Revcore Recovery Ctr. of Manhattan LLC v Rockfeld Group Canal LLC
2021 NY Slip Op 32195(U)
November 5, 2021
Supreme Court, New York County
Docket Number: Index No. 655271/2021
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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REVCORE RECOVERY CENTER OF MANHATTAN LLC,AVRAHAM SCHICK, TIFFANY LIPSCHUTZ

Plaintiffs,

- v -

ROCKFELD GROUP CANAL LLC,

Defendant.

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INDEX NO. 655271/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff's motion for summary judgment is denied.

Background

Plaintiff Revcore is a commercial tenant in a building owned by defendant. Revcore provides drug addiction and mental health services for low-income individuals. Plaintiffs argue that its ability to pay the rent was contingent upon its receipt of funds from the New York State Office of Addiction Services and Supports ("OASAS"). Plaintiffs Schick and Lipschutz executed a guaranty in connection with Revcore's lease.

Plaintiffs contend that because of the pandemic, it was forced to close down in-person services and OASAS failed to provide Revcore with sufficient funding to pay the rent. They maintain that they have tried to negotiate with defendant about the lease, but that defendant has refused to reach an agreement to permit Revcore to stay in the premises.

Plaintiffs insist that they exercised a provision in the guaranty that permitted them to accelerate the expiration of the lease and that they sent a surrender notice to defendant. They point out that they paid the full amount that appeared on the most recent invoice prior to the surrender notice (dated June 8, 2021).

Defendant claimed, in a letter dated June 15, 2021, that plaintiffs had not paid certain fees and, therefore, the surrender notice was ineffective (NYSCEF Doc. No. 26). It asserted that plaintiffs owed late fees, legal fees, an unamortized broker commission, an unamortized free rent period, and an unamortized landlord contribution (all of which totaled over $1 million) (*id*.).

Plaintiffs disagree with defendant's view. They insist that they paid what was included in the most recent invoice prior to the surrender notice and defendant cannot hold them in default based on amounts not charged. Plaintiffs insisted that the claw back expenses (the additional amounts claimed by defendant) are not required to be paid under the terms of the guaranty until the expiration of the lease under the surrender notice (December 31, 2021).

Plaintiffs contend that they are entitled to summary judgment and that they properly exercised their rights to terminate under certain provisions of the guaranty. They claim there is no basis for defendant to seek the payment of claw back expenses before they were able to send a surrender notice.

In opposition, defendant characterizes this action as a "Hail Mary" attempt by plaintiffs to reduce the amount that the guarantors might owe. It points out that no discovery has occurred and that it should be able to seek documents regarding OASAS funding as well as plaintiffs' financial condition. Defendant argues that a few affidavits from plaintiffs are not sufficient to grant their motion for summary judgment.

In reply, plaintiffs insist that their profit and loss statements show that they did not receive sufficient funding from OASAS to continue operations and, therefore, were entitled to seek expiration of the lease. Plaintiffs argue that no discovery is necessary because defendant has now received all relevant documentation.

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]).

Here, plaintiffs claim that they sent a surrender notice under paragraphs 2(A) and 3(C) of the guaranty. Paragraph 2(A) provides that:

> "Notwithstanding anything contained in Paragraph 1 hereof, in the event that (a) Tenant is not in default under any of the terms of the Lease beyond the expiration of notice and cure period, both when the Surrender Notice (referred to below) is given and on the Final Day (defined below), and (b) Tenant gives written notice ("Surrender Notice") by certified mail, return receipt requested or by reputable overnight carrier with signature requested, to the Landlord at Landlord's address in the same manner as set forth in the Lease, that Tenant will vacate the Premises on or prior to the last calendar day (the "Final Day") of the sixth (6^{th}) calendar month after the month in which the Surrender Notice is actually received by the Landlord, and (c) Tenant performs all of the conditions set forth in subparagraphs (i) through (iv) below (the "Release Conditions"), on or before the Final Day, TIME BEING OF THE ESSENCE then (and only in such circumstances) Guarantor shall be released from the Guaranteed Obligations accruing after the Final Day under the provisions of Paragraph 1 of this Guaranty. The Release Conditions are as follows, i.e., Tenant shall have:
>
> (i) Vacated and surrendered the Premises to the Landlord, broom clean and vacant; and in the condition required under the Lease; and
> (ii) Delivered the keys to the Premises to the Landlord or its managing agent; and
> (iii) Paid to Landlord the Rent Guaranty to and through the Final Day, and removed, or caused to be removed, all Mechanic's Liens and violations of record; and
> (iv) Paid to Landlord all reasonable costs and expenditures incurred by Landlord to enforce this Guaranty and the Lease, including, but not limited to reasonable legal fees incurred by Landlord pursuant to the provisions of the Lease" (NYSCEF Doc. No. 21).

Paragraph 2(B) states that: "In the event the Guarantor shall exercise the rights set forth in this Guaranty, the Rent Guaranty shall also be deemed to include (x) the unamortized portion of the Free Rent Period, (y) the unamortized portion of the Broker Commission, and (z) the unamortized portion of the Landlord Contribution" (*id*.).

Clearly, these two paragraphs suggest that if the guarantors "exercised the rights" (or sent the surrender notice), they would be responsible for the items listed in defendant's response to the surrender notice. That raises an issue of fact that compels the Court to deny the motion. The Court recognizes that plaintiffs argue that they were entitled to send a surrender notice and the Court agrees. However, the wording of the guaranty permitted defendant to seek these additional

monies (although the Court takes no position on whether defendant is actually entitled to the exact amount demanded by defendant). In other words, the Court is unable to find, as demanded by plaintiffs, that defendant was prohibited from seeking these amounts because defendant did not seek such fees earlier. In fact, the series of events occurred in accordance with the guaranty: plaintiffs sent a surrender notice and then the defendant sought these fees after plaintiffs exercised their rights under the guaranty. The Court also questions how these unamortized amounts could have been billed before the defendant received the surrender notice.

Section 3(C) states that "Notwithstanding anything to the contrary contained herein, in the event the Guarantor shall be required to exercise the rights set forth in this Guaranty solely as a result of Tenant's failure to obtain sufficient funding from the New York State Office of Alcoholism and Substance Abuse Services to continue to operate its business in the Premises for Tenant's Permitted Use and demonstrates same to Landlord, then, provided Guarantor comply with all of the terms and conditions set forth in this Guaranty on the Final Day, the Lease shall terminate as though the Final Day were the Expiration Date set forth in the Lease" (*id.*).

Contrary to plaintiffs' arguments, this provision absolutely requires that there be discovery. The phrase "sufficient funding" from OASAS demands that defendant is able to explore this issue (make discovery requests and hold depositions). This phrase does not lend itself to determinations before any discovery has occurred. Plaintiffs' submission of a profit and loss statement on a motion for summary judgment (filed before there has even been a preliminary conference) is not sufficient at this stage of the litigation. It may be that discovery reveals that plaintiffs properly invoked their rights to terminate the lease, but the Court cannot yet reach that conclusion as a matter of law.

Accordingly, it is hereby

ORDERED that the motion by plaintiffs for summary judgment is denied.

Remote Conference: January 12, 2022.

11/5/2021
DATE

ARLENE BLUTH, J.S.C.

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