

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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VANDERGRAND PROPERTIES CO., L.P.,

Plaintiff,

- v -

SUSAN WARNOCK, ROBERT BECKER

Defendants.

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INDEX NO. 150336/2020

MOTION DATE 10/29/2021

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 152, 153, 154, 155,

were read on this motion to/for

JUDGMENT - SUMMARY

The motion by plaintiff for summary judgment is granted and the cross-motion by defendant Becker to consolidate is denied.

Background

Plaintiff owns a building in which nonparty Thirteenth Floor Group, LLC (the “Tenant”) entered into a lease for the entire rentable portion of the thirteenth floor. Defendants Becker and Warnock executed guarantees for the lease (which was eventually amended to include space on the fifteenth floor).

Plaintiff contends that the Tenant stopped paying rent and now owes over \$1 million and seeks recovery from defendants.

In opposition and in support of his cross-motion to consolidate, Becker complains about purported construction work performed by plaintiff associated with a WeWork lease in the building. He insists that construction workers monopolized elevators, caused excessive noise

and disrupted the Tenant's meetings. Becker also claims that he had concerns that WeWork would change the building's "character" and move it away from its "old school" environment.

Becker also insists that there are issues of fact that compel the Court to deny the instant motion. He argues that it remains to be seen what, if anything, the Tenant owes under the lease. He insists that plaintiff has unclean hands because it failed to notify the Tenant about WeWork before the Tenant entered into an amended lease.

Defendant Warnock also offers opposition and joins in Becker's cross-motion to consolidate. She points out that plaintiff failed to comply with 22 NYCRR 202.8-g by not attaching a statement of material facts. Warnock also argues that plaintiff breached the lease because of the construction.

In reply, plaintiff argues that nothing offered by the defendants provides a basis for the Tenant to not pay the rent. It insists that the Tenant has an unconditional obligation to pay the rent and it failed to do so. Plaintiff argues that the guaranty is absolute and that the guaranty has a "no set-off" provision. With respect to consolidation, plaintiff argues that the lease bars consolidation of a nonpayment proceeding with any other action brought in court by the Tenant. Plaintiff also argues that the lease bars the Tenant from interposing counterclaims, and it cannot seek an end-run around that provision through consolidation.

Discussion

As an initial matter, the Court observes that it will consider Warnock's opposition even though it appears to be late under the terms of the briefing schedule as this Court prefers to decide motions on the merits. The Court also declines to get involved in the parties' various arguments about deadlines.

That plaintiff did not submit a statement of material facts is not dispositive. The parties are well aware of the facts of this case.

Plaintiff's Motion

Turning to the merits, the Court grants plaintiff's motion. It is undisputed that the Tenant has not paid anything in rent for over a year and continues to occupy the premises. This is not a situation where the Tenant seeks reimbursement for rent paid or even that it paid some amount of rent. Instead, the Tenant seems to argue that construction in the building and the inconveniences that accompanied it somehow justifies not paying any rent despite the fact that the Tenant continues to operate its business out of the subject premises.

The complaints asserted by Becker, which include assertions about the construction, that plaintiff failed to clean the women's bathrooms, that the kitchen was unusable for two months, and that there were various issues with outlets, lighting might justify an affirmative action by the Tenant (which has already occurred) do not raise an issue of fact. They do not constitute a valid defense to not paying the rent. That is simply not how the parties structured their agreement.

As plaintiff points out, the lease provides that the rent has to be paid "without any set-off, offset, abatement or deduction whatsoever (except to the extent otherwise expressly set forth herein)" (NYSCEF Doc. No. 108 § 1.04[A]). And the guarantees provide that "This Guaranty is an absolute and unconditional, guaranty of payment and of performance to the extent set forth in Paragraph I. It shall be enforceable against Guarantor without the necessity of any suit or proceedings on Landlord's part of any kind or nature whatsoever against Tenant" (NYSCEF Doc. Nos. 111, 112 § 2). Section 2(d) observes that the guarantees cannot be affected or diminished by "any lack of validity or enforceability of this Guaranty, the Lease, any other guaranty or any

other circumstance which might otherwise constitute a defense available to Guarantor or Tenant” (*id.* § 2[d]).

In other words, the defendants in this action signed absolute and unconditional guarantees, and the Tenant has not paid the rent. That the Tenant might be entitled to some amount of damages in another action is irrelevant to this case under the terms of the parties’ agreement.

Consolidation

The Court denies the cross-motion to consolidate this case with one commenced by the Tenant and with a summary proceeding in Civil Court. The lease contains a prohibition on consolidation with summary proceedings (NYSCEF Doc. No. 108, § 25.03) so there is no basis to consolidate with the proceeding pending in Civil Court. And the Court finds that there is no reason to consolidate this action with the currently pending Supreme Court action because there are no common questions of law and fact. In this case, the plaintiff alleges (and the Tenant does not dispute) that the Tenant has not paid the rent and so defendants (the guarantors) are liable. Whatever damages, if any, the Tenant might be able to recover due to the construction has nothing to do with this case. As stated above, the terms of the lease are clear: the Tenant has to pay the rent.

Summary

The Court grants the relief requested by plaintiff and awards plaintiff a judgment for \$1,017,033.22. The Court deducted the amount requested for legal fees, severs that issue and will hold a hearing to determine the amount of reasonable legal fees to be awarded to plaintiff.

Although defendants go on, at great length, about all the alleged issues with the construction work at the premises, the fact is that the Tenant has not paid rent for over a year and

remains in the premises. And defendants signed absolute and unconditional guarantees in connection with the Tenant’s lease. Simply put, nothing on these papers justifies the Tenant’s decision to just not pay any rent.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$1,017,033.22 plus interest from August 1, 2021 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the cross-motion by defendant Becker to consolidate is denied; and it is further

ORDERED that the issue of legal fees is severed, and the Court will hold a hearing (to be scheduled by the clerk of this part) to determine the reasonable amount of fees to be awarded to plaintiff.

11/5/2021

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE