

**Clark, Wile & Mayer, Inc. v Kewalranani**

2008 NY Slip Op 30110(U)

January 14, 2008

Supreme Court, New York County

Docket Number: 0107646/2007

Judge: Barbara Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Justice

Index Number : 107646/2007  
**CLARK, WILE & MAYER**  
 vs.  
**KEWALRANANI, ASHOR**  
 SEQUENCE NUMBER : # 001  
 DISMISS

INDEX NO. 107646/07  
 MOTION DATE #001  
 MOTION SEQ. NO. #001  
 MOTION CAL. NO. \_\_\_\_\_

re read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

JAN 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 1/14/08

**BARBARA R. KAPNICK** J.S.C.  
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 12

-----X

CLARK, WILE & MAYER, INC.,

Plaintiff,

-against-

ASHOK KEWALRANANI a/k/a  
ASHOK KEWALARAMANI,

Defendant.

-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 107646/07  
Motion Seq. No. 001

Plaintiff Clark, Wile & Mayer, Inc. is the owner/landlord of the commercial premises located at 1185-1193 Broadway, New York, New York, which were leased to Dart NY, Inc. ("Dart") as tenant, pursuant to a written Lease agreement dated March 18, 2004. The term of the Lease was for three years, commencing on July 1, 2004 and expiring on June 30, 2007, unless terminated earlier pursuant to the terms of paragraph 44 of the Rider to the Lease, which provides, in relevant part, as follows:

All payments of base or fixed rent and additional rent are due on the first day of each successive month of the term of this Lease. If any such payment is paid and collected subsequent to the month in which such payment is due (hereinafter a "Late Payment"), the term of this Lease shall be reduced by one month. After the sixth occurrence of a Late Payment during the term of this Lease, the term of this Lease shall be reduced by two months for each Late Payment...

Pursuant to Guaranty dated May 21, 2004, defendant Ashok Kewalranani a/k/a Ashok Kewalramani agreed as follows:

The undersigned Guarantor guarantees to Owner, Owner's successors and assigns, the full performance and observance of all the agreements to be performed and observed by Tenant in the attached lease... The Guarantor further agrees that this guaranty shall remain and continue in full force and effect as to any renewal, change or extension of the lease...

On or about April 12, 2007, plaintiff commenced a summary holdover proceeding against Dart in the Civil Court, New York County, seeking a judgment of possession and a money judgment in the sum of \$105,087.60 for use and occupancy in arrears, together with interest from February 1, 2007. In the Petition, plaintiff claimed that the Lease had expired by its own terms on January 31, 2007.

Plaintiff also commenced the instant action against the defendant guarantor seeking to recover the sum of \$210,175.20, together with interest from February 1, 2007 based on his alleged breach of guaranty for the period February 1, 2007 through May 31, 2007, and legal fees.

Plaintiff and Dart thereafter resolved the holdover proceeding pursuant to Stipulation of Settlement dated June 13, 2007, by which Dart consented to: (a) a final judgment of possession and the issuance of a warrant of eviction, with execution thereof to be stayed through June 30, 2007; and (b) "a money judgment in the sum

of \$212,719.00 (this is calculated as straight rent from Feb. 1, 2007 thru June 30, 2007, \$131,319.50 doubled, less security of approx \$50,000)." However, the parties also agreed that "if respondent vacates the premises, broom clean, all personalty of respondent removed & keys surrendered by June 30, 2007, then \$131,359.50 from judgment waived or deemed satisfied."

The Stipulation also provided as follows:

Petition[er] has commenced an action against the lease guarantor in Supreme NY. The guarantor's liability shall be limited to \$131,359.50, if tenant fails to vacated [sic.] as provided in this agreement, and limited to \$81,359.50 if tenant vacates pursuant to this agreement. All other rights reserved.

Defendant now moves for an order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the instant action on the ground that the Complaint fails to state a cause of action and is barred by the documentary evidence since the Guaranty lapsed upon expiration of the corporate tenant's lease on January 31, 2007, and as such, cannot serve as the basis for individual liability against defendant for the holdover period.

The Appellate Division, First Department, has held that

[t]he terms of the guaranty, which are to be strictly construed in favor of a private guarantor (citation omitted), only create an obligation on the part of the

guarantor as to "any renewal, change or extension of the Lease." Since a "guarantor should not be bound beyond the express terms of his guarantee" (citation omitted), and since it is undisputed that there was no written lease extension [covering the period in question],<sup>1</sup> the guaranty lapsed, releasing the defendant's decedent from liability under the lease.

665-75 Eleventh Avenue Realty Corp. v. Schlanger, 265 A.D.2d 270, 271 (1<sup>st</sup> Dep't 1999). See also, Elite Gold, Inc. v. TT Jewelry Outlet Corp., 31 A.D.3d 338 (1<sup>st</sup> Dep't 2006).

Thus, absent a lease extension, a guaranty does not generally apply to a holdover period. See, Abart Holdings LLC v. Laasch, 15 Misc.3d 142(A) (App. Term, 1st Dep't 2007).

However, defendant's expansive guaranty related to the "full performance and observance of all the agreements to be performed and observed by Tenant" under the Lease (see, 131 Seventh Ave. S. LLC v. Young, 6 Misc.3d 804 [Civ. Ct., N.Y. Co. 2004]), which included the requirement in Paragraph 52 of the Lease Rider that tenant pay

to Owner as liquidated damages for each month and for each portion of any month during which Tenant holds over in the demised premises after expiration of termination of the Term of this Lease, a sum equal to two times the aggregate of that portion of the Fixed Rent and Rent Escalations payable under this Lease during (or in the case of tax escalation, applicable to) the last month of the term.

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<sup>1</sup> There were 25 prior written extensions of the Lease.

In addition, the Guaranty must be read to apply to paragraph 53 of the Lease Rider which specifically provides that "Tenant's obligation to pay rent, additional rent, indemnifications and other charges due hereunder, shall survive the expiration or sooner termination (emphasis supplied) of the term of this Lease."

Accordingly, based on the papers submitted and the oral argument held on the record on October 24, 2007, defendant's motion to dismiss the instant action is denied.


Defendant shall serve an Answer within 20 days of service of a copy of this order with notice of entry.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on March 5, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

**FILED**  
JAN 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: January 14, 2008

  
Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.