

Royal Equities Operating, LLC v Rubin
2016 NY Slip Op 32438(U)
December 12, 2016
Supreme Court, New York County
Docket Number: 653201/2016
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

ROYAL EQUITIES OPERATING, LLC,
Plaintiff,

Index No.: 653201/2016

Motion Date: 11/15/2016

- v -

Motion Seq. No.: 01

JOSHUA D. RUBIN and EVAN S. ORENSTEN,
Defendants.

The following papers, numbered 1 to 3 were read on this motion for summary judgment in lieu of complaint.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

<u>PAPERS NUMBERED</u>	
	1
	2
	3

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant plaintiff's motion for summary judgment in lieu of complaint to the extent of liability.

The defendants each signed an instrument whereby each "absolutely, irrevocably and unconditionally" guaranteed to plaintiff Landlord payment of "all rent and additional rent" under the seven year lease between Capitan Lucas Inc. and plaintiff dated as of May 15, 2014 (Lease), and plaintiff brings this action for breach of such guarantees by defendants. The court determines that this action "is based upon an instrument

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

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

for the payment of money only" pursuant to CPLR 3213 and that the other requirements of the statute have been met.

Further,

On a motion for summary judgment to enforce a written guarantee, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (BNF Financial Corp. V Clare, 172 A.D.2d 203,...; Chemical Bank v Geronimo Auto Parts Corp., 225 A.D.2d 461...).
City of New York v Clarose Cinema Corp., 256 A.D.2d 69 (1st Dept 1998).

Defendants argue that there is no underlying debt because non-party Capitan Lucas Inc. paid all rent and additional rent under the Lease through March 2016 to plaintiff, and as of May 15, 2016, without obtaining a judgment of possession and warrant of eviction, plaintiff re-let the premises to a third party known as Brea, which gave non-party Capitan Lucas Inc. permission to stay in possession of the premises. Defendants contend that plaintiff, therefore, improperly accelerated the balance due under the Lease, and that their obligations are limited to payment of March and April 2016 rent and additional rent.

Defendants' arguments lack merit.

Defendants' contention that plaintiff improperly accelerated the rent under the Lease when plaintiff re-let the premises to a third party fails because defendants concede that non party Capitan Lucas, Inc. is still in possession and has neither

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surrendered nor delivered possession of the premises to plaintiff. See Fifty States Management Corporation v Pioneer Auto Parks, Inc., 46 NY2d 573 (1979).

In any event, plaintiff is correct that under each absolute, irrevocable, unconditional guarantee, which is an agreement separate and distinct from the Lease, the defendants waived their right to interpose any defenses. See 1 Bldg, Inc. v Hong Mei Cheung, 137 AD3d 478 (1st Dept 2016).

Likewise, as argued by plaintiff, by its plain terms each guarantee states that the guarantor "shall not be entitled to an offset against the [guarantor's] obligations under this Guaranty for any security which was deposited with the Landlord."

Accordingly, it is

ORDERED that it appearing that plaintiff is entitled to judgment on liability and the only triable issues of fact arising on plaintiff's motion for summary judgment in lieu of complaint relate to the amount of damages, including rent, additional rent, late charges, interest and reasonable attorneys fees, to which plaintiff is entitled; and it is further

ORDERED that an immediate trial of the aforesaid issues of fact shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial

Support Office (Room 158) and shall serve and file with such Clerk a note of issue and statement of readiness and shall pay the fee therefor, and such Clerk shall cause the matter to be place upon the calendar for such trial.

This is the decision and order of the court.

Dated: December 12, 2016

ENTER:

~~Debra A. James~~
J.S.C.
DEBRA A. JAMES