PWE (Multi) QRS 14-85 Inc. v J-M Mfg. Co., Inc.
2023 NY Slip Op 31740(U)
May 23, 2023
Supreme Court, New York County
Docket Number: Index No. 652983/2022
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** ***Justice*** **PART** **07**

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PWE (MULTI) QRS 14-85 INC.,

Plaintiff,

- v -

J-M MANUFACTURING COMPANY, INC.,

Defendant.

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INDEX NO. 652983/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISS.

Greenberg Traurig, LLP, New York, NY (Daniel J. Ansell, Hal N. Beerman, and Jarret S. Meskin of counsel), for plaintiff.
Dorsey & Whitney LLP, New York, NY (Kaley McNeely of counsel), for defendant.

Gerald Lebovits, J.:

Defendant-guarantor J-M Manufacturing Company, Inc. d/b/a JM Eagle, as Successor in Interest Via Merger to PW Eagle, Inc., moves under CPLR 3211 (a) (4) to dismiss the complaint of plaintiff-landlord PWE (Multi) QRS 14-85 Inc. In the alternative, defendant moves under CPLR 3211 (a) (4) to stay this action pending the resolution of the prior-filed action in Utah.

BACKGROUND

PWE is the landlord of four commercial buildings located in Utah, California, Washington, and Oregon. In 2002, PW Eagle, Inc. (tenant), and landlord entered into an agreement under which tenant leased the four buildings from landlord for a term expiring February 28, 2022. (NYSCEF No. 18 [lease agreement].) In 2007, guarantor J-M Manufacturing guaranteed tenant's obligations under the lease. (NYSCEF No. 19 [guaranty and suretyship agreement].) Tenant later merged with guarantor and is currently doing business as "JM Eagle." (NYSCEF No. 13 at 2.)

The lease gives tenant the option to buy the buildings for fair-market value if tenant is not in default. The lease provides that if tenant exercises the purchase option but the parties cannot reach agreement on the fair market value, they will each select an appraiser. If the parties cannot determine the fair market value for the premises by the lease expiration date, then the lease is extended and remains in full force and effect until tenant closes on the purchase option.

On April 2, 2021, tenant notified landlord that it intended to exercise the purchase option. The parties were unable to reach agreement on the premises' fair market value, so they each retained an independent appraiser. On July 2, 2021, tenant commenced an action in Utah District Court for declaratory relief concerning the meaning of "fair market value" and an injunction staying the appraisal process pending the Utah court's decision.[1] In its amended complaint in the Utah action, tenant alleged that the parties are unable to agree on a fair market value because landlord intends to instruct its appraiser to include "additional rent" in the valuation, which would lead to "an unearned windfall" to landlord. (NYSCEF No. 7 at ¶ 10 [Utah amended complaint].)

After tenant's commencement of the Utah action, landlord agreed that additional rent would not be included in the final valuation "[i]n the interest of completing the transaction expeditiously." (NYSCEF No. 21 at 4 [landlord's memorandum of law in opposition].) On May 5, 2022, the appraisers' valuations set the fair market value at $53.5 million. And landlord subsequently advised tenant that it was ready to close on the purchase option on June 3, 2022. According to landlord, however, tenant disputes the fair market value determination and refuses to close on the sale of the buildings. Landlord further asserts that because the parties did not compute the premises' fair market value until after the lease's expiration, the term of the lease is automatically extended and remains in full force and effect as of March 1, 2022, and continuing until tenant closes. (NYSCEF No. 6 at ¶ 21.)

Landlord filed its initial answer and counterclaim in the Utah action on January 3, 2022. On August 1, 2022, landlord filed a proposed amended counterclaim that was subsequently filed as an operative pleading on August 24, 2022. The amended counterclaim seeks (1) specific performance of the purchase option; (2) damages for tenant's refusal to close on the purchase option; (3) damages for tenant's "failure to maintain the Buildings"; (4) damages for tenant's breach of the implied covenant of good faith and fair dealing; (5) declaratory judgment that landlord is entitled to possession of the buildings if tenant fails to close; and (6) a writ of restitution ejecting tenant if he fails to close. (NYSCEF No. 21 at 5.) On October 10, 2022, the parties stipulated to extend fact discovery in the Utah action until January 3, 2023. (NYSCEF No. 13 at 4.)

Landlord commenced this action on August 18, 2022. Landlord's complaint alleges that guarantor is liable (1) for tenant's unpaid rent from March 1, 2022, through the closing on the purchase option, and (2) for attorney fees, costs, and expenses incurred by landlord in enforcing its rights under the guaranty. (NYSCEF No. 6 at ¶¶ 22, 24, 27, 33 [complaint].) Guarantor now moves under CPLR 3211 (a) (4) to dismiss this action, or alternatively for a stay pending the resolution of the Utah action. Guarantor's request for a stay of this action is granted.

DISCUSSION

Under CPLR 3211 (a) (4), a party may move to dismiss on the ground that "there is another action pending between the same parties for the same cause of action." In deciding the

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[1] *See J-M Manufacturing Company, Inc., dba JM Eagle v PWE (Multi) QRS 14-85, Inc.*, Utah Dist. Ct., July 2, 2021, Faust, J., Index No. 210903495.

motion, a "court need not dismiss . . . but may make such order as justice requires." (CPLR 3211 [a] [4].) To meet the rule's requirements, there must "be sufficient identity as to both the parties and the causes of action asserted in the respective actions." (*White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 93 [1st Dept 1997].) This criterion is lacking "where the relief demanded is antagonistic and inconsistent or the purposes of the two actions are entirely different." (*Id.* at 94 [internal quotation marks omitted].)

In this motion, guarantor argues that this court must dismiss landlord's complaint or stay this action under CPLR 3211 (a) (4), because the Utah action—commenced a year before this action—"involves the same parties, substantially similar claims, and the same underlying facts as this action." (NYSCEF No. 13 at 1.) Further, guarantor asserts that as "a buyer in possession" it has "no obligation to pay rent while parties litigate the meaning of fair market value under the lease." (*Id.*)

Landlord, however, asserts that dismissal is improper. Landlord emphasizes that the guaranty's forum-selection clause mandates that this action be brought in New York and that the guaranty lacks any requirement that landlord first litigate its claims against tenant. Landlord further argues that this action and the Utah action are not sufficiently alike to warrant dismissal under CPLR 3211 (a) (4). (NYSCEF No. 21 at 2 ["Unlike PWE's claims in this Action to enforce the Guaranty, the Utah Action was commenced by Tenant against PWE to resolve a dispute over a purchase option under the Lease. Notably, the Utah Action does not include any cause of action for breach of Guaranty or a claim to recover rental arrears."].)

This court will first address whether dismissal under CPLR 3211 (a) (4) is available given the guaranty's forum-selection clause. If the court finds that it may consider applicability of the "first-in-time" rule, the court will then address whether the similarities between the actions warrant either dismissal of this action or a stay pending resolution of the Utah action.[2]

1. **Whether the Guaranty's Forum-Selection Clause Precludes Consideration of Guarantor's Motion**

The guaranty's forum-selection clause provides that any action "arising out of or relating to this Guaranty shall be instituted in any federal or state court in New York, New York." (NYSCEF No. 19 at § 4.10 [b] [guaranty and suretyship agreement].) Landlord argues that guarantor's attempt to move under the first-in-time rule is futile because the rule "does not apply to disputes that are governed by mandatory forum selection and exclusive jurisdiction clauses." (NYSCEF No. 21 at 7.) But the cases cited by landlord do not support its argument.

In the cases cited by landlord, the parties' agreement included a mandatory forum-selection clause, the first-filed action was brought in a forum that was improper under that clause, and the second action was brought in the proper forum. In *that* posture, courts have held

[2] The CPLR 3211 (a) (4) inquiry also calls for an assessment "whether the litigation and the parties have sufficient contact with this State to justify the burdens imposed on our judicial system." (*Flintkote Co. v American Mut. Liab. Ins. Co.*, 103 AD2d 501, 506 [2d Dept 1984].) The parties do not address this issue. This court therefore does not discuss it either.

that the first-filed action (brought in the wrong place) cannot be used as the basis for a CPLR 3211 (a) (4) dismissal of the second action (brought in the right place). (*See Carlyle CIM Agent, L.L.C. v Trey Resources I, LLC*, 148 AD3d 562, 564 [1st Dept 2017] [concluding that instituting the Oklahoma proceeding was a "defined breach" of the forum-selection clauses, and thus the court may not "dismiss the New York actions pursuant to CPLR 3211 (a) (4) so as to consolidate them with the Oklahoma proceeding"]; *Posadas de Puerto Rico Assoc., LLC v Condado Plaza Acquisition, LLC*, 2020 NY Slip Op 32176[U], at *6-7 [Sup Ct, New York County 2020].)

Here, on the other hand, both the lease and guaranty contains forum-selection clauses at issue, and both the Utah action and this action were brought in accordance with the applicable forum-selection clause. In these circumstances, this court sees no reason why the forum-selection clause in the guaranty should render the first-in-time rule "irrelevant" to this court's analysis, as landlord suggests. (*Posadas de Puerto Rico Assoc.*, 2020 NY Slip Op 32176[U], at *7.)

Indeed, guarantor does not dispute that landlord's claims under the guaranty must be brought in New York. (NYSCEF No. 22 at 1 [defendant's reply memorandum of law].) Nor does guarantor dispute landlord's assertion that landlord had the right under the guaranty to first bring its claims against guarantor, rather than tenant. (*See id.* at 2 ["Plaintiff was free to bring those claims either before or after asserting claims in the Utah Action."].) Rather, guarantor argues that the actions are sufficiently similar so that permitting both to proceed would "be a waste of judicial (and the parties') resources" and would "present a real risk of divergent rulings." (*Id.*)

Because the court concludes that the guaranty's forum-selection clause does not render the first-in-time rule inapplicable for CPLR 3211 (a) (4) purposes, this court must next consider whether the rule applies.

2. Whether the Parties are the Same

Guarantor argues that the parties are identical because J-M Manufacturing and PW Eagle merged and are now one entity. (NYSCEF No. 13 at 7 [arguing the parties are the same because "PWE and JM Eagle" are the parties to both actions].) Landlord asserts that although the parties might have merged, they still retain separate rights and obligations as guarantor under the guaranty and tenant under the lease. The court agrees with guarantor.

Although landlord is correct that JM Eagle's dual roles as guarantor and tenant confer different rights and obligations, these differences pertain to the identity of the actions, not the parties. (*See White Light Prods.*, 231 AD2d at 94 [finding CPLR 3211 (a) (4) inapplicable where "[t]he purposes of the two actions are entirely different"] [internal quotation marks omitted], citing *Matter of Sullivan*, 289 NY 323, [1942] [actions brought in individual and representative capacity]; *Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 568 n 4 [1984] [concluding that "there is no bar" under CPLR 3211 (a) (4) to a stockholder's institution of an appraisal proceeding and his institution of an action seeking equitable relief in his individual capacity because "[t]he two claims are not identical"].)

3. Whether the Actions and Relief Sought are Substantially the Same

Landlord argues that the two actions are insufficiently similar under the first-in-time rule. Landlord asserts that although the Utah action deals with interpretation of the lease's purchase option, this action concerns guarantor's liability under the guaranty for tenant's default in rent. Guarantor, on the other hand, argues that the two actions arise from tenant's alleged breach of the lease, including its failure to pay rent, and that both seek the courts' intervention to interpret and enforce the lease. According to guarantor, the similarities between the cases warrant this court's granting guarantor's CPLR 3211 (a) (4) motion for dismissal or a stay. The court agrees.

Landlord states that "New York courts have held that claims to enforce a guaranty are distinct from claims against the underlying obligor for the purposes of CPLR 3211 (a) (4)." (NYSCEF No. 21 at 11.) For support, landlord cites to *Island Props., LLC v Calabretta* (2011 NY Slip Op 33520 (U] [Sup Ct, NY County 2011]), in which the court denied the (a) (4)-motion to dismiss because the first action sought to recover possession of the premises under the lease and the second sought to recover unpaid rent under the guaranty. But in that case, the court's decision was not based solely on the differences in contractual rights and obligations asserted in the actions. Instead, the court also emphasized the differences in relief sought—a monetary judgment in that action and a possessory judgment in the prior action—and plaintiff's inability, as a matter of law, to obtain monetary relief in the summary proceeding. (*Island Props.*, 2011 NY Slip Op 33520[U], *3-4.) Moreover, defendant in the *Island Props.* action was not a party to the prior summary-judgment proceeding. (*Id.* at *3.) That is not the case here.[3]

In this action, landlord seeks guarantor's payment of tenant's rent arrears pursuant to guarantor's obligations under the guarantee. Landlord is correct to the extent that the prior action differs from the current action in that it does not include claims concerning the guaranty and claims against JM Eagle as guarantor. But the relief landlord seeks under the guaranty—payment of rent having accrued allegedly between March and August 2022—is relief that is also available under the lease and thus available in the prior action. Of course, neither the lease nor guarantee requires that landlord pursue its claim to rent against tenant first. But as plaintiff notes, landlord already "chose to assert [these] claims in the Utah Action *before* commencing this action." (NYSCEF No. 22 at 2 [emphasis in original].)

Landlord's counterclaims do not include a cause of action expressly requesting repayment of rent. Landlord's sixth cause of action for unlawful detainer, however, provides for this relief. Landlord's unlawful-detainer claim seeks damages under Utah Code Ann. § 78B-6-

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[3] Landlord also emphasizes the decision in *31 East 28th Street Note Buyer LLC v Terzi* (2020 NY Slip Op 31432[U], *3 [Sup Ct, New York County 2020]), in which the court stated that "[i]t is beyond cavil that an action maintained against a Guarantor may be maintained separately from an action against an obligor." But in that case, the first-in-time action concerned the foreclosure of mortgages under mortgage contracts based on obligor's alleged default and the later action concerned guarantor's liability for the default under the note and guaranty. (*31 East 28th Street Note Buyer LLC*, 2020 NY Slip Op 31432[U], *1, 3.) This is quite different from the situation presented here, where one action concerns tenant's obligations under a lease and the other concerns guarantor's guarantee of the performance of those obligations.

811 (2) for "unlawful detainer, waste of the premises during the tenancy, amounts due under the Lease, and the abatement of the nuisance by eviction." (NYSCEF No. 10 at ¶ 55.) And Utah courts have consistently held that "[d]amages for unlawful detainer include lost rental value." (*Martin v Kristensen*, 450 P3d 66, 74 (Utah App 2019], citing *Forrester v Cook*, 77 Utah 137, 292 P 206, 214 [1930] ["While damages may not be restricted to the rental value and may include more, yet the rental value during the unlawful withholding of possession is the *minimum* of damages."] [emphasis added].) Moreover, landlord's supplemental initial disclosures state that landlord "claims damages . . . for delinquent rent for the four leased properties" together with interest and attorney fees. (NYSCEF No. 24 at 5.)

Although landlord's proffered legal theories in the Utah action and this action may differ, this court concludes that the relief sought is sufficiently similar to implicate the first-in-time rule. (*See Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009] [stating that under the rule, "the precise legal theories presented in the first action" need not "also be presented in the second action; rather, it is sufficient if the two actions are sufficiently similar and that the relief sought is the same or substantially the same"] [internal quotation marks omitted].)

Further, if this action were to proceed, there would be a significant risk of conflicting verdicts concerning whether tenant is obligated to pay rent. The Utah action concerns interpretation of "fair market value" as it is set forth in section 29 of the lease. Tenant's complaint specifically seeks clarification of the phrase in section 29 (c). But the Utah court's analysis on the issue will likely also impact interpretation of section 29 (b), under which landlord asserts its entitlement to rent. (NYSCEF No. 6 at ¶ 12 [landlord's complaint] ["Lease Paragraph 29 further provides that if the Fair Market Value is not determined by the Initial Expiration Date, the Lease is extended and remains in full force and effect until Tenant ultimately closes on the Purchase Option."].) Moreover, JM Eagle claims in this action that it is a buyer in possession and thus has "no obligation to pay rent while parties litigate the meaning of fair market value under the lease." (NYSCEF No. 13 at 1.) Were this court to agree, but the Utah court to conclude otherwise, the result would be "vexatious litigation," "duplication of effort," and "divergent rulings on similar issues" (*White Light Prods.*, 231 AD2d at 96)—concerns the first-in-time rule seeks to avoid.

CPLR 3211 (a) (4) thus compels this court to defer to the first-in-time court. And this court grants guarantor's motion to the extent that it seeks a stay of the action. There is a possibility that the Utah court will uphold landlord's claim to rent during the pendency of the action, but that landlord will fail to obtain such relief against tenant. As landlord rightly notes, it can assert claims against guarantor only in New York. This action is therefore stayed pending a final determination in the Utah action. (*See Lawler v TropWorld Casino & Entertainment Resort*, 238 AD2d 383, 383 [2d Dept 1997] ["Where there is a prior action pending in another State and there is a question as to whether the parties can be afforded full relief therein, the preferred course is to stay."].)

Accordingly, it is

ORDERED that defendant's motion to dismiss under CPLR 3211 (a) (4) is granted to the extent of staying further proceedings in this action, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may move to vacate or modify this stay upon the final determination of the action known as *J-M Manufacturing Company, Inc., dba JM Eagle v PWE (Multi) QRS 14-85, Inc.*, Index No. 210903495, pending before the Third Judicial District Court of Utah; and it is further

ORDERED that defendant is directed to serve a copy of this order with notice of entry on plaintiff and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within 10 days from entry and the Clerk shall mark this matter stayed as herein provided.

5/23/2023
DATE

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