

Fifth Partners LLC v E-Value Appraisals, LLC

2020 NY Slip Op 31742(U)

June 3, 2020

Supreme Court, New York County

Docket Number: 151437/2018

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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FIFTH PARTNERS LLC,
Plaintiff,

- v -

E-VALUE APPRAISALS, LLC DBA REMAX MIDTWON LLC,
WONWOO CHANG, WONWOO CHANG

Defendants.

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INDEX NO. 151437/2018
MOTION DATE 01/20/2020
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendants' cross-motion to amend is granted, and plaintiff's motion for summary judgment is also granted as set forth more fully herein.

Background

Plaintiff, Fifth Partners LLC, owned or owns a building at 19 West 21st Street in New York (the "Building"). Pursuant to a five-year lease (December 1, 2012 – November 30, 2017), defendant-tenant E-Value Appraisals LLC d/b/a Remax Midtown LLC ("E-Value") was the commercial tenant of the Building's Suite 703. According to plaintiff, E-Value was created "for the sole purpose of leasing the premises" and currently has no assets. Defendant-guarantor Wonwoo Chang ("Chang") (also known as "John Wonwoo Chang" and doing business as "E-Value"; "Evalueapp.com;" and "JWC Real Estate Group") executed a written guaranty of E-Value's performance under the lease. Plaintiff asserts that E-Value failed to comply with the lease and vacated Suite 703 on December 11, 2017 (eleven days following the lease's November 30, 2017 expiration). However, E-Value claims that it vacated the premises on November 30, 2017 (NYSCEF Doc. No 69).

The Civil Court Action

In an action that plaintiff commenced on October 12, 2017 in Civil Court, the Hon. Carol R. Feinman awarded plaintiff a money judgment in the amount of \$34,191.54 (representing all rent due through December 11, 2017, the date on which plaintiff claims E-Value vacated the subject premises) against E-Value. According to the amended complaint in the instant action, Judge Feinman also awarded plaintiff a separate money judgment against E-Value in the amount of \$6,117.00 for plaintiff's attorney's fees.

The Instant Action

On February 13, 2018, plaintiff commenced the instant action against defendants, seeking a judgment [1] on its first cause of action, against E-Value and Wonwoo Chang a/k/a John Wonwoo Chang, jointly and severally, in the amount of \$56,548.99, “to be adjusted upward through the judgment date,” plus interest thereon from August 1, 2017; [2] on its second cause of action, against E-Value and Wonwoo Chang a/k/a John Wonwoo Chang, jointly and severally, for attorney’s fees in an amount that the Court would determine; [3] on its third cause of action, declaring that JWC Real Estate Group and/or Evalueapp.com are the alter egos of E-Value and granting a monetary judgment against them, jointly and severally, in the sum of \$56,548.99, “to be adjusted upward through the judgment date,” plus interest thereon from August 1, 2017; [4] on its fourth cause of action, against JWC Real Estate Group and Evaluapp.com, jointly and severally in the sum of \$56,548.99, “to be adjusted upward through the judgment date,” plus interest thereon from August 1, 2017; [5] on its fifth cause of action, declaring that E-Value and Wonwoo Chang a/k/a John Wonwoo Chang, violated Debtor Creditor Law § 272 and awarding \$56,548.99, “to be adjusted upward through the judgment date,” plus interest thereon from August 1, 2017, to plaintiff; [6] on its sixth cause of action, declaring that E-Value and Wonwoo Chang a/k/a John Wonwoo Chang violated Debtor Creditor Law § 274 and awarding \$56,548.99, “to be adjusted upward through the judgment date,” plus interest thereon from August 1, 2017, to plaintiff; [7] on its seventh cause of action, declaring that E-Value Appraisals LLC and Wonwoo Chang a/k/a John Wonwoo Chang violated Debtor Creditor Law § 276 and awarding \$56,548.99, “to be adjusted upward through the judgment date,” plus interest thereon from August 1, 2017, to plaintiff; plus costs and disbursements.

On January 16, 2018, the Civil Court granted plaintiff’s request for \$6,117.00 in attorney’s fees (NYSCEF Doc. No. 55).

Plaintiff’s Motion Seq. No. 001

On June 18, 2018, plaintiff moved [1] pursuant to CPLR 3025(c) to amend the pleadings to conform to the evidenced adduced herein to include all amounts due through the date that motion was determined; [2] pursuant to CPLR 3212, granting plaintiff summary judgment against E-Value on the first and second causes action, for pre-vacatur rent, use and occupancy, and damages in the amount of \$32,052.11; [3] pursuant to CPLR 3212, granting plaintiff summary judgment against defendant Wonwoo Chang d/b/a E-Vale Appraisals LLC and Wonwoo Chang d/b/a JWC Real Estate Groups (“Chang”) as guarantor, on the first and second causes of action for pre-vacatur rent, use, and occupancy, and damages in the amount of \$72,360.65; [4] pursuant to CPLR 3212, granting plaintiff summary judgment against Chang as signatory of the lease on behalf of E-Value, a corporation that purportedly never existed, on the seventh cause of action, for pre-vacatur rent and occupancy in the amount of \$72,360.65; and [5] granting plaintiff costs and disbursements (NYSCEF Doc. No. 18).

This Court’s Decision and Order on Motion Seq. No. 001

On March 1, 2019, this Court granted plaintiff’s requests to amend the pleadings (requiring plaintiff to serve and file its amended complaint within 30 days of the Decision and Order’s date) and denied, without prejudice, its request for summary judgment (NYSCEF Doc. No. 69).

In that Decision and Order, this Court noted that “no seventh cause of action is identified or alleged. Plaintiff’s complaint jumps from its fifth cause of action directly to its eighth cause of action” (NYSCEF Doc. No. 69).

This Court expressed, inter alia, that it was “confounded as to why plaintiff would seek summary judgment when it has not yet determined the final value of the damages it is alleging” (NYSCEF Doc. No. 69).

On September 16, 2019 (over thirty-days from this Court’s March 1, 2019 Decision and Order), plaintiff filed its amended complaint (NYSCEF Doc. No. 71).

Plaintiff’s Amended Complaint

On September 16, 2019, plaintiff submitted an amended complaint that addressed shortcomings that this Court noted in its March 1, 2019 Decision and Order (NYSCEF Doc. No. 71). For example, plaintiff reduced its causes of action to only three and requested a judgment (1) on its first cause of action, against Chang, in the amount of \$48,608.54, “to be adjusted upward through the judgment date,” plus interest from December 2017; (2) on its second cause of action, against Chang, for attorney’s fees; and (3) on its third cause of action, declaring that Chang signed and entered the subject lease on behalf of a nonexistent limited liability company and granting plaintiff a monetary judgment against Chang in the amount of \$48,608.54, “to be adjusted upward through the judgment date,” plus interest thereon from December 2017.

Plaintiff’s Motion Seq. No. 003 (The Instant Motion)

Plaintiff now moves [1] pursuant to CPLR 3212, for summary judgment against defendant-guarantor Chang, as guarantor, on the first and second causes of action, in the amount of \$48,608.54, plus attorney’s fees; [2] pursuant to CPLR 3212, for summary judgment against defendant-guarantor Chang on the third cause of action as signatory of the lease on behalf of defendant E-Value (an entity that purportedly never existed), in the amount of \$48,608.54; [3] pursuant to CPLR 3211(a), dismissing defendants’ affirmative defenses; and [4] awarding plaintiff’s costs and disbursements per statute and post-judgment interest (NYSCEF Doc. No. 77).

In his January 8, 2020 Affirmation, David B. Rosenbaum, Esq. (“Mr. Rosenbaum”) asserts that plaintiff is entitled to summary judgment “because Chang is liable for [sic] under the guaranty for the amounts of the two Civil Court Judgments and by virtue of executing the Leases on behalf of a non-existent entity [E-Value] (NYSCEF Doc. No. 78).

Mr. Rosenbaum contends that res judicata bars most of defendants’ eight defenses in their joint October 17, 2019 answer (NYSCEF Doc. No. 81), as the Civil Court previously found that E-Value held-over in the subject premises until December 11, 2017, thus owing rent and additional rent, which the Civil Court awarded to plaintiff.

In his January 10, 2020 Affidavit, Ryan Mehra (“Mr. Mehra”), a member of plaintiff Fifth Partners LLC, who manages the Building, including collecting rent, billing, and ensuring lease compliance, points out that both Civil Court Judgments of \$34,191.54 and \$6,117.00 remain unpaid to plaintiff (NYSCEF Doc. No. 79). Mr. Mehra adds that, although Article 22 of the

subject lease obligates tenants to leave the premises in broom-clean condition, plaintiff paid \$8,300.00 to demolish and remove E-Value's furnishings and debris from the Building. According to Mr. Mehra, as E-Value does not allege a written agreement that plaintiff permitted E-Value to leave its possessions in the subject premises, E-Value must pay plaintiff the said \$8,300.00.

Mr. Mehra offers a calculation of the charges that Chang, in his capacity as guarantor, owes to plaintiff: \$34,181.54 (Civil Court Principal Judgment) + \$6,117.00 (Civil Court Legal Fee Judgment) + \$8,300.00 (Demolition/Carting Charges), totaling \$48,608.54, plus attorney's fees. Mr. Mehra thus asserts that plaintiff is entitled to summary judgment on the first and second causes of action in the amount of \$46,608.54, plus attorney's fees.

Additionally, Mr. Mehra contends that plaintiff is entitled to summary judgment against Chang on the third cause of action and to a dismissal of defendants' affirmative defenses. Mr. Mehra cites plaintiff's Memorandum of Law (NYSCEF Doc. No. 30), which explains "a person entering into a contract on behalf of a nonexistent corporate entity is personally liable on the contract;" Chang, E-Value's president, allegedly signed a lease on behalf of a nonexistent corporate entity, namely, E-Value.

Plaintiff asserts that defendants' claim that "this case is barred by the doctrine of res judicata" is meritless, as the causes of action arising out of Chang's capacity as the lease guarantor who signed said lease on behalf of a non-existent entity were not litigated in Civil Court (NYSCEF Doc. No. 90).

Cross-Motion (Motion Seq No. 001)

On February 26, 2020, defendants E-Value; Chang d/b/a E-Value; and Chang d/b/a JWC Real Estate Groups, cross-moved for permission to file an amended answer to the amended complaint (NYSCEF Doc. No. 93). Chang explains that the proposed amended answer contains a counterclaim demanding the return of the \$15,003.75 security deposit that E-Value paid plaintiff when E-Value entered into the subject lease on October 5, 2012 (NYSCEF Doc. No. 94).

Opposition to Motion Seq. No. 003 and Support for Cross-Motion

On February 26, 2020, defendants opposed the instant motion, requesting that this Court deny plaintiff's requests for summary judgment and grant defendants' cross-motion to amend their answer. Defendants do not request that this Court deny plaintiff's request to dismiss defendants' affirmative defenses.

Defendants essentially oppose the instant motion on the following grounds: (1) that the entire amended complaint is (as directly stated by plaintiff) pled "upon information and belief;" (2) that plaintiff cannot enforce its Civil Court judgments for \$34,191.54 and \$6,117.00 against Chang because it has not proven that said judgments are liabilities that Chang guaranteed; (3) plaintiff claims that Chang is personally liable because he signed the subject lease as an agent of the nonexistent principal E-Value but, at that time, E-Value was doing business as the incorporated Remax Midtown LLC (which is allegedly reflected on the lease, excluding Chang from personal liability, and which plaintiff allegedly had "long known"); (4) res judicata (which, according to defendants, bars re-litigating not only issues decided in the initial case but also those issues that *could have been* decided in the initial case) bars plaintiff's request for \$8,300.00 in demolition

and carting fees; Avilong Automotive Group v Leontiev, 168 AD3d 78, 85 (1st Dep't 2019); and (5) that, as plaintiff asserts that defendants "may not set off their \$15,003.75 security deposit...against any amounts that they may owe to [plaintiff]," defendants now cross-move to amend their answer to add a counterclaim for said security deposit from plaintiff.

Plaintiff's Reply

In his March 12, 2020 Affirmation, Mr. Rosenbaum asserts that plaintiff established that it is entitled to summary judgment, and, thus, the burden to identify issues of fact shifts to defendants (NYSCEF Doc. No. 106). Mr. Rosenbaum asserts that defendants have failed to meet their burden "to defeat summary judgment."

Mr. Rosenbaum highlights that Chang filed his Affidavit in support of defendants' cross-motion only, and defendants' attorneys' affirmation "is of no probative value" (NYSCEF Doc. No. 106). He also contests defendants' claim that Chang is not liable for signing on behalf of E-Value because E-Value was "doing business as" Remax Midtown LLC at the time; Mr. Rosenbaum explains that E-Value cannot have a "d/b/a" entity "because it was never created and, thus, could not register a 'd/b/a' in accordance with the law."

In his March 13, 2020 Affidavit, Mr. Mehra refers to defendants' insistence that the term "base rent" is not included in the guaranty as "nonsensical" (NYSCEF Doc. No. 107).

Mr. Mehra responds to defendants' cross-motion for the security deposit by explaining that plaintiff will apply the security deposit to the final amount that the Court determines that E-Value and Chang owe.

Discussion

Plaintiff has made out its prima face case that it is entitled to summary judgment against Chang. Defendant has failed to demonstrate a triable issue of fact. Defendants' opposition thus fails to bar summary judgment in favor of plaintiff.

Additionally, the subject guaranty "includes a catchall provision that Chang is liable for 'any and all other charges that have accrued or may accrue under the terms of the leases (See Exhibit 'E')" (NYSCEF Doc. No. 108).

As E-Value does not exist, and "one who signs an agreement on behalf of a nonexistent principal may himself be held liable on that agreement" (NYSCEF Doc. No. 108). Grutman v Katz, 202 AD 2d 293, 294 (1st Dep't 1994). On April 12, 2018, Chang admitted that E-Value is a "non-existing Limited Liability Company" (NYSCEF Doc. No. 22).

Furthermore, plaintiff's demolition expenses accrued after the December 21, 2017 Civil Court Decision and Order.

CPLR 3025(b) states:

A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be

just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly.

Conclusion

Thus, for the reasons stated herein, defendants' cross-motion to amend its answer to the amended complaint is hereby granted, and the proposed amended answer is hereby deemed served and filed. Plaintiff's request, pursuant to CPLR 3212, for summary judgment against defendant-guarantor Wonwoo Chang, as guarantor, on the first cause of action, is hereby granted. Plaintiff's request, pursuant to CPLR 3212, for summary judgment against defendant-guarantor Wonwoo Chang, as signatory of the lease on behalf of defendant E-Value Appraisals LLC d/b/a Remax Midtown LLC (an entity that purportedly never existed), on the third cause of action, is hereby granted (note, however, that this cause of action is duplicative with the first two causes of action for purposes of determining damages). Plaintiff's request, pursuant to CPLR 3211(a), to dismiss defendants' affirmative defenses, is hereby granted. Defendants' request to deduct the Security Deposit from today's Judgment is hereby granted. Plaintiff's request for summary judgment on the second cause of action, for attorney's fees, is hereby granted, and plaintiff may obtain an inquest into attorney's fees by presenting a copy of this Decision and Order, a Note of Issue with Notice of Inquest, and any necessary fees. The Clerk is hereby directed to enter judgment in favor of plaintiff, Fifth Partners LLC, and against defendant Wonwoo Chang, in the amount of \$33,604.79 (\$48,608.54 – the \$15,003.75 Security Deposit), plus interest thereon from December 21, 2017, plus costs and disbursements.

<u>6/3/2020</u> DATE					<u>ARTHUR F. ENGORON, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE