

Harlington Realty Co. LLC v Thomas

2017 NY Slip Op 32079(U)

September 28, 2017

Supreme Court, New York County

Docket Number: 655587/2016

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAVID BENJAMIN COHEN
Justice

PART 58

HARLINGTON REALTY CO. LLC,

Plaintiff,

- v -

DESIREE THOMAS, DERIDES ENTERPRISES, LLC

Defendant.

INDEX NO. 655587/2016

MOTION DATE 3/31/2017

MOTION SEQ. NO. 001

JUDGMENT

The following e-filed documents, listed by NYSCEF document number 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, it is

Plaintiff's motion for summary judgment is granted. According to the Complaint, Harlington Realty Co. LLC ("Plaintiff" or "Harlington") rented Store No. 4 on the Ground Floor, in the building known as and located at 5619-5625 Broadway, Bronx, New York 10463 (hereinafter referred to as the "subject premises"), to Derides Enterprises LLC ("Tenant") and Desiree Thomas, acting as guarantor (hereinafter collectively referred to as "Defendants") pursuant to a written lease and guaranty. Plaintiff presently claims that defendants currently owe \$67,232.33 for all rent and additional rent under the terms of the lease, which includes a credit for the amounts collected as rent during the term of the lease from subsequent tenants.

Plaintiff moved for summary judgment pursuant to CPLR § 3212. As evidence to support its motion, plaintiff provided the Court with the following; (1) a verified complaint which was

verified upon personal knowledge of the landlord, (2) the affidavit of Jeffery Stern, an agent of plaintiff, (3) a detailed rent breakdown, (4) the lease signed by defendant Thomas, (5) the guaranty signed by defendant Thomas, and (6) notices to tenant of real estate tax escalation. Defendants argue that plaintiff failed to present the requisite evidence to overcome its burden to show that there is no triable issue of fact. As evidence to support their claim, defendants provided the affidavit of Defendant Desiree Thomas, the guarantor to the lease at issue.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]]. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Defendants claim that plaintiff has failed to meet its required burden of proof is incorrect. The Appellate Division recently held that a plaintiff seeking summary judgment succeeded in making “a *prima facie* showing for rent arrears accruing. . .by submitting the original lease. . .and a detailed statement documenting outstanding rent arrears” (*Dee Cee Assoc. LLC v 44 Beehan Corp.*, 148 AD3d 636, 641 [1st Dept 2017]). Here, plaintiff has provided the Court with both a

copy of the original lease and a detailed statement documenting outstanding rent. Therefore, plaintiff has successfully met its requisite prima facie burden.

Thus, to prevail, defendants have the burden to demonstrate by admissible evidence the existence of a factual issue requiring a trial (*see Zuckerman*, 49 NY2d at 557). Defendants has failed to do so. Defendants have not submitted any evidence showing that they did not owe the rent at issue. Instead, defendant offered the affidavit of Defendant Thomas regarding the unpaid rent. However, Thomas's affirmation is completely devoid of any facts. Defendant Thomas's affirmation mostly contains conclusory allegations regarding the existence of questions of fact. Further, the affirmation contains re-statements of statements previously made to Defendant Thomas by her attorney. As found by the Court in *Dillenberger v Fifth Avenue Owners Corp.*, "...mere conclusory allegations regarding the existence of questions of fact are insufficient to defeat a motion for summary judgment" (155 AD2d 327 [1st Dept 1989]). Therefore, defendants have failed to meet their burden of demonstrating evidence of existing factual issues. Accordingly, it is therefore

ORDERED, that plaintiff's motion for summary judgment on the first second and third causes of action and dismissing all affirmative defenses and the counterclaim is granted; and it is further

ORDERED, that on the first and second causes of action, the Clerk is directed to enter judgment in favor of plaintiff and against both defendants in the sum of \$ 67,232.33, with interest at the rate of 9 % per annum from the date of June 1, 2014, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that on the third cause of action, plaintiff's application for an award of reasonable attorney's fees is granted as against defendants and the claim for fees is severed. A trial is granted to determine the amount of fees to be awarded. Plaintiff shall cause the matter to be placed upon the calendar for such trial. Plaintiff shall, within 20 days from the date of this order, serve a copy of this order upon (counsel for) all parties hereto by regular mail and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

9/28/2017
DATE



 DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: