Al 229 W. 43rd St.Prop. Owner, LLC v Finley
2018 NY Slip Op 32211(U)
September 7, 2018
Supreme Court, New York County
Docket Number: 652312/14
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

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AI 229 WEST 43RD STREET PROPERTY OWNER, LLC,
Plaintiff,

Index No.: 652312/14
DECISION/ORDER

-against-

DONALD R. FINLEY,
Defendant.

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ROBERT R. REED, J.:

In this commercial landlord/tenant action, plaintiff AI 229 West 43rd Street Property Owner, LLC (AI) moves to confirm a Special Referee's report (motion sequence number 006). For the following reasons, this motion is granted.

BACKGROUND

AI is the owner of a building located at 229 West 43rd Street in the County, City and State of New York (the building). *See* notice of motion, exhibit 15. Non-party Adventure Entertainment LLC (Adventure) was the former corporate tenant of the building's first and second floor commercial space pursuant to a lease dated April 5, 2011 (the lease). *Id.*, Koh affirmation, ¶ 3, exhibit 1. Defendant Donald R. Finley (Finley) is Adventure's president. *Id.* At the same time as he executed the lease with AI on Adventure's behalf, Finley also executed a personal guaranty for Adventure's tenancy obligations (the guaranty). *Id.*; exhibit 3.

Adventure defaulted on its rental obligation under the lease in February, 2013. *See* notice of motion (motion sequence number 006), exhibit 2-A. Thereafter, on August 23, 2013, AI and Adventure executed a "first amendment to lease" to cure this default (the lease amendment). *Id.*, exhibit 2. Finley executed the lease amendment on behalf of Adventure, and the lease

amendment specifically referred to the guaranty. *Id.* Adventure thereafter also defaulted on its rental obligation under the lease amendment, and on March 27, 2014, AI commenced a summary non-payment proceeding against Adventure in the Civil Court of the City of New York. *Id.*; exhibit 15. Adventure eventually sent AI a letter on March 23, 2015 by which it surrendered possession of the commercial space. *Id.*; exhibit 16.

In the meantime, AI commenced this action on the guaranty against Finley on July 28, 2014. On July 21, 2016, this court granted AI's motion for summary judgment on the issue of liability, and committed the issue of the computation of damages to a special referee to hear and report on (motion sequence number 003). The referee held hearings on November 17, 22 and 23, 2016. *See* notice of motion (motion sequence number 006), exhibits D, E, F. The referee then issued a report on June 12, 2017 (the referee's report). *Id.*, exhibit A. Now before the court is AI's motion to confirm the referee's report (motion sequence number 006).

DISCUSSION

CPLR 4403 provides, in pertinent part, that:

> Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, ... the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing.

It is well settled that "generally, [the] courts will not disturb the findings of a referee 'to the extent that the record substantiates his findings ... [although] they may reject findings that are not supported by the record.'" *See Continental Cas. Co. v Lecei*, 65 AD3d 931, 932 (1st Dept 2009); citing *Kardanis v Velis*, 90 AD2d 727, 727 (1st Dept 1982); quoting *Holy Spirit Assn. for the Unification of World Christianity v Tax Commission of the City of New York*, 81 AD2d 64, 71

(1st Dept 1981), rev'd on other grounds 55 NY2d 512 (1982). In its motion, AI argues that "the court should confirm the referee's report in its entirety" because it is "well supported by the record." *See* plaintiff's mem of law at 4-10. AI contends that the referee "correctly determined Finley's personal liability under the guaranty" for: 1) fixed rent ($824,960.24); 2) mechanic's liens and related expenses ($414,193.00); and 3) attorney's fees ($99,320.72) and disbursements ($6,962.33). *Id.* The court's review of the hearing transcripts and the documents submitted at the hearing indicates that there is sufficient evidentiary support for these calculations. Finley nevertheless raises three opposition arguments that the referee's report should not be confirmed.

First, Finley argues that his "obligations pursuant to the guaranty are expressly limited." *See* defendant's post-hearing brief at 2-15. Finley specifically objects to the referee's calculations of: 1) rental obligations; 2) lien obligations; and 3) attorney's fees. *Id.* The court will examine each of these objections in turn.

With respect to rental obligations, Finley argues that the referee incorrectly calculated the amounts due for Adventure's "fixed rent," "tax payments" and "operating expense payments," as those terms are defined in the lease. *See* defendant's post-hearing brief at 4-7. As regards "fixed rent," Finley argues that the referee improperly included rental charges for the periods one month before the commencement of Adventure's tenancy, and one month after Adventure surrendered possession of the premises. *Id.* at 4-5. AI replies that Finley's argument is based on a misreading of the evidence, and notes that the referee had already determined that the evidence did not show any improper rent charges during either of those periods. *See* plaintiff's reply mem at 1-3. After reviewing the evidence, the court finds that the referee's findings were amply supported.

Pursuant to the lease, Adventure's tenancy commenced on July 15, 2012, and its obligation to pay rent began at that time too. *See* notice of motion, Koh affirmation, exhibit 1. AI presented a "rent summary spreadsheet" to the referee that showed zero rent charges for July 2012 and $108,333.33 rent charges for June 2012. *Id.*, exhibit 13. AI explained to the referee that the monthly rent charges had been inadvertently transposed into the wrong months by the data entry person who prepared the spreadsheet, and that the correct charges were zero for June 2012, and $108,333.33 for July 2012. *See* plaintiff's reply mem at 2. The referee accepted this explanation, and concluded that the evidence did not show that Adventure had been improperly billed for rent prior to the inception of its tenancy. *See* notice of motion, Koh affirmation, exhibit A at 17. Having now examined the spreadsheet itself, the court agrees with the referee's finding that it clearly contains an inadvertent transposition and not an improper rent charge for the period prior to Adventure's tenancy.

Finley alleges that Adventure ended its tenancy when it surrendered possession via a letter dated March 23, 2015. *See* notice of motion, Koh affirmation, exhibit 16. AI notes that the relevant portion of the guaranty provides that Finley's obligation for Adventure's rent terminated only after Adventure "vacated and surrendered legal possession of the premises . . . *with substantially all the movable equipment, trade fixtures, inventory and other items of personal property, rubbish and personal effects . . . removed* [emphasis added]." *Id.*, exhibit 3. AI also notes that, while Adventure's March 23, 2015 letter may have constituted a " surrender of legal possession of the premises," Finley's obligation did not terminate until later, after the "removal of property" also mandated by the guaranty. *See* plaintiff's reply mem at 2-3. In his June 12, 2017 report, the referee found that the March 23, 2015 letter did not constitute evidence that

Adventure had complied with the latter guaranty requirement, and thus included a rent charge of $125,000.00 for April 2015 in the fixed rent calculation because the property removal was evidently not completed until some point in that month. *See* notice of motion, Koh affirmation, exhibit A at 17-18. The court agrees that the record is devoid of any evidence that Adventure had completely vacated the premises at the time of the March 23, 2015 letter, and notes that Finley has neither pointed to any such evidence, nor included any along with his opposition papers. As a result, the court concludes that the referee's decision to permit a rental charge against Adventure for April 2015 was warranted by the evidence in the record. Therefore, for the foregoing reasons, the court rejects Finley's contention that the total amount of Adventure's "fixed rent" was improperly calculated.

As regards "tax payments," Finley argues that "the tenant's ledger produced by [AI] lists some charges as 'tax,' [but] there is no indication as to how these charges were computed." *See* defendant's post-hearing brief at 5-6. AI does not address this argument in its reply papers. However, a cursory review of the ledger that Finley refers to discloses that there is no mention of "taxes" anywhere in that document. *See* notice of motion, Koh affirmation, exhibit 12. Further, the referee specifically *declined* to make an assessment of tax liability against Finley, so there appears to be no rationale for his objection. *Id.*, exhibit A at 17, fn 5. Therefore, the court rejects Finley's "tax payments" contention as unsupported.

As regards "operating expense payments," Finley argues that the unpaid utility charges which AI seeks as "additional rent" do not fall within the definition of "operating expenses" in Adventure's lease (which provides that "some operating expenses" do constitute "additional rent" for which Adventure can be liable). *See* defendant's post-hearing brief at 6-8. Again, AI

does not address this argument in its reply papers. Also again, however, the referee specifically *denied* AI's application to recover unpaid utility charges from the categories of additional rent for which AI could recover money damages. *See* notice of motion, Koh affirmation, exhibit A at 18-19. Therefore, there is no basis for Finley's objection to the referee's purported calculation of "operating expense payments," because the special referee made no such calculation. Consequently, the court disregards Finley's final objection, and finds that his argument that the special referee miscalculated Adventure's total rental obligation is unsupported.

With respect to lien obligations, Finley argues that the referee "failed to establish [AI's] entitlement to all amounts claimed," because: 1) AI failed to comply with a notice provision contained in the lease which was a prerequisite to seeking recovery for unpaid liens; and 2) AI itself was not listed as a party on the settlement agreements that resolved the subject mechanic's liens. *See* defendant's post-hearing brief at 8-10. AI replies that: 1) the court rejected Finley's notice argument at the July 21, 2016 hearing of AI's summary judgment motion; and 2) while it is true that the party named on the lien settlement agreements was AI's corporate parent, AI Holdings (USA) Corp., Finley waived his right to argue about the identity of the lien holder by failing to raise that argument before the referee. *See* plaintiff's reply mem at 3-4. The court finds that AI is correct on both counts, because the transcript of the July 21, 2016 hearing of AI's summary judgment motion speaks for itself. At that time, the court plainly rejected Finley's lien notice argument, and Finley plainly failed to raise any argument about the identity of the lien holder. *See* Tr (July 21, 2016) at 22-23. Therefore, the court discounts Finley's objection to the referee's calculation of Adventure's lien obligations.

With respect to attorney's fees, Finley states that AI "improperly seeks attorney's fees for

reasons other than default under the guaranty." *See* defendant's post-hearing brief at 11-15. Finley specifically argues that: 1) the terms of the guaranty limit his liability for attorney's fees to those "which may arise by reason of [his] default [under the guaranty] and/or in connection with [AI's] enforcement of the guaranty"; but that 2) AI nevertheless improperly seeks attorney's fees for three law firms - LaMonica, Herbst & Maniscalco (LHM), Goldfarb & Fleece, LLP (G&F), and Meister, Seelig & Fein, LLP (MSF) - whose legal work was unrelated to the guaranty. *Id.* Once again, AI does not address this argument in its reply papers. This is not a problem, however, since the referee adequately disposed of both of Finley's arguments in his report, and because Finley's opposition papers contain no new arguments. First, the referee specifically agreed with Finley's legal position that the terms of the guaranty limit his attorney's fees liability to those sums which are incurred by either his default under the guaranty or AI's enforcement of the guaranty. *See* notice of motion, Koh affirmation, exhibit A at 20-21. Second, the referee's report also specifically recommended that AI *not* be allowed to recover attorney's fees for work performed by LHM or G&F, since AI had failed to establish that that work was related to the guaranty. *Id.* at 21-22. With respect to MSF, however, the referee recommended a reduced attorney's fees award which he adjusted downward to reflect: 1) a 10% discount in hourly rates; and 2) a decrease in the amount of billable hours permitted that was occasioned by MSF's clerical use of "block billing" record keeping, instead of a system that would accurately match each attorney's hours to the specific matter on which he or she was working. *Id.* at 22-26. The referee based his modifications on MSF's fee invoices and the testimony of Damien Stein (Stein), an officer of both AI and of its corporate parent, regarding which law firms he had retained to perform which work. *Id.* at 1-2, 7-8, 20-27. Finley's opposition argument is that

some of MSF's work was unrelated to the guaranty in any way; however, the referee rejected that argument after a thorough review of MSF's invoices. *Id.* at 23-24; exhibit 7. Finley's argument does not cite any new evidence or explain how the referee might have misinterpreted those invoices, so the court concludes that the portion of the referee's report that dealt with attorney's fees was adequately supported by the record. Therefore, the court discounts Finley's objection to the special referee's calculation of Adventure's legal fees. Accordingly, the court rejects, in full, Finley's first opposition argument (i.e., that the referee's purportedly miscalculated AI's damages for unpaid rent, lien charges and attorney's fees).

Next, Finley argues that "default interest is not warranted." *See* defendant's post-hearing brief at 16-18. One more time, AI does not reply to this argument. However, it did not need to, since the referee's report plainly recommended *no* award of default interest, and did *not* include this item in the special referee's final calculation of damages. *See* notice of motion, Koh affirmation, exhibit A at 27-30. Therefore, the court rejects Finley's default interest argument.

Finally, Finley argues that "plaintiff's exhibit 13 is inadmissible as it is hearsay and prepared for litigation." *See* defendant's post-hearing brief at 19-22. Finley specifically contends that exhibit 13 - the "rent summary spreadsheet" mentioned earlier in this decision - should not have been admitted because it was not a business record, but instead a record "prepared solely for the purpose of litigation." *Id.* AI did not reply to this argument, evidently choosing to rely on the referee's decision to admit the spreadsheet "provisionally, under the voluminous record exception to the hearsay rule." *See* notice of motion, Koh affirmation, exhibit A at 13-14. Finley's opposition papers argue that this exception is unavailable. *See* defendant's post hearing brief at 22-23. After reviewing the controlling case law, however, the court

disagrees. In the seminal decision on this matter, *Ed Guth Realty v Gingold* (34 NY2d 440, 452 [1974]), the Court of Appeals held that the "voluminous writing exception" to the best evidence rule "permits the admission of summaries of voluminous records or entries where, if requested, the party against whom it is offered can have access to the original data," and authorized the use of the exception where there was "no claim . . . that the [defendant] was denied access to the underlying material." Here, too, Finley does not deny that AI produced all of Adventure's rent records for his inspection. Indeed, Finley states that "the copies of the documents that AI produced are not in dispute." Given this admission, Finley's objection to the "voluminous writing exception" is not legally tenable. Therefore, the court rejects Finley's final opposition argument, and concludes that AI's motion to confirm the referee's report should be granted.

DECISION

The plaintiff, AI 229 West 43rd Street Property Owner, LLC , by its attorney, Howard S. Koh, Esq., having duly moved for an order pursuant to CPLR 4403 (motion sequence number 006), confirming the report of Jeremy R. Feinberg, Esq., special referee, to inquire and report, appointed herein, pursuant to an order dated July 21, 2016 (motion sequence number 003), and directing that judgment be entered in its favor upon the ground that the referee's report is supported by the overwhelming preponderance of evidence and that there remain no other issues in the action requiring a trial, and the motion having regularly come on to be heard,

Now, upon reading and filing the notice of motion dated June 27, 2017, the affirmation of Howard S. Koh, Esq., in support of the motion, sworn to on the 27th day of June, 2017, the referee's report dated June 12, 2017, the transcript of testimony, and the exhibits or copies thereof filed on the 27th day of June, 2017, in the office of the clerk of the County of New York,

and the affirmation of Gabriel R. Korinman, Esq., in opposition thereto, sworn to on the 19th day of July, 2017, and after hearing Howard S. Koh, Esq., for the plaintiff, in support of the motion, and Gabriel R. Korinman, Esq., for the defendant, in opposition thereto, and after due deliberation having been held thereon, and it appearing that the findings and conclusions of the referee accord with the overwhelming preponderance of the evidence adduced at the hearing held before him and that no further issues remain to be tried,

Now, upon motion of Howard S. Koh, Esq., attorney for plaintiff, AI 229 West 43rd Street Property Owner, LLC, it is

ORDERED that the instant motion to confirm pursuant to CPLR 4403 (motion sequence number 006) be and the same is hereby in all respects granted, and that the report dated June 12, 2017 be and the same is hereby in all respects confirmed, and it is further

ORDERED that the plaintiff recover judgment against the defendant for $1,345,436.29, and the clerk is directed to enter judgment accordingly, together with costs and disbursements of this action.

Dated: New York, New York
September 7, 2018

ENTER:

J.S.C.