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

PRESENT: ~~HON. SHIRLEY WERNER KORNREICH~~ Justice PART 54

Index Number : 600664/2006
DIANE FINK MANAGEMENT
vs
MASUKO, OSAMU
Sequence Number : 002
MONEY JUDGMENT

INDEX NO. 600664/06
MOTION DATE 2/22/07
MOTION SEQ. NO. 002
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

FILED
JUN 19 2007
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/12/07

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DIANE FINK MANAGEMENT CO.,

Plaintiff,

Index No.: 600664/06

- against-

DECISION
and ORDER

OSAMU MASUKO

Defendant.

---------- X

KORNREICH, SHIRLEY WERNER, J.:

This action arises from defendant's guarantee of all rent and expenses under a commercial lease between plaintiff and Two Lines Music, Inc. ("Two Lines"). Plaintiff now moves for: (1) summary judgment seeking a money judgment of $145,271.52 which represents the rent for the lease term and expenses; (2) dismissal of defendant's thirteen affirmative defenses and three counterclaims; and (3) attorneys fees. Defendant opposes.

I. *Statement of Facts*

A. *Plaintiff's Proof*

In support of its motion, plaintiff Diane Fink Management Co. ("Fink Management") presents the affidavit of Lawrence Fink, its managing partner demonstrating the following. On May 31, 2001, plaintiff and Two Lines entered into a lease for the ground floor store, basement and sub-basement at 370 Broadway, New York, N.Y. ("the premises"), for a term commencing on June 15, 2001 and terminating on June 14, 2006. On that same date, defendant Osamu Masuko entered into a personal guarantee ("the guarantee") allegedly unconditionally

guaranteeing all payments under the lease. Mr. Fink avers he was present when defendant signed the guarantee.

Two Lines defaulted under the lease in August 2004, and plaintiff commenced a non-payment summary proceeding against Two Lines. On October 24, 2005, plaintiff and Two Lines entered into a stipulation of settlement ("the stipulation"), and a money judgment of $35,321.72 was entered against Two Lines for rent and additional rent for all charges billed as of October 31, 2005. November's rent was forgiven. The stipulation also called for Two Lines to voluntarily vacate the premises by November 30, 2005 and to deliver its keys to plaintiff. Mr. Fink avers that none of the judgment was paid and that Two Lines did not vacate the premises and was subsequently evicted on December 2, 2005.

Mr. Fink further avers that as of the eviction date, Two Lines owed plaintiff additional amounts for rent and/or the use and occupancy which accrued after the stipulation. He contends that Two Lines is liable under the terms of the lease for the remaining balance and additional rent through the expiration of the lease on June 14, 2006 since plaintiff was not able to re-rent the premises until August 2006. Therefore, plaintiff argues, pursuant to the terms of the lease and guarantee, defendant is liable for the outstanding balances owed by Two Lines.

B. *Opposition*

Pro se defendant Osamu Masuko challenges the validity of the guarantee. He claims that he never signed the guarantee and that any production of a signed guarantee by plaintiff is "the product of fraud." In addition, defendant contends that Two Lines' payment of $12,868.40 by check on October 31, 2005 along with plaintiff's retention of Two Lines' security deposit of

$25,736.88 satisfied his obligations. Defendant's verified answer also asserts thirteen affirmative defenses and three counterclaims.

C. *Guarantee*

The guarantee provides:

> guarantor's liability hereunder shall be for the period from the date of commencement of the lease and ending the date the premises are vacated and possession is surrendered to Landlord by Tenant tendering the keys to the premises leaving the same in the condition required in accordance with the lease, and upon surrender of the premises, the guarantors shall be deemed generally release[d] from any claims or liability relating to any period after the date the premises are so surrendered to Landlord; and the guarantors liability under this guarantee shall be limited to [I] any fixed additional rent payable pursuant to the terms of the lease for the period is liable as provided in this paragraph and (ii) any reasonable cost of reasonable expense that may be recoverable by Landlord in accordance with the provisions of this guarantee. Additionally, in the event that Tenant vacates during the first five years of the lease term, [g]uarantor shall pay to landlord the sum of four months of the then existing monthly rental at the time of surrender.

II. *Conclusions of Law*

A *Summary Judgment*

A party moving for summary judgment must make a prima facie showing of entitlement to judgement as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). Once movant has made the requisite showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of material fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003).

A guarantee is an agreement to pay a debt owed by another which creates secondary liability collateral to the contractual obligation. *Midland Steel Warehouse Corp. v. Godinger Silver Art Ltd.*, 276 A.D.2d 341, 343 (1st Dept. 2000). The primary debtor is not a party to the

guarantee and the guarantor is not a party to the initial obligation. *Midland Steel*, 276 A.D.2d at 343. A guarantee like any contract is to be interpreted according to the words of the document. *Louis Dreyfus Energy Corp. v. MG Refining and Marketing, Inc.*, 2 N.Y.3d 495 (2004). "The nature of the obligation depends upon the parties' intention, and where that intention may be gathered from the four corners of the instrument, interpretation of the contract is a question of law." *Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner*, 243 A.D.2d 1, 9 (1st Dept. 1998) quoting *Brewster Transit Mix Corp. v. McLean*, 169 A.D.2d 1036, 1037 (3rd Dept. 1991). Plaintiff has the burden of proving the existence of the guarantee, underlying debt, and the guarantor's failure to perform under the guarantee. *Kensington House Co., v. Oram*, 293 A.D.2d 304, 304-305 (1st Dept. 2002). The guarantor's liability accrues only after default by the principal debtor. *Midland Steel*, 276 A.D.2d at 343.

The validity of a signature on a guarantee is critical because without a memorandum of a promise to pay signed by the party to be charged, a guarantee cannot be enforced. *Lane Crawford Jewelry Center, Inc. v. Diana Han*, 222 A.D.2d 214, 214-215 (1st Dept. 1995). When questioned, the authority of a signature is a triable issue. *Martinez v. Mordolo*, 160 A.D.2d 387, 389 (1st Dept. 1990).

Here, defendant avers in his eleventh affirmative defense that he never signed the guarantee, and that the signed guarantee produced was the product of fraud. Although Lawrence Fink avers that defendant signed the guarantee in his presence and produces a copy of the signed guarantee the signature was not notarized. Nor did either party offer expert evidence as to the validity of the signature. Consequently, a material issue of fact exists as to the authenticity of defendant's signature, and summary judgment cannot be granted. *See Crawford*, 222 A.D.2d at

214 (summary judgment for plaintiff on enforcement of guarantee denied where defendant, in her answer, denied having signed guarantee, claimed that guarantee bearing her name was forgery, and neither side submitted expert evidence as to validity of signature).

B. *Motion to Dismiss Affirmative Defenses and Counterclaims*

> In considering a motion to dismiss, a court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *McGill v. Parker*, 179 A.D.2d 98, 105 (1992); *see also Cron v. Harago Fabrics*, 91 N.Y.2d 362, 366 (1998); *Monroe v. Monroe* 50 N.Y.2d 481, 484 (1980). The court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *See e.g. Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration. *Caniglia v. Chicago Tribune-New York News Syndicate*, 204 A.D.2d 233 (1994).

Skillgames, L.L.C. v. Brody, 1 A.D.3d 247, 250 (1st Dept. 2003).

1. Personal Jurisdiction

Defendant's first affirmative defense pleads a lack of personal jurisdiction based upon his New Jersey residence. CPLR § 302(a)(1) provides for a court "to exercise personal jurisdiction over a non-domiciliary...who in person or through an agent...transacts any business within the state or contracts anywhere to supply goods or services in the state." The purpose of the long-arm statute is to extend jurisdiction of New York courts to non-residents who have "engaged in some purposeful activity [here]...in connection with the matter at suit." *First Nat'l Bank and Trust Co. v. Wilson*, 171 A.D.2d 616 (1st Dept. 1991). A guarantee agreement expressly to be performed in New York is sufficient to confer personal jurisdiction over a defendant pursuant to CPLR § 302(a)(1). *Hi Fashion Wigs Inc. v. Peter Hammond Adver. Inc.*, 32 N.Y.2d 583 (1973); *State Bank of India v. Taj Lanka Hotels Ltd.*, 259 A.D.2d. 291 (1st Dept. 1999).

Clearly, if the instant guarantee is found to be genuine, the defendant will be subject to jurisdiction under CPLR § 302(a)(1). However, a question of fact exists as to the validity of the guarantee. Therefore, defendant has presented a factual basis to contest jurisdiction, and plaintiff's motion to dismiss this defense is denied.

2. Stipulation

Defendant contends that Two Lines' stipulation of settlement served to terminate the lease, and any remaining obligations under the guarantee. However, where as here a summary proceeding to recover possession of real property has been instituted, the landlord-tenant relationship can only be terminated by actual surrender of the premises. *See Eight Cooper Equities v. Abrahams*, 143 Misc.2d 52, 54 (Sup. Ct. N.Y. Co., 1989). Tenant here breached the stipulation by never surrendering the premises. Thus, the stipulation did not terminate the lease, and plaintiff's motion to dismiss this defense is granted.

3. Unconscionability

Defendant in his third affirmative defense argues that the lease, rider, and guarantee are procedurally and substantively unconscionable. "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable, i.e., 'some showing of an absence of meaningful choice on the part of the parties together with contract terms which are unreasonably favorable to the other party.'" *Warburg, Pincus, Equity Partners, L.P. v. Keane*, 22 A.D.3d 321, 322 (1st Dept. 2005) quoting *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (1988).

No facts are cited here to establish any unconscionability. On its face, a guarantee of a lease is not unconscionable. *See Bank of Am., N.A. v. Tetham*, 305 A.D.2d 183 (1st Dept. 2003)

(legal presumption contrary to defendant's contention that guarantee was unconscionable). Therefore, plaintiff's motion to dismiss this affirmative defense is granted.

4. Constructive Eviction

Defendant's fourth affirmative defense, and first counterclaim, is that Two Lines was constructively evicted from the premises. A tenant is constructively evicted when the landlord's wrongful acts substantially and materially deprive him of the beneficial use and enjoyment of the premises. *Barash v. Penn. Terminal Real Estate Corp.*, 26 N.Y.2d 77, 83 (1970). Unless the tenant abandons the premises, however, he may not claim constructive eviction. *Barash*, 26 N.Y.2d at 83.

Defendant contends that regular water leaks at the premises caused flooding that damaged and destroyed portions of Two Lines' inventory making it impossible for it to conduct any business. Defendant also claims that chunks of the ceiling fell, and that there were rats, cockroaches, and other vermin present on a regular basis. All of this, according to defendant, caused Two Lines to be constructively evicted from the premises. However, defendant does not allege that Two Lines abandoned the premises. Consequently, plaintiff's motion to dismiss defendant's fourth affirmative defense and first counterclaim is granted.

5. *Negligence*

Defendant's fifth and thirteenth affirmative defenses and second and third counterclaims allege that plaintiff's negligence caused property damage to the premises. A landlord is generally not liable for negligence regarding the condition of property after transfer of possession and control to a tenant unless the landlord has contractual obligations to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed

repairs at the tenant's expense and liability is based on a substantial structural or design defect that is contrary to a specific statutory safety provision. *Lane v. Fisher Park Lane Co.*, 276 A.D.2d 136, 141 (1st Dept. 2000).

Defendant reiterates that water leaks, inventory loss, ceiling damage, and pest problems caused damage and that Verizon employees "used the demised premises as their urinal and toilet" and stole inventory. Moreover, the lease provides that the owner "shall have the right...to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and make such repairs, replacements and improvements as the Owner may deem necessary."

Defendant avers that plaintiff failed to address this problem despite constant complaints and objections by Two Lines. Plaintiff argues that defendant cannot assert these defenses since he is not an officer or director of Two Lines. However, a guarantor can assert any defenses or counterclaims that are available to the principal obligor. *Durable Group Inc. v. DeBenedetto*, 85 A.D.2d 524 (1st Dept. 1981). A guarantor, when sued by a creditor, can successfully resist by showing that the creditor totally failed to perform his obligations to the principal. *Walcutt v. Clevite Corp.*, 13 N.Y.2d 48, 56 (1963). Consequently, defendant may assert the negligence and property damage as an offset.

6. Multiple Dwelling

Defendant's sixth affirmative defense is that the premises is a multiple dwelling, and plaintiff is barred from collecting any rent since the premises was not registered with the New York City Department of Housing Preservation and Development ("HPD"). This is a commercial lease, not a residential lease. A commercial tenant is still required to pay rent

regardless of any multiple dwelling registration claims. *See Phillips & Huyler Assocs., v. Flynn*, 154 Misc.2d 689 (Civ Ct, New York County 1992), *aff'd.* 225 A.D.2d 475 (1st Dept. 1996). Accordingly, plaintiff's motion to dismiss this defense is granted.

7. *Accord and Satisfaction*

Defendant's seventh affirmative defense is that Two Lines' payment of $12,868.40 by check on October 31, 2005, in addition to plaintiff holding Two Lines' security deposit of $25,736.88, operated as an accord and satisfaction. "[T]he acceptance of a check in full settlement of a disputed, unliquidated claim, without any reservation of rights, operates as an accord and satisfaction discharging the claim." *Nationwide Registry and Security, Ltd. v. B&R Consultants, Inc.*, 4 A.D.3d 298, 299 (1st Dept. 2004). The theory underlying this rule is that the parties have entered into a new agreement discharging all or part of their obligations under the original contract. *Nationwide*, 4 A.D.3d at 299. A clear manifestation of intent must be made by the parties that payment was made, and accepted, in full satisfaction of the claim. *Id.*

Here, defendant breached the agreement - the stipulation by not surrendering the premises. Two Lines' $12,868.40 payment by check and $25,736.88 security deposit go towards the issue of damages and setoff but is not an accord and satisfaction.

8. Standing and Ripeness

Defendant's eighth and tenth affirmative defenses are that plaintiff lacks standing and the case is not ripe for determination. The doctrine of standing is part of the larger question of justicibility and is designed to ensure that a party seeking relief has a sufficient stake in the outcome to present a court with a dispute that is capable of judicial resolution. *Cmty. Bd. 7 v. Schaffer*, 84 N.Y.2d 148, 154-155 (1994); *Sec. Pacific Nat'l Bank v. Evans*, 31 A.D.3d 278, 279

(1st Dept. 2006). "The most critical requirement of standing...is the presence of 'injury in fact an actual legal stake in the matter being adjudicated.'" *Pacific*, 31 A.D.3d at 279 quoting *Soc'y of the Plastics Indus. Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772 (1991).

Here, plaintiff is seeking payment from defendant, as guarantor, for past and accrued rents due under the terms of its lease with Two Lines. Plaintiff has pleaded a cognizable injury, has an actual stake in receiving payments under the lease, and has presented the court with a dispute that is capable of being resolved. Further, defendant has offered no facts in support of these two defenses. Therefore, plaintiff's motion to dismiss defendant's eighth and tenth affirmative defenses is granted.

9. *Unreasonable Penalty*

Defendant contends that the $145,271.52 demanded by plaintiff constitutes an unreasonable penalty. The language of a guarantee does not foreclose a guarantor from challenging the amount owed. *See e.g. Rusch Factors v. Sheffler*, 58 A.D.2d 557 (1st Dept. 1977).

Plaintiff argues that pursuant to the guarantee defendant is liable for all rent and expenses through the expiration of the lease on June 14, 2006. However, the guarantee appears to contain a "good guy" clause stating that defendant's liability terminates "the date the premises are vacated and possession is surrendered to Landlord...and upon surrender of the premises, the guarantors shall be deemed generally release[d] from any claims or liability relating to any period after the date the premises are so surrendered." The guarantee also states "in the event that Tenant vacates during the first five years of the lease term, [g]uarantor shall pay to landlord the sum of four months of the then existing monthly rental at the time of surrender." Since

defendant has pleaded a cognizable challenge to the amount of relief requested, plaintiff's motion to dismiss this defense is denied.

10. Surrender of the Premises

Defendant's twelfth affirmative defense is that once the premises was surrendered to plaintiff, the guarantee was voided. A guarantor is not liable for any lease payments subsequent to the surrender date when a clause in the guarantee extinguishes the guarantor's liability once the tenant vacates the premises. *See Preamble Pros., L.P. v. Woodward Antiques Corp.*, 293 A.D.2d 330 (1st Dept 2002).

Here, the guarantee contained a clause terminating the guarantor's liability upon surrender of the property. As a result, plaintiff's motion to dismiss this defense is denied. Accordingly, it is

ORDERED that the portion of plaintiff's motion for summary judgment seeking a money judgment in the amount of $145,271.52 and the award of attorney's fees is denied; and it is further

ORDERED that the portion of plaintiff's motion seeking to dismiss defendant's affirmative defenses and counterclaims is granted to the extent that defendant's second, third, fourth, sixth, seventh, eighth, and tenth affirmative defenses and first counterclaim are dismissed and the remainder of defendant's affirmative defenses and counterclaims are severed and shall continue.

DATE: June 12, 20
New York, N.Y.

ENTER:

J.S.C.