Wells Fargo Fin. Leasing, Inc. v First Capital Real Estate Advisors, LP
2017 NY Slip Op 32522(U)
November 9, 2017
Supreme Court, New York County
Docket Number: 655637/2016
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART 58
Justice

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WELLS FARGO FINANCIAL LEASING, INC.,

Plaintiff,

- v -

FIRST CAPITAL REAL ESTATE ADVISORS, LP A/K/A UNITED REALTY ADVISORS, L.P., JACOB FRYDMAN

Defendant.

INDEX NO. 655637/2016

MOTION DATE 6/30/2017

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 46, 47

were read on this application to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, it is

Decided that the motion seeking a default judgment against First Capital is granted and the motion seeking judgment against Jacob Frydman is also granted. The facts are not in dispute. Defendant First Capital a/k/a United Realty and TAMCO Capital Corporation entered into a commercial equipment lease. Pursuant to the lease, First Capital leased certain equipment and was supposed to make 60 payments of $1,947.00 for a total of $116,820.00. The lease contained an acceleration provision that permitted an acceleration of the amount due if payments were not made. Defendant Frydman signed the lease on behalf of the corporation and signed a separate personal guaranty. TAMCO assigned its rights under the lease to plaintiff. First Capital made a number of payments but in February 2016, plaintiff brought an action against both United Realty

after First Capital failed to make payments and sought the accelerated amounts due. In March 2016, plaintiff and defendant United Realty executed a settlement where United made a large payment and was brought current. Plaintiff agreed to not accelerate the total amount due. Defendant Frydman was not a party to the settlement agreement.

Plaintiff brought this second action following additional missed payments. Plaintiff alleges that 31 out of the 60 payments were made but defendant has failed to make payments since the September 2016 payment was due. Accordingly, plaintiff seeks the balance of the total amount due of $52,698, plus pursuant to the contract (a) interest in the amount of one and one-half percent since September 29, 2016, (b) plus a late fee of $194.70, (c) plus the present discounted value of the equipment in the amount of $9,668.73, (d) plus taxes in the amount of $5,5:5.10 and (e) reasonable attorneys' fees. Defendant First Capital/United has not appeared. Defendant Frydman appeared and denied the allegations. Frydman also asserted one affirmative defense that he was not a party to the March 2016 settlement agreement and should be deemed discharged from any obligation to plaintiff as a result of it. Frydman also asserted cross-claims against the non-appearing co-defendant First Capital.

Plaintiff filed the instant motion seeking a default judgment against First Capital and summary judgment against Frydman. In support of the motion, plaintiff submitted the affidavit Rocky Hardy, a loan adjustor for plaintiff, the lease, the guaranty and the assignment of the lease. In opposition, defendant submitted the affidavit of Frydman. In the affidavit, Frydman argues that he did not consent to the settlement agreement and because the settlement de-accelerated the debt, it has impacted him and he should be discharged from his obligations under the guaranty. Similarly, the settlement agreement contained a release from United to plaintiff which should also discharge Frydman's obligations under the guaranty.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Here, there is no dispute of material facts. Defendant Frydman sole argument is that the settlement agreement between United and plaintiff impacted Frydman's obligations. Specifcally, that "where an obligee materially alters the terms of the contract and increases the risks imposed on the surety [or guarantor] by such acts as modifying the duties of the principal [or] extending the time for the principal's performance" – as here – the surety [or guarantor – here Mr. Frydman] ". . . is relieved of its obligation." 63 N.Y. Jur. 2d Guaranty and Suretyship § 190 (emphasis added)." Further, "the rule that an extension of the time of payment of the debt without the consent of a surety bound for its payment discharges the surety is applied without regard, at least in the case of an uncompensated surety, to whether the surety suffers substantial injury as a result of the extension, or it works to his or her detriment." Id., § 205."

Defendant Frydman's argument is without merit. First of all, the settlement agreement did not materially alter the terms of the contract, increase the risks, modify the duties or extend the time of payment under the contract. The settlement agreement put the parties in the exact same position that they were in prior to the initial default. Arguably, the settlement agreement actually improved Frydman's position in plaintiff agreeing not to seek the immediate payment of all monies due and giving another chance. Further, even if the terms were modified in a negative manner, in the guaranty Frydman had already agreed and that he consented to modifications to the lease. Thus, as there remains no question of fact, summary judgment is granted to plaintiff. Defendant Frydman has not cross-moved for a default judgment against his non-appearing co-defendant Accordingly, it is therefore

ORDERED, that a default judgment is awarded to plaintiff against the non-appearing defendant First Capital Real Estate Advisors, LP A/K/A United Realty Advisors, L.P. in the amount of $52,698, plus pursuant to the contract (a) interest in the amount of one and one-half percent since September 29, 2016, (b) plus a late fee of $194.70, (c) plus the present discounted value of the equipment in the amount of $9,668.73, (d) plus taxes in the amount of $5,5.5.10, plus costs and disbursements; and it is further

ORDERED, that plaintiff is awarded summary judgment against defendant Frydman in the amount of $52,698, plus pursuant to the contract (a) interest in the amount of one and one-half percent since September 29, 2016, (b) plus a late fee of $194.70, (c) plus the present discounted value of the equipment in the amount of $9,668.73, (d) plus taxes in the amount of $5,5.5.10, plus costs and disbursements; and it is further

ORDERED, that the cause of action for an award of reasonable attorney's fees is granted as against defendants and the claim for fees is severed. An inquest/trial is granted to

determine the amount of fees to be awarded. Plaintiff shall cause the matter to be placed upon the calendar for such trial. Plaintiff shall, within 20 days from the date of this order, serve a copy of this order upon (counsel for) all parties hereto by regular mail and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

This constitutes the decision and order of the Court.

11/9/2017
DATE

DAVID BENJAMIN COHEN, J.S.C.
HON. DAVID B. COHEN
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED	[ ]	DENIED	[ ]	NON-FINAL DISPOSITION	
	[X]	GRANTED			[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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