

IG Second Generation Partners, L.P. v LaMotta

2013 NY Slip Op 33711(U)

December 19, 2013

Sup Ct, New York County

Docket Number: 114175/2011

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: PAUL WOOTEN J.S.C. *Justice*

PART 7

IG SECOND GENERATION PARTNERS, L.P.,

INDEX NO. 114175/2011

Plaintiff,

- against -

MOTION SEQ. NO. 003

**FRANCO LA MOTTA a/k/a FRANCESCO LA
MOTTA, a/k/a FRANK LA MOTA,**

FILED

Defendant.

DEC 20 2013

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COUNTY CLERK'S OFFICE

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits — Exhibits _____ | No(s). _____

Cross-Motion: Yes No

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

In this action, IG Second Generation Partners (plaintiff), a landlord, is seeking to recover \$641,705.98, plus statutory interest from the defendant Frank La Motta (La Motta), sole officer, director and shareholder for a tenant, Café Amore of New York Restaurant Inc (Café Amore) on the basis that La Motta signed an individual guaranty for a commercial lease between plaintiff's predecessor in interest and Café Amore, which Café Amore breached. The amount plaintiff is seeking includes, *inter alia*, past due rent, property taxes, water and sewer charges and late fees. Plaintiff had earlier received a judgement of eviction and monies for past due base rent, property taxes, water and sewer charges against Café Amore in the amount of \$ 251,410.22 in a summary proceeding in the New York Civil Court (*see IG Second Generation Partners v Café Amore of New York Restaurant Inc., L & T* Index no. 81109/2009). However, plaintiff has yet to collect its debt from Café Amore, which was

unsuccessful in discharging the debt before the United States Bankruptcy Court (see plaintiff's exhibit 12, *Café Amore of New York Restaurant Inc.*, USBC Order, Case no. 11-13705-SMB).

Before the Court is a motion by plaintiff's for summary judgment on its complaint and to strike La Motta's affirmative defenses and counterclaims. Plaintiff asserts that its predecessor and La Motta's company entered into a commercial lease, and that La Motta personally guaranteed all the obligations due to the owner and the landlord pursuant to the terms of the lease. According to the plaintiff, La Motta's company breached the lease, and as such, he is personally liable for damages for such breach. La Motta files in opposition alleging, *inter alia*, triable issues of fact exist based upon false testimony in the summary Civil Court proceeding, and on the grounds that plaintiff is not a party to the lease signed by Café Amore, and so plaintiff cannot as a matter of law recover against him under the terms of the lease.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

In support of its motion, plaintiff submits, *inter alia*, certificate of incorporation records from the New York State Department of State, the lease agreement, the guarantor agreement, business records, New York City property tax and water meter records, records from the summary proceeding seeking eviction from the New York Civil Court and the United State Bankruptcy Court records. After reviewing the record and in viewing the documentary evidence submitted in the light most favorable to La Motta, and affording the defendant the benefit of all reasonable inferences that can be drawn from the evidence, the Court finds that plaintiff has met its prima facie burden to establish its entitlement to summary judgment in the amount of \$ 604,705.98, and for an order striking La Motta's affirmative defenses and counterclaims, which the Court finds have no merit.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for summary judgment for an order striking La Motta's affirmative defenses and counterclaims is granted; and it is further,

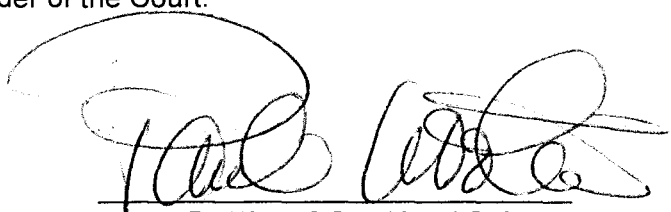
ORDERED that plaintiff's motion seeking summary judgment is granted and plaintiff is hereby granted judgment on its complaint against defendant FRANCO LA MOTTA a/k/a FRANCESCO LA MOTTA, a/k/a FRANK LA MOTA, in the amount of \$604,705.98, with interest at the statutory rate from the date of December 16, 2011 until the entry of judgment, as calculated by the Clerk of the Court, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill

of costs; and it is further,

ORDERED that plaintiff shall serve a copy of this order, with Notice of Entry, upon defendant and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/19/13


PAUL WOOTEN J.S.C.

- 1. Check one:
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FILED
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