

| |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Mill Rock Owners Corp. v G&J's Pizzeria, LLC |
| 2019 NY Slip Op 33248(U) |
| October 31, 2019 |
| Supreme Court, New York County |
| Docket Number: 151195/19 |
| Judge: Lynn R. Kotler |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

MILL ROCK OWNERS CORP.

INDEX NO. 151195/19

- v -

MOT. DATE

G&J'S PIZZERIA, LLC et al.

MOT. SEQ. NO. 001

| | |
|----------------------------------------------------------------|-------------------------|
| The following papers were read on this motion to/for <u>sj</u> | |
| Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits | NYSCEF DOC No(s). _____ |
| Notice of Cross-Motion/Answering Affidavits — Exhibits | NYSCEF DOC No(s). _____ |
| Replying Affidavits | NYSCEF DOC No(s). _____ |

This action arises from defendants' breach of a lease and guaranty. The corporate defendant was evicted from the subject commercial premises after a gas shut-off when it stopped paying rent due under the lease.

Plaintiff now moves for summary judgment pursuant to CPLR § 3212 on its claims against defendants in the amount of \$134,050.25 and dismissing defendants' affirmative defense and for a hearing to determine the reasonable amount of attorneys' fees and costs. Defendants oppose the motion, arguing that it is premature (CPLR § 3212[f]) and that triable issues of fact preclude summary judgment. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion is granted.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Dated: 10/31/19



HON. LYNN R. KOTLER, J.S.C.

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

The relevant facts are not in dispute. Plaintiff's motion is supported by the affidavit of Amr Aly, its President. Plaintiff owns the building located at 1797 First Avenue, New York, New York (the "building"). Plaintiff and the corporate defendant, G&J's Pizzeria ("G&J") entered into a commercial lease for Commercial Unit 3 at the building (the "premises") pursuant to a Second Assignment and Assumption of Lease and Consent dated June 15, 2015 (the "assignment"). Pursuant to the assignment, G&J assumed the tenants responsibilities and obligations under an initial lease dated July 15, 2009 between plaintiff and NSLK, LLC (the "lease").

The individual defendants each entered into an Assignment and Assumption of Promissory Note, Security Agreement and Personal Guarantees (the "guaranty") whereby they unconditionally guaranteed G&J's performance under the lease.

G&J was evicted from the premises by a New York City Marshal on January 23, 2019. The premises remains vacant. Paragraph 4 of the lease requires that G&J "shall, throughout the term of the lease, take good care of the demised premises . . . and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition."

Paragraph 42(d) of the lease provides in relevant part:

Tenant shall throughout the term of this Lease, keep in working order, at its sole cost and expense, all electrical, gas, water, heating, air conditioning and plumbing equipment and appliances, and any other equipment and appliances or utility systems, pipes or conduits which may be servicing the demised premises exclusively or which may be located within any portion of the demised premises.

Paragraph 43(c) further states:

Landlord shall not in any way or under any circumstances be liable or responsible to the Tenant for any loss or damage or expense which the Tenant may sustain or incur, if, during the term of this Lease, either the quantity or character of electric current, gas, water, or any other utility changes or is no longer available or suitable for the Tenant's requirements; and the Tenant's obligations to pay rent and to perform all of the other covenants and agreements under this Lease shall in no way be affected, impaired or excused by reason thereof. The Tenant covenants and agrees that at all times its use of gas, electric current and water shall never exceed the capacity of the existing feeders to the demised premises and Landlord makes no representation as to such capacity, The Tenant shall make no alterations or additions to the electrical equipment and/or appliances and/or plumbing and/or heating equipment or systems in or with respect to the demised premises, or install or use any other such equipment or appliances, without the prior written consent of the Landlord in each instance

On or about November 2017, gas service was shut off to the premises. Plaintiff alleges that the shut-off was "due to G&J's failure to properly maintain the premises." Thereafter, plaintiff claims that G&J agreed to install a new electric hot water heater and perform necessary rewiring. In connection therewith, plaintiff incurred costs in the amount of \$2,172.06 for work performed by K & G Electric CO., Inc. Plaintiff has provided a copy of the invoice for such work. Plaintiff also engaged an architect who generated revised drawings required by the Department of Buildings to resolve the gas shut-off. In connection therewith, plaintiff incurred a fee of \$770.50.

On or about May 21, 2018, plaintiff constructed a new ADA-compliant entrance ramp to the premises. The work was performed by Refit Construction Corp. in May 2018. Plaintiff has provided an invoice for such work in the amount of \$11,750.00. Defendants have not paid any of the aforesaid bills.

Plaintiff has also provided a copy of G&J's rent payment history, which reflects that it stopped paying base rent, real estate taxes and water charges and began incurring late fees in October 2017. Plaintiff sent a five day rent demand on or about September 20, 2018 which demanded payment by October 12, 2018 in the amount of \$101,582.46 for base rent, additional rent, late fees and legal fees. Defendants did not make any payment and on or about October 18, 2018, plaintiff commenced a non-payment proceeding in New York City Civil Court, New York County, entitled *Mill Rock Owners Corp. v. G&J's Pizzeria LLC*, Index Number LT-075580-18-NY. G&J did not answer the petition or otherwise appear in that proceeding.

On or about November 30, 2018, plaintiff applied for a warrant of eviction, which was issued on or about January 23, 2019. During that period, plaintiff incurred charges of \$1,000 and \$759.95 to power wash the sidewalks and remove trash left behind by G&J at the premises. Plaintiff also incurred attorney fees in connection with the Civil Court proceeding totaling \$15,303.83.

Plaintiff's complaint asserts three causes of action: breach of the lease against G&J, breach of the guaranty against the individual defendants and for reimbursement of legal fees in this action. Plaintiff therefore seeks a money judgment against defendants in the following amount: \$67,371.02 for base rent, \$31,875.83 for tax escalations, \$1,100 in late fees, \$1,897.56 for water charges, \$770.50 for architectural fees, \$2,172.06 for hot water heater and electrical work, \$1,000 and for power washing the sidewalk, \$11,750 for construction of an ADA-complaint entrance ramp and \$759.95 for removal of abandoned items.

Defendants' answer consists of general denials and asserts one affirmative defense that "[t]he rent demand is fatally defective..." In opposition to plaintiff's motion, defendants argue that the motion is premature and that "there is a material issue of fact as to which party caused the gas leak and therefore which party was liable to repair and pay for the subsequent damage." These arguments are unavailing.

Summary judgment is premature when facts not in a party's possession could be discovered during the course of discovery which would enable it to defeat a CPLR § 3212 motion. Here, defense counsel's argument is unsubstantiated, since defendant has failed to identify what facts would bear out during discovery which would enable defendants to mount a successful opposition. Therefore, summary judgment is not premature.

On this record, plaintiff has established that G&J breached the lease by failing to pay rent due thereunder, and that the individual defendants breached the guaranty by failing to honor G&J's obligations under the lease. Further, the defendants are each obligated to pay legal fees incurred in connection with both the Civil Court proceeding and this action.

Defendants have failed to raise a material issue of fact, since it is of no moment whether their negligence led to the gas leak. G&J took the premises as is, and the lease specifically provides that plaintiff would not be liable for any latent defect in the premises or building. Defendants have otherwise failed to demonstrate that plaintiffs were obligated to maintain the gas pipe, since plaintiff has established through the affidavit of Vendim Lushaj, the building's superintendent, that the gas pipe servicing the premises "runs directly and exclusively to the Premises and does not service any other unit in the [b]uilding."

Indeed, pursuant to paragraph 43(c) of the lease, plaintiff is not liable for damages resulting from the gas shut-off and G&J's obligation to pay rent was "in no way [] affected, impaired or excused by reason thereof."

Otherwise, defendants' affirmative defense does not defeat plaintiff's motion.

Accordingly, plaintiff's motion is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's motion for summary judgment on its complaint and dismissing defendants' affirmative defense is granted in its entirety; and it is further

ORDERED that the Clerk is directed to enter a money judgment in favor of plaintiff Mill Rock Owners Corp. and against defendants G&J's Pizzeria, LLC, Gregory Barrios and Evelyn Barrios, joint and severally, for \$118,746.42 from September 18, 2018; and it is further

ORDERED that the issue of plaintiff's reasonable attorneys fees incurred in connection with the prosecution of this action is hereby referred to the Special Referee Clerk for assignment to a Special Referee to hear and report; and it is further

ORDERED that plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a complete Information Sheet¹, upon the special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

10/31/19
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.

¹ Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh (under the "References" section of the "Courthouse Procedures" link).