SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2172-16T4

TOWER TWO CENTER, LLC c/o CBRE, INC.,

Plaintiff-Respondent,

v.

ATRIUM EXECUTIVE CENTER, LLC,

Defendant,

and

GEORGE DIEMER,

Defendant-Appellant.

Submitted February 28, 2018 – Decided April 6, 2018

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-0948-16.

Cohen, Seglias, Pallas, Greenhall, and Furman, PC, attorneys for appellant (Jonathan A. Cass, on the briefs).

Fox Rothschild LLP, attorneys for respondent (R. James Kravitz, of counsel and on the brief).

PER CURIAM

Defendant George Diemer appeals from the July 22, 2016 and December 16, 2016 orders granting plaintiff's, Tower Two Center, LLC c/o CBRE Inc., motions for summary judgment as to liability and damages, respectively. After a review of the contentions in light of the record and applicable principles of law, we affirm.

In 2012, plaintiff's predecessor[1] and defendant Atrium Executive Center LLC[2] entered into a lease for a commercial space. Several months later, Diemer executed a personal guaranty of Atrium's performance of its lease obligations. The lease required Atrium to pay a monthly rent as well as a share of operating expenses, utilities, real estate taxes, and insurance premiums. Atrium, in turn, rented the space to small business owners for shared office facilities and services.

Atrium stopped making rent payments after the remitted payment in January 2016. Therefore, plaintiff instituted suit against Atrium and Diemer in March 2016 seeking the past due rent and operating expenses. Atrium filed for bankruptcy protection in April 2016. Pursuant to a bankruptcy court order, Atrium

[1] Tower Center II Investment Group, LLC assigned the lease to plaintiff in November 2015.

[2] Atrium did not appear in the trial proceedings and has not participated in this appeal. We, therefore, refer to Diemer as defendant.

vacated the premises in June, and plaintiff began receiving rent payments directly from Atrium's subtenants.

Defendant filed an answer to the complaint on May 13, 2016. In one of numerous affirmative defenses, Diemer indicated that service of process was deficient as the served complaint was missing two pages. As a result, plaintiff's counsel provided a complete copy of the complaint to defendant's counsel on May 17.

On June 6, 2016, plaintiff filed a partial motion for summary judgment on the issue of liability returnable July 8, 2016. The following day defendant served plaintiff with discovery requests. Plaintiff responded to the request for admissions, provided answers to interrogatories, and produced the requested documents on June 20 and 21, 2016. Defendant did not advise plaintiff of any deficiencies in the produced discovery.

The court conducted oral argument on July 22, 2016. Defendant opposed the motion, asserting that because he had not been properly served with the complete complaint, he could not defend himself against all of the claims. He also argued, without specificity, that plaintiff had not produced all of the requested documents. Defendant contended that the summary judgment application was premature, depriving him of the opportunity to take discovery relating to his affirmative defenses.

In an oral decision issued following argument, the judge noted that, in responding to plaintiff's statements of facts, defendant denied each fact, but failed to provide any specificity as to the reason for the denial. The answers generally stated: "denied as legal conclusion." The judge said:

> The movant . . . provided the [c]ourt with a copy of the lease purportedly signed by the defendant. There's no dispute in the response from the defendant . . . whether he signed it or not. There's no affidavit or certification from the defendant saying that he disputes that rent is owed, or that he signed the guarantee, or that [it] is not his signature, or that is not the guarantee . . . that he signed.

The judge found that defendant was the principal of Atrium, he had signed a guarantee that if Atrium did not make the rental payments he would do so on Atrium's behalf, and that both defendant and Atrium failed to make those payments. The judge concluded that defendant had not demonstrated there were material issues in dispute as to whether there was a default of the obligations under the lease. As a result, defendant, as the guarantor, was liable for Atrium's obligations. Summary judgment was granted on the issue of liability.

The discovery end date was October 10, 2016. On October 7, plaintiff filed a motion for summary judgment on the issue of damages. Defendant had not pursued any discovery in the several

months that had elapsed since the July motion. There were no objections to plaintiff's production of documents, nor any requests for depositions. There had been no application to extend discovery. Defendant opposed the motion, reiterating the arguments made in response to the first summary judgment motion. There were no specific arguments challenging plaintiff's statement of the amount due.

During the December 16, 2016 oral argument, the judge queried defense counsel as to whether he was disputing the damages figures posited by plaintiff. Counsel conceded that he was reasserting the same arguments previously made and that he had not undertaken any discovery as to the damages. Therefore, the judge found that there were no material issues of fact, and he granted the summary judgment motion, awarding plaintiff $544,531.54 in damages. This appeal followed.

When evaluating whether summary judgment was proper, we conduct a de novo review, applying the same standard as the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Summary judgment must be granted "if 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." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995).

To defeat summary judgment, the non-moving party must bring forth evidence that creates a genuine issue as to a material fact. See Brill, 142 N.J. at 529. "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted).

Defendant argues on appeal, as he did before the trial court, that summary judgment was erroneously granted because he was not served with a complete copy of the complaint, and he did not have a chance to finish discovery. We are unpersuaded by these arguments.

Insufficient service of process is an affirmative defense, and, therefore, it must be asserted in a defendant's first responsive pleading. See R. 4:6-2(d). A defense based upon insufficient of service of process may also be "raised by motion within 90 days after service of the answer." R. 4:6-3. However, under Rule 4:6-7, a defense based upon insufficient service of process is "waived if not raised by motion pursuant to R. 4:6-3."

Here, although defendant raised the affirmative defense of insufficient service of process in his answer, he did not file a

motion to dismiss on that ground. Instead, he answered the complaint, engaged in discovery and opposed plaintiff's motion for summary judgment as to liability. There was no cross-motion to dismiss based upon insufficient service; defendant only argued that the complete complaint was not served. Moreover, after plaintiff reviewed the answer and noted the affirmative defense as to insufficient service, he provided a full copy of the complaint to counsel. It was sent four days after receipt of the answer. As the judge noted in his decision, defendant "argued that he did know that there was a defect or purportedly a defect in the complaint, but he failed to try to remedy the defect . . . . More importantly, he answered the complaint."

We agree. Defendant had ample opportunity to challenge the sufficiency of service of process before the summary judgment motion was filed as well as during the pendency of that motion. In failing to do so, he waived the defense. Moreover, plaintiff's counsel provided the complete complaint four days after receipt of the answer.

In response to both motions for summary judgment, defendant argued, without specificity, that the motions were premature as he had not been able to fully conduct discovery. It is well established that where discovery on material issues is not complete, the court must afford the non-movant the opportunity to

take discovery before disposition of the motion. See Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2001). However, in order to defeat summary judgment, the non-movant who resists the motion on the grounds of incomplete discovery is required to specify the discovery that is still necessary. Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007).

Here, discovery ended on October 10, 2016, prior to the disposition of the summary judgment motion as to damages. In his opposition to the motion, defendant again made only conclusory allegations that discovery was not complete. He failed to set forth, specifically, what discovery was still required to determine damages. In his decision on the motion, the judge reasoned that defendant "could have cross-moved, requesting that the Court allow a brief period to conduct discovery as to the damages amount, but [he] didn't do that." Instead, he "acquiesced" to the damage figure.

There were no genuine issues of material facts presented by defendant, either as to liability or damages, to defeat the summary judgment motions.

Affirmed.