

Chelsea 8th Ave., LLC v OA 21st LLC
2019 NY Slip Op 32458(U)
August 13, 2019
Supreme Court, New York County
Docket Number: 151472/2018
Judge: III, Francis A. Kahn
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 14
Acting Justice

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INDEX NO. 151472/2018

CHELSEA 8th AVENUE, LLC,
Plaintiff,

MOTION DATE 04/30/2019

MOTION SEQ. NO. 001

- v -

OA 21st LLC, CHRISTOPHER ANCI and
DOUGLAS EVANS

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1,2,15-53
were read on this motion to/for SUMMARY JUDGMENT

In this case involving the alleged breach of a commercial lease agreement, Plaintiff Chelsea 8th Avenue, LLC, moves for summary judgment on the first four out of nine causes of action for recoupment of past and future rent and attorneys' fees and expenses. Plaintiff further moves for a default judgment against Defendant Douglas Evans ("Evans"), the purported guarantor of the lease agreement. Defendants, OA 21st LLC ("OA 21") and Christopher Anci ("Anci"), oppose only those branches of the motion seeking summary judgment.

Facts and Procedural History

Plaintiff is the owner of a building located at 261 West 21st Street in Manhattan (see affidavit of Fred Shalom in support of motion, NYSCEF Document #17). Plaintiff and non-party Organic Chelsea LLC ("Organic") entered into a lease agreement to operate a store in Plaintiff's building; with a lease term of June 15, 2012 to June 30, 2022 (see Plaintiff's motion, Exhibit C, Lease agreement and guaranty, NYSCEF Document #20). Defendant Evans1 signed the guaranty to this lease (id.). Subsequently, Organic filed for bankruptcy and assigned the lease to Defendant OA 21 on December 1, 2015 (see Shalom affidavit, paragraph 7, NYSCEF Document #17; Exhibit P, Assignment and assumption agreement, NYSCEF Document #332). On December 3, 2015, OA 21 gave Plaintiff \$184,500.00 as a security deposit (see Shalom affidavit, paragraph 8, NYSCEF Document #17). Pursuant to the lease agreement, OA 21 was required to pay a base rent of \$27,500.00 per month until May 31, 2018 (id., paragraph 9; Exhibit C, Lease agreement and guaranty, NYSCEF Document #20, rider paragraph 42). For the balance of the lease term, the base rent was \$30,250.00 per month (id.). Other lease provisions covered OA 21's responsibility to pay taxes and late fees (id., paragraphs 10, 11; Exhibit C, rider paragraphs 43, 61). Paragraph 18 of the lease prescribed the remedies of the owner upon tenant default or dispossession and authorized owner to collect rent due as well as future rent for the remainder of the lease term (id., paragraph 18).

Due to OA 21's failure to pay rent, Plaintiff commenced nonpayment proceedings in Civil Court, New York County (see Shalom affidavit, paragraph 12, NYSCEF Document #17). As a result, Defendant's eviction on October 16, 2017 and a money judgment totaling \$55,000 against OA 21 for its failure to pay rent in April

1 The notary identified the signator to the guaranty to be Evan Douglas.

2 This document was signed by Defendant Christopher Anci, as managing member of OA 21st LLC.

and May 2017 (*id.*, paragraphs 12-14; Exhibit D, Marshal's Notice of Possession, NYSCEF Document #21; Exhibit E, Amended Commercial Non-Payment Petition, NYSCEF Document # 22; Exhibit F, Possessory Judgment, NYSCEF Document # 23; Exhibit G, Money Judgment, NYSCEF Document #24; Decision/Order awarding possession and money damages, NYSCEF Document #25).

On February 16, 2018, Plaintiff commenced this action by filing its summons and complaint (*see* NYSCEF Document ##1, 2; Plaintiff's motion, Exhibit A, NYSCEF Document #18). For purposes of the motion, focusing on the first four causes of action, Plaintiff's first cause of action is for the payment of rent, taxes, late charges and attorneys' fees owed by OA 21 pursuant to the lease for the time period of September 2017 to February 2018 in the amount of \$181,688.85 (*id.*, pages 6-8, paragraphs 26-38). The second cause of action seeks to accelerate and collect rent and taxes from OA 21 through the unexpired term of the lease – March 1, 2018 to June 30, 2022 – in the amount of \$1,129,336.04 (*id.*, pages 8-9, paragraphs 39-45). Plaintiff's third cause of action is to enforce the guaranty signed by Evans on June 21, 2012 for the tenant's monetary obligations, including rent, taxes legal fees and late fees in the amount of \$1,311,024.69 (*id.*, pages 9-10, paragraphs 46-54). In the fourth cause of action, Plaintiff seeks its legal fees and cost from OA 21 and Evans (*id.*, page 11, paragraphs 55-60).

In their answer, OA 21 and Anci admit to acquiring the lease from Organic in connection with a prior bankruptcy sale (*see* Plaintiff's motion, Exhibit B, NYSCEF Document #19, page 1, paragraph 2). As to the assumption of the lease, the terms of the lease and the guaranty, Defendants neither admit nor deny Plaintiff's contentions and refer this Court to those documents for the terms and conditions (*id.*, paragraph 4; page 2, paragraphs 6, 7, 11-12; page 3, paragraphs 16, 20; page 4, paragraph 23).

Plaintiff's Motion for Summary Judgment

By its motion, based upon the terms of the lease, Plaintiff moves for summary judgment against Defendant OA 21 seeking:

- (a) From the first cause of action, pre-vacatur base and additional rent through October 31, 2017 of \$49,638.21;
- (b) From the first and second causes of action, post-vacatur base and additional rent and re-letting expenses for November 1, 2017 through July 14, 2018 for \$271,711.30;
- (c) From the first and second causes of action for post-vacatur base and additional rent and re-letting expenses for July 15, 2018, the date the new tenant began paying rent through June 30, 2022, the end of the lease term for \$305,861.23; and
- (d) From the fourth cause of action, for attorney's fees and expenses incurred in the underlying nonpayment proceeding against OA 21st LLC for \$44,32.00 and for the instant action through September 30, 2018 for \$14,081.36.

As against Defendant Evans, Plaintiff seeks:

- (e) Pursuant to CPLR §3215 a default judgment for the third cause of action, seeking pre-vacatur and post-vacatur base and additional rent due from Tenant through June 30, 2022 for \$633,210.74; and

- (f) Pursuant to CPLR §3215 a default judgment for the fourth cause of action, seeking for attorney's fees and expenses incurred in the underlying nonpayment proceeding against OA 21 for \$44,32.00 and for the instant action through September 30, 2018 for \$14,081.36.

In opposition, Defendants assert there is a question of fact as to OA 21's continuing liability under the lease because of the owner's purported acceptance of Defendant's surrender and re-letting of premises for a term in excess of the lease term of the subject lease (*see* Defendants' Memorandum of Law, NYSCEF Document #48, pages 2, 3). Defendants assert that the owner commenced non-payment proceedings that required tenant to pay an additional deposit in order to remain in possession (*see* Defendant's Ancillary Affidavit, NYSCEF Document #46, page 2, paragraph 5). Unable to do so, in June 2017, OA 21st LLC "surrendered possession of the premises in broom clean condition" (*id.*, paragraph 6). When coupled with the owner's re-entry and re-letting the premises, Defendants claim these are factors supporting that a surrender by operation of law occurred that obviates OA 21's obligation under the lease after the surrender (*id.*, pages 3-6). In any case, Defendants contend that the amount of money Plaintiff claims is owed under the lease is not properly reconciled with OA 21's security deposit nor the rent collected from the subsequent tenant (*id.*, pages 6-7).

In Plaintiff's reply, it notes that Defendants do not dispute OA 21's obligation to pay rent prior to its eviction in October 2017 (*see* Plaintiff's reply Memorandum, NYSCEF Document #51, page 2-3). It further asserts that there could be no surrender of the premise since OA 21 was evicted (*id.*). However, Plaintiff indicates that the figures proffered in its motion were incorrect as to the amounts owed by tenant and guarantor and submits new numbers in reply (*id.*, page 1, footnotes 1 and 2; *see also* Shalom reply affidavit; NYSCEF Document #49).

Discussion

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 (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). CPLR §3212(b) requires the court to determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit" (*id.*). The evidence submitted by the movant must be viewed in the light most favorable to the non-movant (*see Jacobsen v N.Y. City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *see also Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). Once the movant makes a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact warranting denial of the motion (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

Here, Plaintiff has met its burden as to Defendants' liability under the lease. Plaintiff has demonstrated the existence of a fully executed lease agreement assumed by OA 21 and guaranteed by Evans (*see Lexington Owner LLC v Kaplowitz*, 149 AD3d 590 [1st Dept 2017]) By the terms of the lease as set forth, OA 21 is responsible for all rent, late fees, taxes and attorney's fees and cost for the lease term (*see New 24 West 40th Street LLC v XE Capital Management, LLC*, 104 AD3d 513 [1st Dept 2013]; *Van Duzer Realty Corp v Globe Alumni Student Assistance Ass'n, Inc.*, 102 AD3d 543 [1st Dept 2013]). In the event OA 21 fails to perform, Evans is personally liable (*see 4 USS LLC v DSW MS LLC*, 120 AD3d 1049 [1st Dept 2014]).

While Defendants do not dispute OA 21's liability under the lease prior to dispossession, they assert they are not responsible for the rent and other expenses following the tenant's departure. Paragraph 18 of the lease agreement addresses this. It states:

"In case of any such default, reentry, expiration and/or dispossession by summary proceedings or otherwise, (a) the rent and additional rent, shall become due thereupon and be paid up to the time of such re-entry, dispossession and/or expiration, (b) Owner may re-let the demised premises or any part or parts thereof, either in the name of Owner or otherwise for a term or terms, which may at Owner's option be less than or exceed the period which would otherwise have constituted the balance of term of this lease, and may grant concession or free rent or charge a higher rental than in this lease, and/or (c) Tenant or the legal representatives of Tenant shall also pay Owner, as liquidated damages, for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rent collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease. The failure of Owner to re-let demised premises or any part or parts thereof shall not release or affect Tenant's liability for damages..." (see Plaintiff's motion, Exhibit C, Lease agreement and guaranty, NYSCEF Document #20, paragraph 18).

As for expenses, this paragraph states:

"In computing such liquidated damages there shall be added to the said deficiency such expenses as Owner may incur in connection with re-letting, such as legal expenses, attorney's fees, brokerage, advertising and for keeping the demised premises in good order, or preparing the same for re-letting..." (*id.*).

This paragraph further states:

"Owner, in putting the demised premises in good order or preparing same for re-rental may, at Owner's option, make such alterations, repairs, replacements and/or decorations in the demised premises as Owner...[and] shall not operate or be construed to release Tenant from liability" (*id.*).

Contrary to Defendants' claims, as noted above, the lease clearly and unambiguously states that in the event of a "default, re-entry, expiration and/or dispossession by summary proceedings or otherwise," OA 21 remained obligated to pay rent and other expenses under the lease (see Plaintiff's motion, Exhibit C, Lease agreement and guaranty, NYSCEF Document #20; paragraph 18). The circumstances of OA 21's dispossession, as described by Defendants, do not evidence a meeting of the minds as to a surrender of the premises (see *Connaught Tower Corp v Nagar*, 59 AD3d 218 [1st Dept 2009]). As asserted by Defendants, Plaintiff commenced a summary proceeding that resulted in terms that OA 21 could not sustain to keep possession and prompted it to leave the premises. These facts do not support a surrender by operation of law that functions to release OA 21 from continuing liability under the lease. As such, Defendants' surrender defense is barred by the lease provision setting forth owner's remedies (*Lexington Ave. & 42nd St. Corp. v Pepper*, 221 AD2d 273, 274 [1st Dept 1995])["The 'survival of liability' clause in the parties' lease agreement specifically provided that in the event of a reentry, repossession or termination of the lease prior to the expiration date thereof, the tenant remained liable, at the option of landlord, for, *inter alia*, any rent and additional rent reserved for the balance of the term"]; see also *Holy Properties Limited, LP. v Kenneth Cole*

Productions, Inc., 87 NY2d 130, 134 [1995] [“Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please. If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable” [internal citations omitted]]; *see also L’Aquila Realty, LLC v Jalyng Food Corp.*, 148 AD3d 1004 [2d Dept 2017][Quoting *Holy Properties*, lease provided tenant would remain liable for rent after eviction]). Therefore, Plaintiff’s motion for summary judgment as to liability is granted (CPLR §3212).

As for damages, Plaintiff sets forth different amounts in its motion and reply affirmations that Defendants contend fail to consider OA 21’s security deposit or the rent Plaintiff collected from the subsequent tenant. Quixotically, Plaintiff further contends in its reply affirmation that the guarantor somehow is liable for damages that exceed the tenant’s damages. For these reasons, this matter will be set down for an inquest so to determine damages.

Plaintiff’s Motion for Default Judgment

Plaintiff’s motion for a default judgment against Defendant Douglas Evans is granted without opposition based upon for Defendant’s failure to appear in this matter or answer the summons and complaint (*see* CPLR §3215).

Based upon the foregoing, it is

ORDERED that an assessment of damages against Defendants OA 21st LLC and Douglas Evans is directed as to (1) pre-vacatur base and additional rent; (2) post-vacatur base and additional rent and re-letting expenses; and (3) attorney’s fees and expenses; it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to determine said damages; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M. 646-386-3028 or spref@courts.state.ny.us for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/suptctmanh at the “Local Rules” link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that Plaintiff’s counsel shall serve a copy of this order with notice of entry on Defendants and that counsel for Plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212) 401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/suptctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR §4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.,) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they

may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

8/13/2019

DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-PROTESTABLE

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE