

Cast Iron Co., LLC v Crypto, Inc.
2016 NY Slip Op 32454(U)
December 12, 2016
Supreme Court, New York County
Docket Number: 160885/2015
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

CAST IRON CO., LLC,
Plaintiff,

Index No.: 160885/2015

Motion Date: 11/15/2016

- v -

Motion Seq. No.: 001

CRYPTO, INC. d/b/a BROOKLYN INDUSTRIES,
BROOKLYN INDUSTRIES, LLC and VAHAP AVSAR,
Defendants.

The following papers, numbered 1 to 4 were read on this motion and cross motion for summary judgment

Table with 2 columns: Document Name and No(s). Rows include Notice of Motion/Order to Show Cause -Affidavits -Exhibits (1, 2), Notice of Cross Motion/Answering Affidavits - Exhibits (3), and Replying Affidavits - Exhibits (4).

Cross-Motion: [X] Yes [] No

Upon the foregoing papers, it is ordered that this motion for summary judgment in favor of plaintiff shall granted and this cross motion for summary judgment of defendants shall be denied.

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).

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

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

Plaintiff has come forward with admissible evidence that establishes prima facie that (1) the individual defendant made an absolute and unconditional guarantee of the underlying debt; (2) that there exists an underlying debt comprised of base rent, additional rent, post-vacatur rent, liquidated damages, plus attorneys fees, due as set forth under the Lease dated May 30, 2008 between plaintiff Cast Iron Co, LLC as Landlord, and defendant Crypto, Inc. d/b/a Brooklyn Industries, Inc., as Tenant, arising out of the breach of the Lease by defendant Crypto, Inc. d/b/a Brooklyn Industries, Inc. (Lease), which vacated the subject premises on September 29, 2015 without plaintiff's consent; and (3) that the individual defendant guarantor has failed to perform under the guarantee.

Defendants fails to raise any issues of fact with respect to plaintiff's prima facie case.

First, plaintiff is correct that defendants waived the affirmative defense of lack of in personam jurisdiction, since, though pleading such defense in their answer, they did not move to dismiss within sixty days of service of such pleading pursuant to CPLR 3211(e). This court likewise agrees with plaintiff that the affidavit of the individual defendant contains mere conclusory denials that are insufficient to rebut the presumption of proper service established by the affidavit of service of plaintiff's process server. Grinshpun v

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Borokovich, 100 A.D.3d 551 (1st Dept 2012).

So too, plaintiff is correct that defendants remaining defenses and counterclaims likewise lack merit. Based on the certificate of acknowledgment of the deed conveying title to it of the subject premises, plaintiff had the right to enter into the Lease. Nor can defendants deny that defendant Brooklyn Industries, LLC is obligated under the Lease as Brooklyn Industries, LLC agreed jointly and severally assume the rights and obligation of the Tenant under the Lease pursuant to the Assignment and Assumption Agreement dated July 2011. Finally, the guarantor has no standing to assert the counterclaims and defenses of the Tenant under the Lease. Medallion Funding Corp. v Norritto, 272 AD2d 216 (1st Dept 2000).

Accordingly, it is hereby

ORDERED that the cross motion of defendants Crypto, Inc., Brooklyn Industries, LLP and Vahap Avsa to grant summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion of plaintiff for summary judgment dismissing the counterclaims and affirmative defenses of the answer of defendants is granted, and such counterclaims and affirmative defenses are dismissed, and it is further

ORDERED that the motion for summary judgment in favor of plaintiff Cast Iron Co., LLC, and against defendant Crypto, Inc. d/b/a Brooklyn Industries, Brooklyn Industries, LLC and

defendant Vahap Avsar on the first through fourth causes of action is granted, and plaintiff shall recover from defendants pre-vacatur base and additional rent in the amount of \$149,728.03, plus interest at the rate of sixteen percent (16%) per annum from June 2015 through the date of the decision in the amount of \$_____, plus late fees in the amount of \$7,146.61 and for post-vacatur rent as liquidated damages in the amount of \$208,969.15, plus interest at the rate of sixteen percent (16%) per annum from October 2015 to the date of the decision in the amount of \$_____, plus late fees in the amount of \$10,448.45 for a total of \$_____ , with interest thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the first through fourth causes of action and counterclaims are severed, and the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that the motion of plaintiff for summary judgment on the fifth cause of action for attorneys fees against defendant Crypto, Inc. d/b/a Brooklyn Industries, Brooklyn Industries, LLC and Vahap Avsar is granted and the matter of attorneys fees is referred to hear and report pursuant to CPLR 4320 to a Special Referee and that within 60 days from the date of this Order the movant shall cause a copy of this order with notice of entry,

including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) to arrange a date for a reference to hear and report pursuant to CPLR 4320 and for placement at the earliest convenient date upon the calendar of the Special Referees Part; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This is the decision and order of the court.

Dated: December 12, 2016

ENTER:

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