228 Threestar, LLC v NKR Laundry II Inc.
2018 NY Slip Op 32146(U)
September 4, 2018
Civil Court of the City of New York, Bronx County
Docket Number: 900933/2017
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 52

_______________________________________X

228 THREESTAR, LLC,

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 900933/2017

HON. SABRINA B. KRAUS

NKR LAUNDRY II INC.
717 East 228th Street
Basement Laundry Room (Diagram)
Bronx, New York 10466

Respondent-Tenant

_______________________________________X

BACKGROUND

This commercial summary nonpayment proceeding was commenced by Petitioner against Respondent seeking to recover possession of the basement laundry room at 717 East 228th Street Bronx, New York 10466 (Subject Premises).

PROCEDURAL HISTORY

Petitioner issued a three day rent demand dated May 25, 2017, seeking $8,700 in rent arrears in addition to late charges and legal fees. The arrears covered a period from March 2015 through May 2017, at a monthly rate of $350.00.

The petition was filed on June 9, 2017.

Respondent failed to answer or appear and Petitioner applied for a default judgment. Petitioner's initial application for a default was denied by this Court in December 2017, without prejudice to renewal on proof of the date that the affidavit of service for the petition was filed.

On April 16, 2018, Petitioner moved for the entry of a default judgment and related relief. And motion was granted by this Court, on default. The warrant of eviction issued on May 17, 2018.

On June 28, 2018, Respondent appeared by counsel and moved for an order vacating the default judgment. The motion was resolved by stipulation, which vacated the judgment and warrant, and afforded Respondent until July 18, 2018 to serve and file an answer, and adjourned the proceeding until July 25, 2018.

On July 20, 2018, Respondent filed an answer asserting four affirmative defenses, including failure to state a cause of action, defects in the pleadings, waiver and estoppel and that Petitioner's claims are barred by documentary evidence.

On August 16, 2018, this court held a trial and reserved decision.

FINDINGS OF FACT

Petitioner is the owner of the Subject Premises pursuant to a certified deed dated June 27, 2012 (Ex 1). Respondent is the tenant of record for the Subject Premises pursuant to a lease agreement dated September 8, 2014 (Ex 2).

Paragraph three of the Lease Agreement is titled RENT and provides:

> Lessee will pay Lessor a monthly rental of Three Hundred and Fifty ($350) Dollars. Said commission shall be payable on the last day of the month following the installation of all of the Lessee's equipment and continuing on the monthly there-after.

A rider to the lease states that the equipment was installed as of March 1, 2015.

Respondent alleges that no rent is due based on paragraphs eight and twelve(e) of the Lease Agreement.

Paragraph 8 is titled TERMINATION and provides in pertinent part:

(a) If during any period of Three (3) months, Lessee's proceeds from said laundry equipment, after the payment of rent and utilities, average less than Two Dollars ($2,00) per machine per day ... the lessee shall have the option to terminate this lease or pay monthly rent equal to 20% of collections, less utilities, with Thirty (30) days written notice to Lessor, sent by registered mail

Similar language is included in Paragraph 12(e) of the Lease Agreement, which provides:

Lessee shall always be entitled to receive, after payment of rent, utilities, refunds, superintendent allowances, as inspection fees as minimum compensation for each day of rental period Two Dollars per installed washer and Two Dollars per installed dryer, and the rental due shall be adjusted accordingly.

Petitioner's rent ledger shows, and it was not disputed that, Respondent made only three rent payments. Respondent paid $250 in March 2015, $245 in June 2015 and $255 in July 2015 (Ex 3).

Ezra Azizi (EA) testified for Petitioner. EA has became a managing agent for Petitioner after the parties' lease was negotiated. EA testified that there are two washers and two dryers in the Subject Premises, and that he was last in the Subject Premises on August 15, 2018.

At the close of Petitioner's case, the court granted Petitioner's motion to amend the petition to include all rent due through August 2018.

Shmuel Soffer (Soffer) testified for Respondent. Soffer testified that Respondent runs a family business providing building owners with laundry facilities for their residential tenants. Soffer prepared two documents for submission at trial. Exhibit A which is labeled accounting purports to provide income received by Respondent from the machines from January 2015 through July 2018. Exhibit B is a summary prepared by Soffer of the alleged costs involved in the installation of machines and build out of the laundry room. The court finds neither document constitutes a business record, and both were prepared the day before trial for the purpose of the trial by Soffer's own admission. Therefore the court does not afford great weight to either

document. Soffer testified that based on his calculations no rent was due to Petitioner. Soffer acknowledged that Respondent never gave Petitioner written notice that this was Respondent's position. The court did not find Soffer to be a credible witness.

The lease was initially drafted by Respondent from a form Respondent often uses for other locations.

DISCUSSION

The court finds that Petitioner established a *prima facie* claim that there was rent past due under the lease from March 2015 through August 2018 totaling $13,950.00 at the rate of $350 per month, less payments of $750.00.

Respondent failed to show that it sent the notice required under paragraph 8 of an election to pay less pursuant to the formula provided therein. While no notice requirement is referenced in Paragraph 12(e) of the Lease Agreement the court must read the two provisions together.

> Interpretation of an unambiguous contract is a matter for the court. In construing a contract, the document must be read as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized. Further, a court should not adopt an interpretation which would leave any provision without force and effect.

Snug Harbor Square Venture v Never Home Laundry, Inc. 252 AD2d 520, 521.

The provisions of the Lease Agreement are unambiguous. Respondent had an option for any three month period, where the average of income was less than Two Dollars per day, to claim a rent adjustment for said period upon thirty days written notice to Petitioner. This was not done by Respondent and thus the rent under the lease remains past due.

Additionally, Respondent failed to offer any competent evidence as to the amount of revenue it actually received from the building machines during this period, or to support its affirmative defense that no rents were due pursuant to said calculation.

The lease fails to provide a basis for the assessment of late fees, and Petitioner's claim for same is dismissed.

Paragraph 12 of the lease does provide for attorneys' fees, and the court finds that Petitioner is the prevailing party herein and entitled to attorneys' fees under the lease.

Based on the foregoing, Petitioner is awarded a final judgment of money and possession totaling $13, 950.00. Issuance of the warrant is stayed five days for payment of same.

A hearing to determine the reasonable amount of attorneys' fees to be awarded to Petitioner is set for October 11, 2018 at 9:30 am in Part 52.

This constitutes the decision and order of this court.

Dated: September 4, 2018
Bronx, New York

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Hon. Sabrina B. Kraus
JCC

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[* 6]