

Fraglow Realty LLC v Stein

2011 NY Slip Op 32106(U)

August 1, 2011

Sup Ct, NY County

Docket Number: 101544/11

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Index Number : 101544/2011

FRAGLOW REALTY LLC

vs
STEIN, CATHERINE

Sequence Number : 001

SUMMARY JUDGMENT IN LIEU OF COMPLAINT

INDEX NO. 101544/11

MOTION DATE 001

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1, 2, 3	
3, 4 4, 5	
6, 7, 8	

FILED

Cross-Motion: Yes No

AUG 02 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8/1/11



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
FRAGLOW REALTY, LLC,

Plaintiff,

Index No.
101544/11

Seq No.: 001

- against -

Decision and
Order

FILED

CATHERINE STEIN, MARSHA BLYE, and
SHARON GOLDBERG,

AUG 02 2011

Defendants.

HON. EILEEN A. RAKOWER NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, Fraglow Realty, LLC ("Fraglow"), moves for summary judgment in lieu of the complaint to collect under a guaranty on monies allegedly owed in unpaid rent for the commercial premises located at 8 West 38th Street in the County and State of New York. Fraglow seeks the amount of \$38,611.85 from defendants Catherine Stein, Marsha Blye, and Sharon Goldberg, the guarantors on the lease. Defendants oppose the motion, and cross-move for summary judgment dismissing the action.

A lease was entered into on October 12, 2000, between Fraglow and Catherine Stein Designs, Inc, ("Designs"), to commence on April 1, 2001 for a period of ten years. The first year's annual rent was \$290,000.00, and the last year's rent was to be \$452,793.06. The guaranty is contained in Article 64 of the Rider to the lease. A "First Amendment to the Lease" was entered into in March 2004. Although it is not explicitly stated that Designs vacated the premises at the end of the lease period, defendants make several references in their papers to the return of Design's security deposit. Defendants also represent that Fraglow never initiated a summary proceeding against them at any time during the lease period.

Fraglow, in support of its motion, submits: a summons; the affidavit of Andrew

Udis, Senior Managing Director for Newmark Knight Frank, agent for Fraglow; a copy of the lease and Rider; a copy of a printout titled "Tenant Detail History . . .;" printouts of email correspondence; and a letter from Fraglow's counsel to defendants' counsel. Fraglow asserts that Designs failed to pay the following: \$6,666.66 in unpaid rent due as of January 1, 2011, \$178.52 for past due arrears, \$31,666.67 in rent due on February 1, 2011, and a \$100.00 late fee for February, 2011. As Designs has breached the lease, Fraglow asserts, defendants are now personally liable for said payments. Fraglow asserts that any contention that defendants are entitled to a rent abatement for the months in question, pursuant to Section 37 (c)¹ of the rider to the lease, is without merit. Section 37(c) states, in relevant part:

[P]rovided Tenant has made all payments required under the Lease no later than fifteen (15) days after such sums were due . . . rent for the month of January, 2011 shall be reduced by \$6,666.66, provided Tenant is not in default of a monetary obligation . . . and not in default of a nonmonetary obligation under the Lease . . . Tenant's . . . monthly rent for . . . February, 2011 shall be reduced by \$31,666.67 . . .

Fraglow submits its rent roll and claims that, according to its records, Designs has paid its rent late "on twenty one . . . separate occasions since March, 2004."

Defendants, in opposition and in support of their cross-motion, submit: several checks which correspond with Fraglow's rent roll; the affidavit of Louis R. Rotella, CFO of FAF;² the affidavit of Sharon Goldberg, Treasurer for Designs; and a copy of a document titled "Lease Renewal Proposal." Defendants argue that the guaranty was never triggered, as there was no monetary default. Defendants submit rent checks for each month that Fraglow claims the rent was paid "late," and point to the fact that each of those checks was dated on or before the 15th of the month.

CPLR §3213 states, in relevant portion:

When an action is based upon an instrument for the payment of money only . . . the plaintiff may serve with the summons a notice of motion for

¹As amended by the First Amendment to the Lease.

² According to Mr. Rotella, FAF "purchased certain assets" of Designs as of November 2008, and has been responsible for rent payments since that time.

summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion . . .

CPLR §3213 applies “if a prima facie case would be made out by the instrument and a failure to make the payment called for by its terms.” (*Weissman v. Sinorm Deli*, 88 NY2d 437,444[1996]). A motion for summary judgment in lieu of the complaint is not a proper vehicle where extrinsic evidence, other than simple proof of nonpayment, is required in order to prove there was a default. (*Ian Woodner Family Collection, Inc. v. Abaris Books, Ltd.*, 284 AD2d 163[1st Dept. 2001]).

Here the parties have submitted documentary evidence and affidavits regarding the timing of rent payments. For example, the rent roll shows several payments made after the fifteenth of the month. However, defendants submit checks for each of those occasions, dated on or before the fifteenth. Ms. Goldberg, Design’s Treasurer, attests that checks would be signed “on the same day, or certainly no later than one additional day subsequent to the date contained on each check . . . once the checks were signed, the . . . superintendent would be notified and he would thereafter retrieve the check from our premises . . . Mr. Udis, on the other hand, contends that the rent roll is an “accurate record of when the rents were received from Defendants . . .” Finally, although Flaglow claims that Designs was late twenty-one times, there is only one late fee noted on the rent registry. Those submissions, which are intended to prove or disprove that Designs defaulted on its monetary obligations, “exceed the permissible role of extrinsic proof on a CPLR 3213 motion.” (*Id.* at 164).

Defendants contend that they are entitled to dismissal of the action because Fraglow consistently accepted late payment, thereby waiving its right to enforce the timeliness provision of the lease. “Knowledgeable acceptance of late payments over an extended period of time establishes the necessary elements to constitute a waiver of the right to insist upon timely payments.”(*Madison Ave. Leasehold. LLC v. Madison Bentley Assoc. LLC*, 30 AD3d 1,2[1st Dept. 2006] internal citations and quotations omitted)(Landlord’s practice of accepting late rent payments, without protest, over a period of three years, constituted course of conduct effecting waiver of the timely payment covenant). However, defendants have failed to establish as a matter of law that if Designs did pay late, those payments were in fact accepted by Fraglow “without protest,” thereby constituting a waiver. (*Id.* at 6).

Wherefore it is hereby

ORDERED that the plaintiff's motion for summary judgment in lieu of the complaint is denied; and it is further

ORDERED that defendants' cross-motion is denied; and it is further

ORDERED that the plaintiff's moving papers are hereby deemed the complaint in this action and the defendant's answering papers are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a Preliminary Conference in Room 308, 80 Centre Street on Tuesday September 27, 2011 at 9:30 a.m.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 1, 2011



EILEEN A. RAKOWER, J.S.C

FILED

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