841-853 Fee Owner LLC v BCAM USA LLC

2021 NY Slip Op 31642(U)

May 11, 2021

Supreme Court, New York County

Docket Number: 653278/2020

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH** — ***Justice*** | **PART** **IAS MOTION 14**

--X

841-853 FEE OWNER LLC,

Plaintiff,

- v -

BCAM USA LLC,BCRE - BRACK CAPITAL REAL ESTATE INVESTMENT N.V.

Defendant.

--X

INDEX NO. 653278/2020

MOTION DATE 05/07/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for SUMMARY JUDGMENT.

The motion by plaintiff for summary judgment and to dismiss defendants' affirmative defenses is granted in part and denied in part.

Background

In this commercial landlord tenant case, plaintiff (landlord) claims that the tenant (defendant BCAM USA LLC) and the guarantor (defendant BCRE-Brack Capital Real Estate Investment N.V.) defaulted under the terms of the parties' agreement. Plaintiff contends that the tenant has not paid any base rent, additional rent, or tax escalations since March 2020. Plaintiff admits that the tenant sent a letter to plaintiff in June 2020 advising that the tenant planned to move out on July 18, 2020. But plaintiff insists that no one returned the keys. Plaintiff also maintains that the tenant failed to secure a written agreement signed by plaintiff concerning the surrender as required by the lease.

Plaintiff now moves for summary judgment and to dismiss each of defendants' seven affirmative defenses.

In opposition, defendants contend that the guarantor satisfied the requirements under the limited guaranty and, therefore, the motion should be denied with respect to the guarantor. They admit that the tenant was struggling financially in the year prior to the ongoing pandemic and it was unsuccessful in finding a subtenant to take over the premises prior to March 2020. Defendants argue that they sent the required vacatur notice with 30 days' notice as required under the lease.

They also maintain that plaintiff did not respond to this vacatur notice about how and where to return the keys. Dalit Anter, an employee of the tenant, claims that she went back to the building right after the premises were vacated and spoke with the concierge about the keycard (NYSCEF Doc. 26, ¶ 20). She contends that the concierge confirmed that the building had access to the premises (*id.*). Ms. Anter also observed that the landlord maintained a copy of the keycard (*id.*).

In reply plaintiff emphasizes that defendants do no dispute that no rent has been paid since March 2020 and that there was no written agreement regarding surrender of the premises as required under the terms of the lease. Plaintiff also argues that the affidavit of Ms. Anter does not establish that any keys were ever returned. It also questions why defendants asserted a frustration of purpose defense in the answer and contends that it is not applicable here.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York*

Univ. Med. Ctr., 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

As an initial matter, the Court observes that the opposition from defendants appears solely focused on the guaranty. Defendants admit that the tenant has not paid any base rent, additional rent, or tax payments since March 2020 (NYSCEF Doc. No. 28). Therefore, the Court grants the motion with respect to the tenant, defendant BCAM USA, LLC as to liability only.

With respect to the guarantor, the Court denies the motion. The guaranty required the guarantor to personally guarantee the outstanding rent and other charges "which accrues up to and until the date on which the Demised Premises are vacated and the keys and possession of the Demised Premises are turned over to Owner and are available for re-renting provided, however, that Tenant has given Owner thirty (30) days' prior written notice of the date on which the

Demised Premises will be so vacated and that all items of repair and maintenance of the Demised Premises under the Lease to be performed by the Tenant have been performed" (NYSCEF Doc. No. 14 at 1).

The Court finds that there are issues of fact with respect the date the guarantor's obligations are cut off. The tenant, through the affidavit of Dalit Anter, claims that it sent the required vacatur notice and that plaintiff never responded. In reply, plaintiff does not deny that it received the vacatur notice and does not point to a reply. This raises an issue of fact concerning the purported surrender by the tenant. From the tenant's view, it complied by giving notice about the surrender, leaving the premises and it ensured that the landlord had access to the space.

The vacatur notice specifically states that "if Owner has any transition protocol, in respect of security, key systems or the like, please advise" (NYSCEF Doc. No. 19). Assuming that defendants' account is true, plaintiff cannot ignore this notice and then claim that the guarantor remains liable because the tenant never returned the keys. Defendants specifically asked what to do about the keys and received no response; what were defendants supposed to do in such a situation? Discovery is required to explore exactly what happened surrounding the attempted surrender.

Moreover, plaintiff's repeated insistence that there had to be a written agreement regarding vacatur does not compel the Court to grant this branch of the motion. If plaintiff ignored defendants' letter, then it is difficult for this Court to see what defendants were supposed to do with respect to this requirement (assuming this was a requirement). How could defendants secure a written agreement with plaintiff if plaintiff ignored their request? That would permit plaintiff to unilaterally extend the guarantor's obligations by refusing to participate—surely, that was not the intent of the parties when they entered into this agreement.

Defendants also maintain that there was some agreement with Robert Fisher (plaintiffs' representative) about certain furniture that was left in the premises. No affidavit from Mr. Fisher was submitted in reply; this is another issue of fact to be explored in discovery because the guaranty provides that the guarantor had to reimburse the plaintiff for expense arising from the removal of property (NYSCEF Doc. No. 14 at 1).

However, the Court rejects defendants' reliance on the frustration of purpose doctrine. The doctrine of frustration of purpose requires that "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense"(*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). "[T]his doctrine is a narrow one which does not apply unless the frustration is substantial"(*id.*).

Defendants admit that the financial struggles of the tenant preceded the ongoing pandemic. Moreover, the inability to find a subtenant or financial struggles due to the pandemic do not, standing alone, justify the invocation of this doctrine. The doctrine of frustration of purpose is reserved for situations where the entire basis of the contract no longer makes sense, not where a tenant facing financial difficulties wants to be relieved of its rent obligations.

Summary

Discovery is required in this case with respect to the purported surrender and, consequently, to the application of the limited guaranty. Defendants assert that they followed the requirements of the lease and the guaranty, asked the landlord how it preferred to handle the "transition protocol," and what it should do about the keys. They point out that the lease and the guaranty is silent with respect to the surrender process. Defendants maintain that the landlord ignored them and they properly vacated.

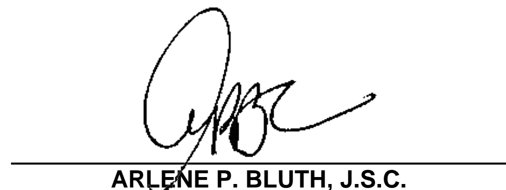
Although plaintiff disagrees, it did not submit evidence sufficient to compel the Court to grant the motion against the guarantor. The Court declines to grant summary judgment where, according to defendants, plaintiff did not allow defendants to seek a surrender (a contractually bargained-for provision). Discovery will explore whether and when defendants returned possession to the plaintiff, as well as the furniture removal issue. If defendants' account is accurate, then plaintiff cannot prevent defendants from seeking relief under the guaranty by refusing to cooperate.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment and to dismiss affirmative defenses is granted with respect to defendant BCAM, USA LLC and an inquest shall be held at the time of trial for this defendant or, if the matter is resolved prior to trial, then plaintiff shall file a note of issue for an inquest; and it is further

ORDERED that the motion is granted with respect to defendant BCRE-Brack Capital Real Estate Investment N.V. only to the extent that the third and sixth affirmative defenses are severed and dismissed and denied as to the remaining relief requested against this defendant.

Remote Conference: July 26, 2021.



5/11/2021 DATE		ARLENE P. BLUTH, J.S.C.	

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	