SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 157964/2012
120 EAST 56TH STREET, LLC
vs
CIMINELLI, SUSAN
Sequence Number : 002
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE 8-9-2013
MOTION SEQ. NO. _____

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

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

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

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this breach of contract action, plaintiff 120 East 56th Street, LLC ("plaintiff") moves pursuant to CPLR 3212 for summary judgment against defendant Susan Ciminelli ("defendant") for breach of guaranty in the amount of $779,176.51 and attorneys' fees, and to dismiss defendant's affirmative defenses.

Factual Background[1]

In support of its motion, plaintiff asserts that on May 7, 2008, plaintiff, as landlord, and Susan Ciminelli, Inc. as tenant, (the "tenant"), entered into a written commercial lease for the entire second floor and portion of the basement in a building located at 120 East 56th Street, New York, New York (the "Premises"), which was later amended by First Amendment to Lease dated April 8, 2009 (the "Lease"). In connection with the Lease, defendant signed a written personal guaranty (the "Guaranty") unconditionally and absolutely guarantying full payment and performance of the Tenant's obligations under the Lease.

When the Tenant defaulted under the Lease by failing to pay rent and additional rent, plaintiff commenced an action in Civil Court and by Order dated May 16, 2013, the Civil Court

[1] The Factual Background is taken from the plaintiff's motion papers.

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

Dated: _____ _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

determined that the Tenant owed plaintiff $779,176.51. Defendant failed to pay plaintiff this amount pursuant to the Guaranty. As a result, plaintiff commenced this action (on May 22, 2013) against defendant alleging that defendant is liable to plaintiff for such amount, plus rent and additional rent and/or use and occupancy as it continues to accrue.

Additionally, the Guaranty obligates defendant to pay all reasonable attorneys' fees, costs and disbursements incurred by plaintiff in connection successfully prosecuting defendant thereunder. Thus, since plaintiff is entitled to summary judgment against defendant based on the Guaranty, defendant is liable to plaintiff for attorneys' fees, costs, and disbursements as determined by either a hearing to be held or based upon the submission of an attorney's fees affirmation.

Further, argues plaintiff, defendant's affirmative defenses should be dismissed. As to the first affirmative defense of failure to state a cause of action, the complaint states a claim for breach of contract and for attorneys' fees. And, the second affirmative defense alleging that an "estoppel certificate" issued by plaintiff shows that plaintiff agreed to reduce the arrears to $100,000 and reduce the monthly rent from $35,000 to $25,000 in order to refinance the Premises lacks merit. Plaintiff asserts that such unauthorized and inaccurate estoppel certificate received from the Tenant was never submitted to plaintiff's lender or used by plaintiff in any manner. The estoppel certificate was originally tendered to the Tenant in "pdf" format to Tenant, and was substantially edited by the Tenant and never used in any manner by plaintiff. Plaintiff refinanced the Premises by obtaining estoppel certificates from other tenants in the Building. And, the estoppel certificate is not signed by the plaintiff and thus, does not alter the terms of the Lease, which contains a comprehensive merger clause prohibiting any changes to the Lease unless in writing and signed by the party to be charged.

In opposition, defendant argues that discovery is outstanding, issues of fact exist as to plaintiff's claims, and its affirmative defenses are adequately supported by the facts. Plaintiff and the tenant negotiated the arrears and issue of on-going rents, resulting in the executed estoppel certificate reflecting the parties' agreement to reduce the amount of the arrears to $100,000 and monthly rents to $20,000. Since the meeting, the Tenant had been paying the rents for $20,000 a month, and plaintiff deposited such amounts. Defendant submits negotiated checks for $20,000 dated on or about November 21, 2011, December 8, 2011, January 12, 2012, February 10, 2012, March 5, 2012, and dated on or about June 4, 2012, November 16, 2012, and December 11, 2012 for $15,000, and dated on or about January 13, 2013, February 25, 2013 and March 20, 2013 for $20,000. The estoppel certificate never contained any line or space for the plaintiff to sign as landlord, and the estoppel certificate does not require plaintiff's signature to be an enforceable, binding amendment to the Lease. Whether plaintiff used the certificate to refinance the Premises is irrelevant. Thus, a question remains as to whether the arrears and rents were negotiated at a reduced amount, and the amount of the arrears and rents due. Consequently, defendant cannot be liable for attorneys' fees.

Further, the Civil Court decision was for possession, and was not a judgment as to the amount of the arrears.

In reply, plaintiff contends that it continued to invoice the Tenant for the full monthly rent from January 1, 2011 through December 1, 2011, despite the Tenant's underpayment of rent since there was no agreement to reduce same. And, the Civil Court order expressly granted a

money judgment in the amount of $779,176.51, and thus, there is no issue of fact as to the amount of plaintiff's damages. The amount cannot be collaterally disputed. Defendant does not deny liability under the Guaranty, and is barred under the doctrines of *res judicata* and collateral estoppel from asserting defenses of the Tenant, with whom defendant (the Tenant's President) has privity, which lack merit in any event. Defendant fails to state or provide evidence of the meeting between the parties to negotiate the arrears and on-going rent, when and where the alleged agreement was determined and established, who was present at the meeting, and whether the agreement was oral or in writing. There is no affidavit of Tenant's attorney Lawrence Morrison indicating his presence at the meeting. And, the caselaw cited by defendant is distinguishable.

Discussion

It is well settled that plaintiff, as the proponent for summary judgment, must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Melendez v Parkchester Medical Services, P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010] *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642 [1985]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact (*Melendez v Parkchester Medical Services, P.C.*, 76 AD3d at 927, *citing Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]).

On a motion for summary judgment to enforce a written guaranty, "the creditor needs to prove an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (*Davimos v Halle*, 35 AD3d 270, 826 NYS2d 61[1st Dept 2006], *citing City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 681 NYS2d 251 [1st Dept 1998]). Once this is shown, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact (*Bank Leumi Trust Co. v Rattet & Liebman*, 182 AD2d 541, 582 NYS 707 [1st Dept 1992]).

Here, plaintiff's agent's affidavit, coupled with the documentation of defendant's unconditional guaranty, the underlying Lease, and the underlying Civil Court proceeding establish the Tenant's debt, defendant's guaranty of Tenant's Lease obligations, and the defendant's failure to perform under the guaranty.

It is uncontested that defendant executed a "Limited Lease Guaranty," in which defendant absolutely and unconditionally guaranteed the Tenant's obligation to pay rent and additional rent to the plaintiff as follows:

> In order to induce [plaintiff] in the above lease . . . to enter into that certain agreement of Lease (the "Lease") between Landlord, as landlord (herein "Landlord") and . . . . Tenant . . . the undersigned (collectively "Guarantor") do hereby, jointly and severally, made the following agreement and guarantee in favor of Landlord . . .:
>
> 1. Guarantor hereby guarantees to Landlord . . . all Obligations . . . that shall accrue and which shall be due and payable from and after the commencement date or the date on which Tenant takes possession . . . of the Premises and until the date on which Tenant . . .

shall have so vacated the Premises . . . . The term "Obligations" shall . . . be limited solely to the fixed annual rent, . . . utility and electric charges payable by Tenant . . . .

2. This Guaranty is absolute and unconditional and is a guarantee of payment and not of collection . . . .

* * * * *

So long as Landlord shall be successful, Guarantor shall be liable to Landlord and shall pay upon demand, all reasonable legal fees, costs and disbursements incurred by Landlord in connection with any efforts by Landlord to enforce the Guaranty.

The Civil Court Order issued on or about May 16, 2013, directs a "judgment for rent and additional rent through May 2013 in the sum of $779,176.51" due under the Lease by the Tenant.

Finally, it is uncontested that defendant failed to pay plaintiff such amounts pursuant to the Guaranty. Therefore, plaintiff established its entitlement to summary judgment on its first cause of action for $779,176.51 against defendant (*see Poah One Acquisition Holdings V Ltd. v Armenta*, 96 AD3d 560, 946 NYS2d 571 [1st Dept. 2012] (holding that "Plaintiff demonstrated its entitlement to summary judgment as against Armenta by submitting the guaranty executed by him and an affidavit of nonpayment") *citing Bank of Am., N.A. v Solow*, 59 AD3d 304, 304–305, 874 NYS2d 48 [2009], *lv. dismissed* 12 NY3d 877, 883 NYS2d 172, 910 NE2d 1001 [2009]).

And, plaintiff established that the Guaranty obligates defendant to "reasonable legal fees" due to plaintiff's efforts in enforcing the Guaranty. As such, summary judgment on the issue of liability on the second cause of action for attorneys' fees is warranted.

As to dismissal of the first affirmative defense alleging failure to state a cause of action, such affirmative defense is severed and dismissed. The elements of a claim for breach of contract are (1) the existence of a contract, (2) due performance of the contract by claimant, (3) breach of the contract by the other party, and (4) damages resulting from the breach (Harris v Seward Park Housing Corp., 79 AD3d 425, 426, 913 NYS2d 161 [1st Dept 2010]). Plaintiff's claims for breach of guaranty and for attorney's fees are sufficiently stated. Plaintiff alleged a valid enforceable contract, *i.e.*, the guaranty, the underlying debt of the Tenant, the defendant's breach of the guaranty, and damages. And, the complaint sufficiently alleges that defendant is liable for attorney's fees in connection with plaintiff's prosecution of the action herein.

As to dismissal of the second affirmative defense premised on the purported estoppel certificate, plaintiff established that such defense lacks merit. In her second affirmative defense, defendant asserts that "the estoppel certificate provided by Plaintiff in order to refinance" the Premises evidences plaintiff's agreement to reduce all arrears and the monthly rent. To defeat this claim, plaintiff submitted a "Tenant's Estoppel Certificate" provided to the Tenant, which is unexecuted by the Tenant, indicating that "Tenant represents and warrants to Capital One, National Association (the "Lender")" that "3. Tenant is currently obligated to pay the rental amount of $ 34,725.04 per month" and that "4. Tenant has not paid the monthly rental . . . through the date hereof and is in arrears in the amount of $216,967.29 through June 30, 2011." To the degree plaintiff admits to providing the Tenant with such certificate, plaintiff establishes that the Estoppel Certificate did not constitute an agreement to reduce the monthly rent or arrears.

The submission of the estoppel certificate signed by the Tenant failed to raise an issue of fact to *defendant's* personal liability under the Guaranty. The estoppel certificate, dated August

24, 2011 (subsequent to the Civil Court order) which "represents" to plaintiff's lender that there "are $15,000 per month offsets or credits against any rentals payable under the Lease" is not signed by plaintiff, and thus, is insufficient to constitute an amendment of the payment terms of the Lease. Article 21 of the Lease requires that any agreement to "change [or] modify" the Lease be "in writing and signed by the party against whom enforcement of the change, modification . . . is sought." The estoppel certificate executed by the Tenant is not signed by the plaintiff.

Further, defendant, who signed the Lease as the Tenant's President, is precluded from raising the defense as to the amount of the rent and additional rent determined by the Civil Court since "a judgment in a prior action is binding not only on the parties to that action, but on those in privity with them" (*Broadway 36th Realty, LLC v London*, 29 Misc 3d 1238(A), 958 NYS2d 644 (Table) [Sup. Ct., New York County 2010] *citing Green v Santa Fe Indus.*, 70 NY2d 244, 519 NYS2d 793 [1987]; *U.S. Securities and Futures Corp. v Irvine*, 2002 WL 34191506 [SDNY 2002] [where the principal of a corporation allows a lawsuit against that corporation to go into default, the principal may not later avoid the consequences of that default]). And, plaintiff's acceptance of the Tenant's underpayments of the rent is insufficient to establish any agreement on the plaintiff's part to amend the Lease to reduce the rent amount and arrears.

Defendant failed to raise an issue of fact as to her liability. Defendant's mere hope that somehow further discovery will yield evidence to defeat plaintiff's claims is insufficient for denial of summary judgment (*see, Kent v 534 East 11th Street*, 80 AD3d 106, 912 NYS2d 2 [1st Dept 2010]). And, the cases cited by defendant to enforce the Estoppel Certificate it signed do are factually distinguishable, in light of the fact that the plaintiff herein did not execute the Certificate and the Certificate materially alters the Lease and as such, must signed by the plaintiff to be enforceable pursuant to the terms of the Lease.

Conclusion

Thus, based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant on the first cause of action in the amount of $779,176.51 and on the second cause of action for attorneys' fees, and to dismiss defendant's affirmative defenses is granted, and defendant's affirmative defenses are severed and dismissed; and it if further

ORDERED that the issue of the amount of attorneys' fees due and owing under the Guaranty (second cause of action) is referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee. And it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated 9 23, 2013 **ENTER:** _____, **J.S.C.**

HON. CAROL EDMEAD

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**