled to summary judgment on its counterclaims for breach of the commercial lease agreements; and it is further

ORDERED that, under the same index No., plaintiff Strathspey Crown Holdings, LLC (Strathspey) affirmative defenses are dismissed; and it is further

ORDERED, under index No. 654552/16, Tower is entitled to summary judgment as to the defendants' Vikram Malik (Malik) and Robert Grant's (Grant) liability under the subject guarantees; and it is further

ORDERED that Malik and Grant's affirmative defenses are dismissed; and it is further

ORERED that the issue of damages owed by Strathspey, Malik, and Grant, as well as the issue of reasonable attorney's fees is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for Tower shall serve a copy of this order with notice of entry on al parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

Dated: December 13, 2018

Hon. Carol Robinson Edmead, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.