West End Estates LLC v Gemignani
2020 NY Slip Op 31777(U)
June 4, 2020
Supreme Court, New York County
Docket Number: 156080/19
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

WEST END ESTATES LLC

INDEX NO. 156080/19

MOT. DATE

- v -

MOT. SEQ. NO. 002

MATTEO MATTIA GEMIGNANI

The following papers were read on this motion to/for _____

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 alleged illegal rental of the subject premises through AirBNB. Plaintiff claims that defendants' conduct caused it to receive several summonses from the New York City Department of Buildings ("DOB"). Plaintiff now moves for a default judgment against defendant Frederick Vaisse and for partial summary judgment "on its Fourth Cause of Action for an award of its attorneys' fees, costs, and disbursements incurred in connection with the prosecution of this action and the defense of the summonses issued by the New York City Department of Buildings ("DOB") to Plaintiff as a result of Defendants' illegal rentals of the Premises as a joint commercial enterprise by renting Apt. 3E and Apt. 5E to transient occupant for stays of less than thirty (30) days and setting the matter down for a hearing to determine the amount". Defendant Kao opposes the motion. Co-defendants Gemignani and Orlando oppose the motion and cross-move to dismiss.

Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available.

At the outset, the court has received letters from both plaintiff and Gemignani and Orlando's counsel about the latter's reply filed after the motion was supposed to be marked submitted. In light of the Covid-19 pandemic, NYSCEF was closed to filing papers. Therefore, Gemignani and Orlando's counsel was unable to file a reply before the motion was returnable. In light of this fact, the court will consider Gemignani and Orlando's reply papers.

Further, Kao's attempt to join the co-defendants cross-motion is rejected as procedurally improper.

The court will first consider plaintiff's motion for partial summary judgment and the cross-motion to dismiss. Familiarity with the court's decision/order dated September 6, 2019 in connection with plaintiff's motion for a preliminary injunction is assumed. The 9/6/19 order denied plaintiff's motion because, *inter alia*, "there is a factual dispute as to whether defendants illegally rented the premises".

Dated: June 4, 2020

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**

Plaintiff is the owner of the building located at 154 West 27th Street, New York, New York 10001 (the "building"). Plaintiff's motion is supported by the affidavit of Yitzchak Schwartz, plaintiff's member, who makes the claims therein based upon his personal knowledge, conversations with his staff and his review of plaintiff's books and records. Schwartz further describes his "duties and responsibilities" as a member of plaintiff as follows:

> I oversee the management of the Building including, but not limited to, reviewing tenant occupancies and the operations of the Building. I also meet with Building personnel, review tenant requests, review investigations and monitor all legal actions or proceedings for the Building.

Schwartz claims that Gemignani and Vaisse were the tenants of record of apartment 3E and Orlando and Kao were the tenants of record of apartment 5E in the building. Schwartz has provided copies of the leases for the two apartments. Portions of the lease for apartment 3E are barely legible, including the signature page, while the entire copy of the lease for apartment 5E is also illegible. Meanwhile, in the 9/6/19 order, the court addressed Kao's argument that "he did not execute the underlying lease and has had nothing to do with the premises", an argument which Kao again raises. Schwartz represents that the Defendants surrendered possession of the subject apartments on or about July 8, 2019.

Schwartz otherwise claims that the defendants rented the premises "as a joint commercial enterprise" by renting them through Airbnb.com. As a result, Schwartz claims that plaintiff was "constrained to incur substantial legal fees in order to enjoin Defendants' conduct and to defend against the Summonses which were issued solely due to Defendants' illegal rentals to transients." Annexed to plaintiff's motion are several decisions from the Office of Administrative Trials and Hearings which indicate that several summonses were dismissed due to defective service while several others were dismissed on the merits. No fines were imposed as a result of the summonses.

In its complaint, plaintiff asserts four causes of action seeking a permanent injunction, declaratory relief and money damages for fees incurred in connection with the summonses and the prosecution of this action. Defendants' answers deny the allegations and assert various affirmative defense. In addition, Gemignani and Orlando assert counterclaims for an abatement (setoff) and their own attorneys fees. By way of this motion, plaintiff seeks to recover the attorneys fees it incurred in this action (fourth cause of action).

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]).

For the reasons that follow, the court finds that plaintiff has failed to demonstrate any of the defendants' *prima facie* liability for violation of the lease and therefore is not entitled to partial summary judgment on its fourth cause of action. Procedurally, while plaintiff seeks an award for its attorneys fees incurred defending against the summonses issued by the DOB, its fourth cause of action is only for the reasonable attorneys' fees incurred by Plaintiff in the prosecution of the instant action.

Turning to the parties' substantive arguments, nothing in Schwartz' affidavit addresses Kao's contention that he did not sign the lease or even have anything to do with the subject apartment, a factual dispute highlighted by the court's 9/6/19 order. Indeed, the parties have not engaged in any discovery, mandating denial of the motion as to Kao. The illegible copies of the leases are further grounds to deny plaintiff's motion.

A further factual dispute which the court identified in the 9/6/19 order remains, to wit, "whether defendants illegally rented the premises". Plaintiff has established that the defendants, other than Kao, rented the premises. Plaintiff has further established that the DOB issued summonses in connection the building. Plaintiff has not, however, demonstrated that the defendants ran an illegal hotel in the subject apartments which caused the DOB to issue the subject summonses.

Schwartz does not assert any facts obtained through personal observations or from any other basis, which demonstrate that the defendants operated an illegal hotel at the subject apartments. Instead, Schwartz' claim on this point is conclusory and unsubstantiated and is therefore insufficient to meet plaintiff's burden on this motion. For example, Schwartz claims that the defendants "have consistently lied about their illegal conduct to prevent Plaintiff from discovering the reality and extent of their scheme." In support of this assertion, Schwartz annexes email correspondence between him and Gemignani dated December 30-31, 2018 wherein Schwartz advises: "We have received complaints from other tenants that you have rented your apartment as an air bnb and they are having loud and noisy parties, making noise and generally causing disturbance. Please be advised that this is ILLEGAL and a breach of your lease!". Gemignani responded, denying that claim as follows: "This is false and vicious information. A tenant in the building confused my NJ family for airbnb guests and reported it including false information such as noise or party." These emails do not demonstrate plaintiff's entitlement to judgment on liability as a matter of law.

Schwartz then claims that Gemignani falsely represented that a person named Ravi Soodi was staying in apartment 3E and no payment was made. As proof of this, Schwartz has provided a copy of an undated letter from Soodi addressed to the New York City Department of Buildings which Gemignani allegedly gave Schwartz.

Schwartz further claims that:

> the spreadsheet provided to me by Vaisse detailing Defendants' Airbnb.com rentals reflects that Ravi Soodi made a reservation through Airbnb.com, confirmation code HM3WBT4EX2, for a four (4) night stay at Apt. 3E commencing February 21, 2019 at a total cost of $1,940.00 and host fee of $60.00.

A spreadsheet is annexed to Schwartz' affidavit, but it is not in admissible form. Nor is its relevance to plaintiff's claims established. Schwartz's factual claim regarding Vaisse's purported admission that his premises was rented on Airbnb.com is based upon an email from Vaisse dated June 4, 2019 which states:

> This is the fake accounting they sent me of Chelsea (trying to say they did not make money) but it at least proves that they have been renting it short term The soho apartments are apartments we also took together right after Chelsea. Same thing here. They promised me to share profits if they were to rent it. Same thing, they kept all money and did not pay rent I can get you all addresses of their other listingS if you want. I have so much evidence, witnesses etc... Just let me know what you need.
>
> Best.
>
> Ps: I should be at the apartment in 20 min

Vaisse's hearsay email is itself replete with hearsay. Even if it was in admissible form, it does not demonstrate defendants' alleged illegal use of the subject apartments giving rise to the DOB summonses at issue.

For at least these reasons, plaintiff's motion is denied.

The court next considers the cross-motion to dismiss. Plaintiff's complaint alleges four causes of actions: [1] the first cause of action is for a permanent injunction enjoining the defendants from, *inter alia*, operating an illegal hotel and/or bed and breakfast out of the subject apartments; [2] the second cause of action is for a declaration that "Defendants' operation of an illegal hotel and/or bed and breakfast out of the Premises is in violation of: (a) substantial obligations of their tenancy and as well as Paragraphs 1, 10, 11, 15, 16 and 19 of the Lease for apartment 3E, Paragraphs 2, 6, and 15 of the Apt. 5 Lease and Paragraphs 19, 36 and 47 of the Rider to the Apt. 5E Lease; (b) the C/O for the Building (c) MDL §4(8); (d) HMC §§27-2004.a.8(a), 27-2006 and 27-2009; (e) Building Code §§310.1.2, 27-366, 27-954, 27-968; and/or (f) Fire Code §§906.1, 903.2, 1001.2, 907.2, 404.2.1, and 405.5; and (c) constitutes an unlawful commercial exploitation and profiteering", [3] the third cause of action is for money damages representing the total fines and penalties plaintiff is currently liable for; and [4] the fourth cause of action is for attorneys' fees incurred by Plaintiff in the prosecution of the instant action.

Gemignani and Orlando argue that "[a]ny conduct on part of the Defendants for use of their Apartments did not cause the Plaintiff to suffer any damages resulting in any fines or penalties from Department of Buildings." They further contend that this action is premature.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88).

The first cause of action must be dismissed, since there can be no dispute that the defendants are not in possession of the subject apartments. As a result, any request for injunctive relief stemming from their use and occupancy of the subject apartments is moot.

The cross-motion otherwise misses the mark. It is of no moment that plaintiff was not assessed any fines in connection with the subject summonses, since plaintiff seeks reimbursement for the attorneys fees, costs and expenses it incurred in connection with defending against them which were allegedly issued due to defendants' conduct constitute a breach of their purported leases with the plaintiff. Since defendants' were allegedly further obligated under their respective leases to reimburse plaintiff for reasonable attorneys fees, costs and expenses incurred in connection with a breach thereof, the motion to dismiss plaintiff's remaining causes of action is unavailing.

Nor is the court persuaded by the cross-movants' further argument that "[t]his instant case was prematurely commenced by Plaintiff." There is no legal basis for such a contention. Indeed, at the completion of discovery, plaintiff may prevail on a dispositive motion or at trial.

Finally, the court considers plaintiff's motion for a default judgment against Vaisse. Plaintiff claims, based upon the affidavit of Ron Black, a process server, that the summons and complaint were served upon Vaisse by affixing same to the door on June 25, 2019 at 154 West 27* Street, Apt. 3E, New York, New York 10001 after three diligent attempts to serve Vaisse were made. Plaintiff's counsel further describes the efforts taken to locate Vaisse, including service of papers on him via email. Plaintiff's coun-

sel also represents that: "Vaisse thereafter appeared on October 24, 2019 at OATH with the attorney for Orlando to testify regarding the summonses related to Apt. 5E. After the hearing, Vaisse acknowledged to me that he was aware of the pendency of this action." In light of the foregoing, plaintiff has established that Vaisse has defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a prima facie cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

In light of the significant factual disputes previously identified by the court herein, plaintiff is not entitled to a default judgment against Vaisse at this juncture. Accordingly, Vaisse's default in appearing is noted. All issues regarding his liability and plaintiff's damages resulting therefore shall be determined at inquest to be held at the time of trial.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is granted only to the extent that defendant Vaisse's default in appearing is noted; and it is further

ORDERED that the balance of plaintiff's motion is otherwise denied; and it is further

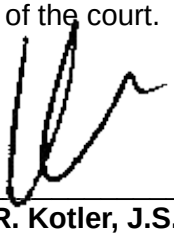
ORDERED that the cross-motion to dismiss is granted only to the extent that the first cause of action is severed and dismissed; and it is further

ORDERED that the cross-motion is otherwise denied.

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: June 4, 2020
New York, New York

So Ordered:



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