2005-2011 Realty LLC v Brailovsky
2018 NY Slip Op 33072(U)
November 26, 2018
Supreme Court, Kings County
Docket Number: 502216/16
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK

KINGS COUNTY

PRESENT: HON. PAUL WOOTEN PART 97
Justice

2005-2011 REALTY LLC,

Plaintiff,

-against-

ALEKSANDR BRAILOVSKY, YULIA BRAILOVSKAYA, YELEMA SAVITSKAYA and DMITRIY BRAILOVSKIY,

Defendants.

ALEKSANDR BRAILOVSKY, YULIA BRAILOVSKAYA, YELEMA SAVITSKAYA and DMITRIY BRAILOVSKIY,

Third-Party Plaintiffs,

-against-

BORIS KURBATSKY and FELIX NEMIROVSKY,

Third-Party Defendants.

INDEX NO. 502216/16

MOTION SEQ. NO. 1, 4

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Motions sequence numbers 1 and 4 are consolidated for purposes of disposition. This is an action commenced by 2005-2011 Realty LLC (plaintiff) via Summons and Verified Complaint on February 17, 2016 against Aleksandr Brailovskiy, Yulia Brailovskaya, Yelema

Savitskaya, and Dmitriy Brailovskiy (collectively, defendants) for rent due and owing to plaintiff pursuant to a Lease Agreement between the parties. Plaintiff is the owner of a property located at 2005-2011 Coney Island Avenue, Brooklyn, New York 11223 (the Building). Defendants were former tenants of the Building.

Before the Court, in motion sequence 1, is plaintiff's motion for an Order: (1) pursuant to CPLR 3212, granting plaintiff summary judgment against defendants on plaintiff's first and second causes of action in the amount of $188,400.00, plus interest thereon, on the ground that there are no triable issues of fact as to defendants' failure to pay plaintiff rent through May 2016, pursuant to a commercial lease; (2) pursuant to CPLR 3212, granting plaintiff summary judgment against defendants on plaintiff's third cause of action for recovery of attorneys' fees, as agreed to and authorized by defendants in the commercial lease; and, (3) striking and dismissing defendants' affirmative defenses as having no basis in law or fact.

According to the Verified Complaint, plaintiff and defendants entered into a lease for the Building on June 6, 2014 (the Lease). The term of the Lease was fifteen years from September 10, 2014 until September 30, 2029. Pursuant to the Lease, the defendants were obligated to pay plaintiff, among other things, a Base Monthly Rent of $20,000.00 from September 10, 2014 through August 31, 2016, with increases thereafter pursuant to the Lease. In the event of a default, defendants were also obligated to pay other charges such as late charges, costs and attorneys' fees. Pursuant to the Verified Complaint, defendants vacated the Building on or about January 11, 2016. Accordingly, plaintiff commenced this action alleging breach of the contract and to recover for unpaid rent, additional costs and attorneys' fees.

Thereafter, on April 21, 2016, defendants commenced a third-party action against Boris Kurbatsky and Felix Nemirovsky (collectively, third-party defendants). On December 11, 2016, in motion sequence 2, defendants/third-party plaintiffs moved via cross-motion, seeking summary judgment as against the third-party defendants on their third-party complaint and

upon granting of summary judgment, that the matter be set down for an immediate inquest on damages. Both motions were returnable for oral presentations before the Court on January 9, 2017 and third-party defendants did not appear in Court. In a Decision and Order dated January 18, 2017 and entered on February 2, 2017, the Court granted the defendants/third-party plaintiffs' cross-motion for summary judgement against the third party-defendants on default and referred the matter to a Special Referee/JHO to hear and determine damages and enter judgement in accordance therewith at the conclusion of this action (*see* Decision and Order of this Court dated January 18, 2017 and entered on February 2, 2017).

On April 6, 2017, third-party defendants filed a motion seeking to vacate the judgement against them that was filed with the Court on February 2, 2017 and to restrain the third-party plaintiffs from enforcing said judgement (motion sequence 3). In support of the motion, counsel for third-party defendants submitted an affirmation in which he asserted, *inter alia*, that: (1) he was substituted into the case on November 30, 2016 and miscommunication between him and previous counsel regarding information and securing the file caused his non-appearance in Court on January 9, 2017; (2) he was never served with the defendants/third-party plaintiffs' cross-motion for summary judgement; and, (3) that his clients have a meritorious defense to the defendants/third-party plaintiffs' claim against them. Counsel asserted that this one incident of law office failure should be excused.

On July 10, 2017, the defendants/third-party plaintiffs filed an affirmation in opposition to third-party defendants' motion to vacate the Court's February 2, 2017 Order asserting that third-party defendants' assertion of law office failure is not an excusable delay, since prior counsel informed the defendants/third-party plaintiffs that he would make incoming counsel aware of the cross-motion and the January 9, 2017 return date. Furthermore, third-party plaintiffs' counsel asserted that the law office failure should not be excused since third-party defendants agreed to participate in the e-filing system. Moreover, counsel asserted that third-party defendants lack a

meritorious defense based on a shareholder agreement between the parties.

On July 10, 2017, the third-party plaintiffs filed a Notice of Inquest, and on July 14, 2017, the Note of Issue was filed with the Court. On September 15, 2017, third-party defendants filed their reply affirmation to their motion to vacate the default judgement.

After oral argument on the record, in a Decision and Order dated November 15, 2017, the Court denied third-party defendants' motion to vacate the February 2, 2017 default judgement (motion sequence 3). Specifically, the Court found that third-party defendants failed to meet the two-prong test to vacate a default judgement "in that they failed to establish a meritorious defense" (*see* Decision and Order of the Court dated November 15, 2017).

Before the Court, in motion sequence 4, is third-party defendants' motion to reargue and renew third-party defendants' motion to vacate the default judgment entered against them on February 2, 2017, which was denied by Decision and Order of this Court dated November 15, 2017, and for an Order staying the Inquest scheduled for January 8, 2018 during the pendency of this action. The Court notes that in a separate Order dated January 17, 2018, the Court stayed the Inquest, which was rescheduled to January 22, 2018, pending a Decision and Order from this Court on third-party defendants' motion to reargue and renew.

DISCUSSION

Motion Sequence 1 - Plaintiff's motion for Partial Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of

the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

A. Plaintiff's First and Second Causes of Action - Breach of Contract

Upon a review of the record, the Court finds that plaintiff is entitled to partial summary judgment on its first and second causes of action for breach of the Lease. Plaintiff met its burden of proof that the defendants breached the terms of the Lease and that rent is due and owing from the time of the breach in September 2015 through and including May 2016, as well as additional late fees, pursuant to Section 53 of the Lease (*see e.g. Joseph Rustin's, Inc. v Manzo's Furniture City, Inc.*, 155 AD3d 848 [2d Dept 2017]).

"'[W]hen the terms of a written contract are clear and unambiguous, the intent of the

parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*Bri Jen Realty Corp. v Altman*, 146 AD3d 744 [2d Dept 2017], quoting *RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 838 [2d Dept 2016]; *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). This principle is particularly important in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, 66 [2006], *rearg denied* 8 NY3d 867 [2007] [internal quotation marks omitted]). Thus, "[c]ourts will give effect to the contract's language and the parties must live with the consequences of their agreement. If they are dissatisfied . . . , the time to say so [is] at the bargaining table" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413 [2013]).

The plaintiff established its prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action to recover damages for breach of contract by submitting a copy of the Lease and an affidavit from Mark Weiss, its managing member (*see 82-90 Broadway Realty Corp. v New York Supermarket, Inc.*, 154 AD3d 797 [2d Dept 2017]). In opposition, defendants failed to raise a triable issue of fact, and as will be analyzed in greater detail below, failed to assert affirmative defenses that have merit. Accordingly, the plaintiff is entitled to summary judgment on its first and second causes of action herein.

B. Plaintiff's Third Cause of Action - Attorneys' Fees

"It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule"(*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; *Spodek v Neiss*, 86 AD3d 561, 561 [2d Dept 2011]).

Pursuant to Section 48 of the Lease, the plaintiff was entitled to recover any expenses, including reasonable attorneys' fees, from the Tenants, herein defendants, in the event that it had to institute any action or proceedings against the Tenant due to the Tenant's default under the terms of the Lease. Given the defendants' vacatur of the Building during the Lease term and their failure to pay rent and fees due and owing under the Lease, and since the plaintiff demonstrated that the defendant breached the unambiguous terms of the Lease, the plaintiff is entitled to reasonable attorneys' fees (*see Great Neck Terrace Owners Corp. v McCabe*, 101 AD3d 944 [2d Dept 2012]; *REP A8 LLC v Aventura Technologies, Inc.*, 68 AD3d 1087, 1090 [2d Dept 2009] ["As the landlord has established entitlement to judgment as a matter of law on the issue of the tenant's liability for breach of the two leases, the landlord has, thus, also established entitlement to a reasonable attorney's fee in this action, the amount to be determined at the trial on the issue of damages"]). In opposition, the defendants failed to raise a triable issue of fact (*see e.g. Rechler Equity B–1, LLC v AKR Corp.*, 98 AD3d 496, 498 [2d Dept 2011]). Accordingly, plaintiff is entitled to summary judgment on its third cause of action.

C. Dismissal of Defendants' Affirmative Defenses

Moreover, plaintiff demonstrates its prima facie entitlement to dismissal of the affirmative defenses as a matter of law. The first affirmative defense is dismissed in light of this Court granting summary judgment in plaintiff's favor, which clearly vitiates the defense that the Verified Complaint fails to state a cause of action. The second affirmative defense which alleges that plaintiff failed to mitigate damages is also dismissed as the plaintiff was under no legal obligation to do so, however, plaintiff was able to secure a new tenant with the payment of rent commencing September 1, 2016.

As to the third and fifth affirmative defenses claiming the Court lacks jurisdiction due to improper service, the Court finds that they must be dismissed. By stipulation dated March 16, 2016, the plaintiff extended the defendants' time to appear, answer, or move with respect to the

Summons and Verified Complaint and the defendants agreed not to assert any affirmative defenses regarding lack of personal jurisdiction. Accordingly, plaintiff has met its burden to establish that defendants waived their jurisdictional defenses (*see Morrison v Budget Rent A Car Sys.*, 230 AD2d 253 [2d Dept 1997] [A defense based on lack of personal jurisdiction may be waived or negotiated away by stipulation]).

The fourth affirmative defense alleges that plaintiff failed to comply with the requirements for Summons pursuant to CPLR 305 and therefore this action is a nullity. CPLR 305(a) provides that "[a] summons shall specify the basis of the venue designated and if based upon the residence of the plaintiff it shall specify the plaintiff's address, and also shall bear the index number assigned and the date of filing with the clerk of the court." Here, the summons served and filed clearly complied with the requirements of CPLR 305(a). However, even assuming *arguendo* that it did not, the action would not be a nullity as stated by defendants but rather plaintiff could have amended the Summons. Specifically, CPLR 305(c) provides: "[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced." Therefore, this affirmative defense lacks merit and must be dismissed.

As to the sixth affirmative defense alleging that the parties were improperly sued in their individual capacities, it too clearly lacks merit and must be dismissed since the defendants signed the Lease in their individual capacities.

Motion Sequence 6 - Third-Party Defendants' Motion to Reargue and Renew

In support of the motion to reargue and renew, third-party defendants, through counsel's affirmation, state that they were deprived of the opportunity to have their day in Court through plaintiffs' failure to properly serve the cross-motion, and that the default judgment is the equivalent of "litigation death warrant." They claim that the failure to appear was excusable law

office failure, and that they have a meritorious defense to the third-party complaint based on a number of theories. Counsel maintains that the Court misapprehended the actual sequence of the defective service of the cross-motion. As to the portion of its motion to renew, third-party defendants want to enlarge the record to include correspondence received by plaintiff's counsel and letters and/or emails sent to third-party plaintiffs' counsel, which counsel maintains shows diligence in seeking to vacate the default once it was discovered that it had been entered.

In an affirmation in opposition, defendants/third-party plaintiffs' counsel states that the Court was correct in denying the motion to vacate on the grounds that third-party defendants failed to meet both prongs of the standard for vacatur, and that its original decision was comprehensive, well-reasoned, and did not overlook or misapply either law or facts. Moreover, counsel asserts that third-party defendants were far from deprived of an opportunity to have their day in court and that they had ample opportunities to come to Court, including numerous chances to appear at settlement conferences, but failed to avail themselves of same. Additionally, the third-party plaintiffs' proffer that "new" evidence - letters from plaintiff dated March 6, 2017, informing third-party defendants of a settlement conference, undercuts the arguments of a reasonable excuse that allegedly existed at the time the first motion to vacate was made, and that the Court clearly understood the issues already.

"A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (*Salcedo v Demon Trucking, Inc.*,146 AD3d 839, 840 [2d Dept 2017], quoting *Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014] [internal quotation marks omitted]; *see* CPLR 2221[d][2]; *Vanderbilt Brookland LLC v Vanderbilt Myrtle, Inc.*, 147 AD3d 1106 [2d Dept 2017]; *Markovic v J & A Realty, LLC*, 124 AD3d 846, 846 [2d Dept 2015]; *Grimm v Bailey*, 105 AD3d 703, 704 [2d Dept 2013]). "'Motions for reargument are addressed to the sound discretion of the court which decided the prior

motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision'" (*id.*, quoting *Mudgett v Long Is. R.R.*, 81 AD3d 614, 614 [2d Dept 2011]). However, "a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Ahmed*, 116 AD3d at 805 [internal quotation marks omitted]; *see Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819 [2d Dept 2011]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434 [2d Dept 2005]).

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]). "To prevail on a motion for leave to renew, the motion 'must be (1) based upon new facts not offered on the prior motion that would change the prior determination, and (2) set forth a reasonable justification for the failure to present such facts on the prior motion'" (*Cioffi v S.M. Foods, Inc.*, 142 AD3d 526, 529 [2d Dept 2016], quoting *Matter of Nelson v Allstate Ins. Co.*, 73 AD3d 929, 929 [2d Dept 2010]; *see Bank of N.Y. Mellon v Garrett*, 144 AD3d 621 [2d Dept 2016]; *Renna v Gullo*, 19 AD3d 472 [2d Dept 2005]).

"The new or additional facts presented 'either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion'" (*Cioffi*, 142 AD3d at 529, quoting *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 586 [2d Dept 2016]). A motion for leave to renew "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Coccia v Liotti*, 70 AD3d 747, 753 [2d Dept 2010]; *see Renna*, 19 AD3d at 473). Leave to renew may be granted in the trial court's discretion even where the additional facts were known to the party seeking renewal at the time of the original motion (*see McHale v Metropolitan Life Ins. Co.*, 165 AD3d 914 [2d Dept 2018]). "[T]he

Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion" (*Jovanovic v Jovanovic*, 96 AD3d 1019, 1020 [2d Dept 2012]; *see Bazile v City of New York*, 94 AD3d 929 [2d Dept 2012]).

After consideration of the foregoing papers, the Court finds that it did not overlook, nor did it misapprehend, any matters of fact or law, which could have changed this Court's prior determination (*see* CPLR 2221[d][2]). The Court considered third-party defendants' arguments in support of their motion to vacate the order granting third-party plaintiffs' motion for summary judgment on default, including the affidavit from Boris Kurbatsky in which he stated "we most certainly have a meritorious defense to the Third-Party Complaint," and found them to be without merit. Specifically, after reviewing the papers submitted and oral argument on the record on November 15, 2017, the Court found that defendants failed to meet the two-prong test necessary for vacatur of the default in that they failed to establish a meritorious defense, nor did they meet their burden of proof to show law office failure (*see* November 15, 2017 Court Tr. at 11). Third-party defendants either advance the same arguments as on the previous motion, or improperly raise the argument that e-filing of the cross-motion did not constitute valid service (*see Ahmed*, 116 AD3d at 805 ["a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" [internal quotation marks omitted]).

Thus, the branch of defendant's motion seeking renewal is denied since counsel admitted on the record that he was in possession of the letter he is seeking to put in the record now at the time that he moved to vacate the default judgment, but fails to offer a reasonable excuse for the failure to include this correspondence in the underlying motion to vacate (*Cioffi*, 142 AD3d at 529). Moreover, the "new" evidence being sought to include in the record does nothing to change the legal determination previously made by this Court to deny third-party

defendants' motion to vacate (*see* CPLR 2221[e][2]). The correspondence does not go to the merits of those findings.

CONCLUSION

Based upon the foregoing, it is hereby,

Motion Sequence 1:

ORDERED that the branch of 2005-2011 Realty LLC's motion for summary judgment dismissing the defendant's affirmative defenses is granted in its entirety, and the affirmative defenses are dismissed; and, it is further,

ORDERED that the branch of plaintiff's motion for partial summary judgment on its first, second, and third causes is granted in its entirety; and, it is further,

ORDERED that the issue of the amount of damages to which plaintiff is entitled on its first and second causes of action, including any rents, late payments, fees, and interest thereon is hereby referred to a Special Referee/JHO to hear and determine; and, it is further,

ORDERED that the amount of attorneys' fees to which plaintiff is entitled on its third cause of action is also referred to a Special Referee/JHO to hear and determine; and, it is further,

Motion Sequence 4:

ORDERED that third-party defendants' motion to reargue and renew the Decision and Order of this Court dated November 15, 2017, which denied their motion to vacate a default judgment entered against them entered on February 2, 2017, is hereby denied; and, it is further,

ORDERED that the prior Stay of the Inquest to determine the amount of damages, if any, to which the third-party plaintiffs are entitled, granted in an Interim Order dated January 17, 2018 is hereby vacated, and the parties are directed to proceed to an Inquest on the Third-Party Complaint forthwith; and, it is further,

ORDERED that counsel for the defendants/third-party plaintiffs is directed to serve a copy of this Order with Notice of Entry upon all parties, the Clerk of the JCP Part who shall schedule an Inquest forthwith, and upon the Clerk of the Court who shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 11/26/18

PAUL WOOTEN ***J.S.C.***

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