26 Ct. Assoc. LLC v Tenenbaum
2024 NY Slip Op 34035(U)
November 14, 2024
Supreme Court, Kings County
Docket Number: Index No. 513029/2023
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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26 COURT ASSOCIATES LLC,

Plaintiff, Decision and order

- against - Index No. 513029/2023

MARTIN TENENBAUM ESQ.,

Defendant, November 14, 2024

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #5 & #6

The plaintiff has moved seeking to strike the defendant's answer for the failure to comply with a court order. The defendant has cross-moved seeking to dismiss the complaint pursuant to CPLR §3211. The motions have been opposed respectively. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, on April 23, 2009 the plaintiff and an entity called Wishful Thinking Inc., entered into a lease extension concerning rental space located at 26 Court Street in Kings County. The defendant Martin Tenenbaum and David Berger both guaranteed the rental payments. The lease expired on September 30, 2020. On September 3, 2020 Mr. Berger sent an email to the defendant which indicated that rental checks for half of July and half of August were mailed and that "this concludes my rental obligations for the penthouse, and the lease (and my guarantee) for Wishful Thinking Realty is terminated. Rent for September, and going forward, is to be a flat $4,000 and

billed only to Tenenbaum & Shivers LLP" (see, Email dated September 3, 2020 sent 4:32 PM [NYSCEF Doc. No. 12]). A few days later a representative of the defendant sent a return email to Mr. Berger which stated "correct" (see, Email dated September 8, 2020 sent 10:40 AM [NYSCEF Doc. No. 13]). A few weeks later the defendant sent the plaintiff an email which included a lease amendment for the rental space. The amendment was never executed between the parties and while the defendant paid the rent through the end of 2020 he did not pay any rent thereafter until his departure in February 2022. This lawsuit was commenced and the plaintiff has asserted causes of action seeking rent owed in the amount of $56,000. The lawsuit has been filed against the defendant in his individual capacity as the guarantor of the lease.

The defendant moves seeking to dismiss the action on the grounds the guaranty executed by the defendant cannot bind him for outstanding rents regarding changed circumstances whereby Berger was no longer a co-guarantor.

It is well settled that a defendant may not file a motion to dismiss when such motion has already been filed and the decision denied such relief on the merits (Newlands Asset Holding Trust v. Vasquez, 218 AD3d 786, 193 NYS3d 258 [2d Dept., 2023]). The earlier decision seeking summary judgement was denied on the merits. Thus, this motion is improper.

In any event even considering the merits of the motion it is clear this action cannot be dismissed. First, the lease amendment extending the terms of the lease for five years with an automatic five year extension dated April 23, 2009 is only guaranteed by the defendant and not Burger at all. More importantly, the guaranty does not merely guaranty payment but also the "full performance and observance of all the covenants, conditions and agreements therein provided to be performed and observed by Tenant" (see, Guaranty dated April 24, 2009 [NYSCEF Doc. No. 2]). Thus, there are surely questions of fact whether the defendant satisfied all the covenants and conditions of the lease including vacating the premises upon the termination of the lease. Thus, there are surely questions whether the guaranty actually implicates the defendant's promises. Therefore, the motion seeking to dismiss the lawsuit is denied.

Turning to the motion to strike the answer, it is true the court has already issued an order that if the defendant failed to participate in discovery the answer would be stricken. The cross-motion filed has delayed the effect of that order. Therefore, the defendant shall be afforded thirty more days in which to comply with all discovery and appear for a deposition. There will be no excuses accepted unless the plaintiff consents. If the discovery is not concluded and a deposition held within thirty days of receipt of this order the plaintiff will be

permitted to submit a proposed order striking the answer. There will be no need for any further motion practice.

So ordered.

ENTER:

DATED: November 14, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC