SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1357-21

WASHINGTON-HUDSON ASSOCIATES II, LLC,

Plaintiff-Respondent,

v.

TOWN SPORTS INTERNATIONAL HOLDINGS, INC.,

Defendant-Appellant.

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Submitted February 7, 2023 – Decided April 6, 2023

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1609-21.

Massimo F. D'Angelo (Akerman LLP), attorney for appellant.

Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, PC, attorneys for respondent (Arnold K. Mytelka and Raymond M. Patella, on the brief).

PER CURIAM

This appeal arises out of a dispute between a commercial landlord and a guarantor of a tenant's lease obligations. The guarantor, defendant Town Sports International Holdings, Inc. (TSI Holdings), appeals from an order and judgment granting summary judgment and awarding $542,800 to the landlord, plaintiff Washington-Hudson Associates II, LLC (WH Associates). Because there are material disputed facts concerning WH Associates' responsibility to mitigate its damages, we reverse and vacate the order and judgment.

I.

WH Associates owns real property in Hoboken, commonly known as the Court Street Plaza (the Property). Beginning in 1997, TSI Hoboken, Inc. and its successor TSI Hoboken, LLC (TSI Hoboken or Tenant) leased approximately 24,450 square feet in the Property to operate a fitness center.

The lease identified the premises as being in the "building in Hoboken, New Jersey commonly known as Court Street Plaza" located at 221 Washington Street. Under a January 2018 amendment and extension of the lease, the Tenant agreed to continue leasing space at the Property for twenty years. The Tenant agreed to pay WH Associates $45,233.33 in monthly rent for the first five years; $48,183.33 in monthly rent for the next five years; and various amounts in monthly rent for the last ten years, increasing yearly at a fixed rate.

The lease had various provisions addressing the Tenant's and WH Associates' obligations. One of those provisions stated that "no abatement, diminution or reduction" in rent would given to the Tenant for:

> any inconvenience, interruption, cessation or loss of business or otherwise, caused directly or indirectly by any present or future laws, ordinances, orders, rules, regulations or requirements of the Federal, State, county or municipal governments, . . . or by any other cause or causes beyond the control of [WH Associates].

TSI Holdings is the parent corporation of TSI Hoboken. In December 2017, in connection with an amendment and extension of the lease, TSI Holdings gave WH Associates a guaranty (the Guaranty). Under the Guaranty, TSI Holdings "absolutely and unconditionally" guaranteed the "full and prompt payment of [b]ase [r]ent and [a]dditional [r]ent and all other charges and sums payable by Tenant under the [l]ease" to WH Associates if TSI Hoboken defaulted on its obligations under the lease. TSI Holdings' liability under the Guaranty was capped at $542,800.

Beginning in early March 2020, Governor Philip D. Murphy issued a series of executive orders to address the Covid-19 pandemic. In Executive Order 103, issued on March 9, 2020, the Governor declared a public health emergency and a state of emergency in New Jersey. Exec. Order No. 103 (Mar. 9, 2020), 52 N.J.R. 549(a) (Apr. 6, 2020). In Executive Order 104, issued on March 16,

2020, the Governor directed, among other things, all fitness centers in New Jersey to close. Exec. Order No. 104 (Mar. 16, 2020), 52 N.J.R. 550(a) (Apr. 6, 2020).

TSI Holdings contends that the mandatory closure and subsequent restrictions placed on fitness centers devastated TSI Hoboken's business. Consequently, TSI Hoboken stopped paying rent to WH Associates in April 2020, and in September 2020, it filed for bankruptcy in the United States Bankruptcy Court for the District of Delaware. Effective as of September 29, 2020, TSI Hoboken rejected its lease with WH Associates in the bankruptcy court. The bankruptcy court order, which acknowledged that rejection, had a schedule attached to it that listed the address for the Property as 59 Newark Street, not 221 Washington Street.

In November 2020, WH Associates filed a proof of claim with the bankruptcy court, asserting a claim for over $1.9 million. WH Associates represented that TSI Hoboken had not paid rent since April 2020 and that TSI Hoboken owed it just over $588,000 in rent from April 2020 through April 2021. According to WH Associates, TSI Hoboken had not vacated the leased space until September 29, 2020, and WH Associates had not re-rented the premises until May 2021.

In April 2021, WH Associates filed this action against TSI Holdings based on the Guaranty. WH Associates contended that TSI Hoboken had breached the lease by not paying rent since April 2020 and by rejecting the lease in the bankruptcy proceeding.

Four months later, in August 2021, WH Associates moved for summary judgment. TSI Holdings filed opposition contending that it should be afforded discovery and that there were material issues of disputed fact. In that regard, TSI Holdings asserted that it needed discovery to determine (1) what lease was rejected by TSI Hoboken in the bankruptcy proceeding because the address for the Property on the lease was different from the address listed in the bankruptcy filing; and (2) whether WH Associates engaged in reasonable efforts to mitigate its damages by re-renting the leased space to another tenant. TSI Holdings also argued that the Covid-19 pandemic constituted an interference by WH Associates or a casualty to the leased space and, therefore, TSI Hoboken was excused from paying rent under the terms of the lease.

The trial court heard argument on the motion on two days: November 19, 2021, and December 3, 2021. On the first day of argument, counsel for the parties discussed the discrepancy concerning the addresses used in the lease and

in the bankruptcy filing. The trial court directed the parties to file certifications to address that issue.

Thereafter, the parties submitted supplemental certifications, and the court heard a second day of argument. In its certification, WH Associates explained that it owned only one building in Hoboken and, therefore, the lease with TSI Hoboken could be only for the Property. The certification submitted by TSI Holdings did not address whether TSI Hoboken had leased space at more than one building in Hoboken from WH Associates. Instead, the certification stated that 221 Washington Street and 59 Newark Street were different addresses, and that discovery was needed to resolve the discrepancy in those addresses.

After reviewing the certifications, the trial court rejected TSI Holdings' certification as a "sham affidavit." The court found that WH Associates owned only one property in Hoboken and, therefore, the lease between WH Associates and TSI Hoboken could have been only for the Property.

The court also found that TSI Hoboken had defaulted on the lease by not paying rent and had breached the lease when it rejected the lease in the bankruptcy court. Therefore, the trial court rejected TSI Holdings' argument that a material issue of fact existed concerning the lease TSI Hoboken had rejected in the bankruptcy proceeding.

In addition, the trial court rejected TSI Holdings' argument that TSI Hoboken had been excused from making rent payments because of the Covid-19 pandemic. The court held that the pandemic was not an "inconvenience" or "interference" by WH Associates under the lease and that the pandemic did not create "the type of impossibility justifying an excuse not to pay rent."

Turning to the issue of mitigation, the trial court took judicial notice of the Covid-19 pandemic and that vaccines had not become available until early 2021. According to the trial court, no reasonable jury could find that WH Associates had failed to mitigate its damages because it could not have been expected to find a new tenant "in the middle of Covid when there's no vaccines."

Consequentially, on December 3, 2021, the trial court stated it would grant WH Associates' motion for summary judgment. Ten days later, on December 13, 2021, the court entered an order and final judgment and awarded $542,800 to WH Associates, which was the full amount of TSI Holdings' liability under the Guaranty. TSI Holdings now appeals from the order and judgment.

II.

On appeal, TSI Holdings argues that the trial court (1) erred in granting summary judgment without permitting TSI Holdings to conduct discovery concerning its defenses; (2) improperly took judicial notice of disputed facts

concerning WH Associates' obligation to mitigate its damages; and (3) failed to consider and permit discovery regarding TSI Holdings' contractual and equitable defenses.

We hold that the trial court correctly rejected TSI Holdings' defenses concerning the alleged discrepancy in the address of the Property and the Covid-19 pandemic. We also hold, however, that the trial court erred in granting summary judgment because there are disputed issues of material facts relating to WH Associates' obligation to mitigate its damages.

We review de novo the grant of summary judgment, applying the same standard as the motion judge. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). That standard requires us to "determine whether 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Ibid. (quoting R. 4:46-2(c)). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). "[The] trial court's interpretation of the law

and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

A. The Address of the Property.

TSI Holdings argues that there is a material issue of fact concerning which lease TSI Hoboken rejected in the bankruptcy proceeding. The address for the building identified in the lease was 221 Washington Street, but the address listed in the bankruptcy filing was 59 Newark Street. The rejection of the lease in the bankruptcy proceeding was important because that rejection constituted a breach of the lease under bankruptcy law. See 11 U.S.C. § 365(g); In re Grand Union Co., 266 B.R. 621, 627 (Bankr. D.N.J. 2001).

The record establishes that there is no material issue concerning the lease rejected in the bankruptcy proceeding. Although there was a discrepancy in the address, there was no dispute that TSI Hoboken leased space in the Court Street Plaza building and that WH Associates owned only one building in Hoboken. Moreover, TSI Holdings never disputed, and offered no evidence disputing, that TSI Hoboken ceased paying rent in April 2020. Consequently, the summary judgment record clearly establishes that TSI Hoboken had breached the lease by

not paying rent and thereby triggered TSI Holdings' obligations under the Guaranty.

B. TSI Holdings' Pandemic Defense.

TSI Holdings argues that the trial court failed to consider its arguments regarding the impact of the Covid-19 pandemic on TSI Hoboken's obligation to pay rent under the lease. We reject this argument and hold that the trial court correctly interpreted the lease. "In interpreting a lease agreement the function of the court is to enforce the lease as written, not to write for the parties a different or better contract." Liqui-Box Corp. v. Est. of Elkman, 238 N.J. Super. 588, 600 (App. Div. 1990).

The lease was clear and unambiguous in providing that there would be "no abatement, diminution or reduction" in rent for "any inconvenience, interruption, cessation or loss of business" caused "directly or indirectly" by government orders "or by any other cause or causes beyond the control of [WH Associates]." The Covid-19 pandemic and Governor Murphy's executive orders fall within the ambit of that provision and preclude both the Tenant and TSI Holdings from claiming that the Covid-19 pandemic or the executive orders excused the obligation to pay rent.

C. WH Associates' Obligation to Mitigate Damages.

"[A] commercial landlord must make 'reasonable' efforts to mitigate its damages after a tenant breaches the lease." Harrison Riverside Ltd. P'ship v. Eagle Affiliates, Inc., 309 N.J. Super. 470, 473 (App. Div. 1998) (quoting McGuire v. City of Jersey City, 125 N.J. 310, 320-21 (1991)). Generally, "[w]hether the landlord's efforts to mitigate its damages were reasonable is a question of fact." Id. at 475.

Normally, "any defense available to the principal [obligor]" against the obligee "is available to the guarantor." 38A C.J.S. Guaranty § 120 (2017); see also Restatement (Third) of Suretyship & Guaranty § 34 cmt. a (Am. Law Inst. 1996) (explaining that to the extent the principal obligor can raise a defense to its duty pursuant to the underlying obligation, the secondary obligor should be able to raise that defense to its secondary obligation). Consequently, unless the terms of a guaranty contract preclude a defense, any defense available to the principal obligor is also available to the guarantor. See Nat'l Westminster Bank N.J. v. Lomker, 277 N.J. Super. 491, 498 (App. Div. 1994) (explaining that "[t]he liability of a guarantor is measured by that of the principal, unless the agreement explicitly provides otherwise").

The parties do not dispute that WH Associates had a burden to mitigate its damages once TSI Hoboken breached the lease. WH Associates contends that it could not mitigate its damages before September 29, 2020, because TSI Hoboken was still in possession of the leased space. After TSI Hoboken vacated the premises, WH Associates claimed it made efforts to re-rent the space but was not able to locate a new tenant until May 2021.

Initially, we note that WH Associates' claims were not supported by certifications or deposition testimony. Instead, those claims were asserted in its briefs. Claims in briefs by counsel do not constitute certified proof and are insufficient to support a summary judgment order. See Sellers v. Schonfeld, 270 N.J. Super. 424, 427 (App. Div. 1993) (noting that on summary judgment, "only the affidavit[s] together with properly certified depositions, answers to interrogatories, or admissions can supply facts outside the record that are not judicially noticeable"); Raday v. Bd. of Educ. of Manville, 130 N.J. Super. 552, 556 (App. Div. 1974) (explaining that material facts "cannot be established by oral argument of counsel or briefs filed with the court, neither of which are verified").

Nevertheless, the trial court found that WH Associates reasonably mitigated its damages from April 2020 to May 2021 by taking judicial notice of

the Covid-19 pandemic. In that regard, the trial court reasoned that no jury could reasonably find that WH Associates could have re-rented the leased space "in the middle of Covid when there's no vaccines and it's a gym in Hoboken."

We hold that the trial court erred in taking judicial notice of those alleged facts. Courts cannot take judicial notice of facts reasonably subject to dispute. See, e.g., Rice v. Miller, 455 N.J. Super. 90, 102 (App. Div. 2018). There is nothing in the record to support the contention that buildings in Hoboken could not be leased to tenants between April 2020 and May 2021 merely because of the Covid-19 pandemic. Instead, that issue requires proofs and evidence concerning WH Associates' efforts to lease the premises and whether there were potential tenants available. Indeed, that issue could involve expert testimony.

TSI Holdings had the right to engage in discovery on the issue of mitigation. We note that the trial court pointed out that discovery had closed by the time it issued its summary judgment ruling. We also note, however, that WH Associates filed its summary judgment motion four months after it filed its complaint. Under those circumstances, TSI Holdings is entitled to reasonable discovery concerning the mitigation issue. See Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 538 (App. Div. 2009) (explaining that when discovery on a material issue is not complete, the respondent should

be given the opportunity to take discovery before the summary-judgment motion is decided); see also New Century Fin. Servs., Inc. v. Oughla, 437 N.J. Super. 299, 315 (App. Div. 2014) (noting that the court "rules allow litigants . . . to prove claims and defenses through discovery").

In summary, we affirm the trial court's rulings rejecting TSI Holdings' defenses on the breach of the lease and the impact of the Covid-19 pandemic. We reverse the order and judgment granting summary judgment to WH Associates because there are material issues of disputed facts concerning mitigation. Accordingly, we remand the matter for discovery and further proceedings.

Reversed and remanded. We do not retain jurisdiction.