

1460 Second Realty, LLC v Neza

2009 NY Slip Op 30109(U)

January 13, 2009

Supreme Court, New York County

Docket Number: 114311/2007

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madden

PART 11

Index Number : 114311/2007
1460 SECOND REALTY, LLC
VS.
NEZAJ, SHERIF
SEQUENCE NUMBER : # 001
DEFAULT JUDGMENT

Justice

INDEX NO. 114311-07
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on this motion to/for a default judgment + summary judgment.
PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion + cross-motion are decided in accordance with the annexed Memorandum Decision & Order.

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

FILED

JAN 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 13, 2009

[Signature]
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 : IAS PART 11

-----X
1460 SECOND REALTY LLC,

Plaintiff,

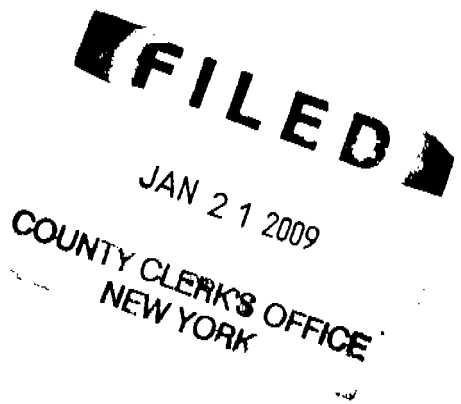
- against -

SHERIF NEZAJ, NIKOLA JOVIC and
SOKOL HADZIJA,

Defendants.

-----X
JOAN A. MADDEN, J.:

Index No.114311/2007



In this action to enforce defendants' written guaranty of obligations under a lease agreement, plaintiff 1460 Second Avenue, LLC ("the Landlord") moves for an order (i) granting judgment in its favor against defendants Sherif Nezaj ("Nezaj") and Sokol Hadzija ("Hadzija") in the sum on \$157,570.79, based upon these defendants failure to appear, answer or otherwise respond to the complaint (ii) granting summary judgment in its favor on its first cause of action against defendant Nikola Jovic ("Jovic") in the in the sum on \$157,570.79 (iii) granting summary judgment on its second cause of action for attorneys' fees and costs as to liability only. Jovic opposes the motion and cross moves for permission to amend its answer to assert cross claims against Nezaj and Hadzija. Nezaj and Hadzija do not oppose the motion or cross motion. For the reasons set forth below, the motion is granted and the cross motion is denied.

Background

The Landlord is the owner of the store and partial basement of a building located at 1460 Second Avcnuc, New York, NY ("the Building"). Non-party 1460 Second Avenue Restaurant Associates, LLC ("the Tenant") was the tenant of Building pursuant to a written Lease

Agreement with the Landlord dated March 28, 2001 ("Lease"). The Lease was for a ten-year term beginning on March 1, 2001. The rent for the first year of the Lease was \$16,000 per month, and increased annually to \$16,800 in the second year, \$18,800 in the third year; \$19,740 in the fourth year; \$20,727 in the fifth year; and \$21,767 in the sixth year when the Tenant was evicted. Paragraph 19 of the Lease and paragraph 74 of the Rider to the Lease provides for the recovery of attorneys' fees from the Tenant in the event the Landlord is a party to any litigation commenced by or against the Tenant as a result of Tenant's default of its obligations under the Lease.

On July 16, 2001, defendants each executed identical "Limited Guaranty of Lease" agreements under which each agreed that:

if default in payment of money only beyond the applicable grace periods shall at any time be made by Tenant, its successors and assigns in the payment of any such rents, additional rent or charges, or in any of the terms, covenants, provisions or conditions contained in the lease, the Guarantor shall and will forthwith pay such rents, additional rent or other charges to Landlord, its successors and assigns and any arrears thereof, and all reasonable attorney's fees and reasonable disbursements incurred by the Landlord in connection with enforcing this Guaranty.

The Guaranty provides that it "is primary and an absolute and unconditional Guaranty of payment and of performance." The Guaranty further provides that "[a]ll of the Landlord's rights and remedies under this Guaranty are intended to be distinct, separate and cumulative and no right or remedy therein or herein mentioned is intended to be exclusive of or a waiver of any of the others. Landlord shall not be required to resort to any security held under the Lease and the Guarantor's liability hereunder is primary." The Guaranty also provides that "[i]t is agreed that any security deposited under Article 31 of the Lease or elsewhere shall not be computed as a

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deduction from any amount payable by Tenant or Guarantor under the terms of this Guaranty or the Lease.”

Thereafter, the Tenant defaulted in the payment of base and additional rent. In March 2005, Landlord commenced a commercial non-payment proceeding in the Civil Court of the City of New York seeking rent and additional rent in the amount of \$132,543.56. The proceeding was settled by stipulation dated April 18, 2005. Pursuant to the April 2005 Stipulation, a final judgment of possession and a monetary judgment in the amount of \$128,941.26, for rents and additional rents due and owing through April 2005 was entered in favor of Landlord and against the Tenant. The Tenant defaulted under the April 2005 Stipulation, and brought an order to show cause seeking additional time, which was resolved pursuant to a stipulation dated July 7, 2006. Under the terms of the July 2006 Stipulation, the Tenant was required to make a payment of \$87,178.08 on or before July 12, 2006, which would have made the Tenant current under the April 2005 Stipulation.

The Tenant failed to make the \$87,178.08 payment under the July 2006 Stipulation or the other payments required under the July 2006 Stipulation and the April 2005 Stipulation. On July 18, 2006, the Tenant was evicted by the Marshal. At that time, the Tenant owed \$157,570.79 in arrears and no amount of these arrears has been paid.¹

¹According to the uncontroverted affidavit of George Lavian, a member of the Landlord, which is a limited liability company, the sum sought consists of: \$66,441.26 on the unpaid judgment; \$65,301.00 in base rent for May, June, and July (at a rate of \$21,767 per month); \$2,677.05 for real estate taxes for May, June and July; \$22,451.60 in late fees/sewer charges/insufficient fund fees and \$700.00 legal fees based on defendant's default under the April 2005 Stipulation. The sum of these amount is \$157,570.91 and not \$157,570.79 as sought in the complaint and in connection with this motion. This minor discrepancy is insufficient to raise any factual question; however given that defendants were given notice of the lesser amount, any judgment should be in that amount.

This action seeks to recover the moneys due and owing for rent and additional rent under the Lease, together with attorneys' fees and other expenses, based on the guaranty agreements executed by the defendants.

Defendants Sherif Nezaj and Sokol Hadzija have failed to answer, move or otherwise respond to the complaint in this action, and Landlord has submitted proof that these defendants were served by substituted service which was complete on December 11, 2007, and that additional notice (by mailing the summons) was served on these defendants pursuant to CPLR 3215(g)(3)(i) on April 1, 2008. Based on this evidence of service and proof submitted on the motion, the Landlord is entitled to a judgment against these defendants in the amount of \$157,570.79 on the first cause of action, and judgment as to liability on the second cause of action for attorneys' fees with the amount to be determined at a hearing.

Defendant Jovic interposed an answer generally denying the allegations in the complaint, and asserting two affirmative defenses. The first defenses alleges lack of personal jurisdiction based on defective service, and the second defense asserts that Jovic "has no record or recollection of ever having executed the guaranty agreement...."

The Landlord moves for summary judgment seeking a judgment in its favor against Jovic for the amounts of base rent and additional rent allegedly due and owing and as to liability on the claim for attorneys' fees and costs. In support of the motion, the Landlord submits a copy of the Lease, the Guaranty, and certain documents from the Civil Court proceeding, including the April 9, 2008 judgment awarding the Landlord a money judgment in the amount of \$128, 941.26, the underlying petition, the April Stipulation and July Stipulation. The Landlord also an affidavit from George Lavian a member of Landlord, which is a limited liability company.

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In opposition, Jovic does not deny his liability under the guaranty but argues that the amount due and owing should be reduced by \$64,000, the sum of security deposit purportedly provided by the Tenant upon execution of the Lease. Jovic also cross moves to amend its answer to assert cross claims against his co-defendants for contribution.

In reply, the Landlord submits a second affidavit from George Lavian who states that at the time that the Tenant was evicted it had only paid \$18,000 in security deposit. In addition, the Landlord asserts that under the terms of the Guaranty, the Guaranty is independent of any security or other remedies the Landlord may have, and thus Jovic may not reduce his liability by applying the security deposit to the amount of rent or additional rent due and owing. The Landlord also points out that paragraph 31 of the Lease provides that, in the event of a Tenant's default, the Landlord may apply the security deposit to pay, inter alia, "any damages or deficiency [incurred by the Landlord] in the re-letting of the premises, whether such damages or deficiency occurred before or after summary proceeding or other re-entry [by the Landlord]." In this case, according to Mr. Lavian, after the Tenant was evicted in July 2006, the Building was not re-rented until February 2007, thus rendering the Tenant liable for prospective rent and that the security deposit was applied to the amount due for such rent.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that

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material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

“On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guarantee.” City of New York v. Clarose Cinema Corp., 256 A.D.2d 69, 71 (1st Dept. 1998); see also Kensington House Co. v. Oram, 293 A.D.2d 304 (1st Dept. 2002).

Here, the Landlord has set forth sufficient documentary evidence to demonstrate that the Guaranty executed by Jovic was absolute and unconditional, that there is an underlying debt based on the unpaid rent and additional owed by the Tenant, and that Jovic has not paid this debt as he agreed under the Guaranty. The burden thus shifts to Jovic to assert a defense to the enforcement of the Guaranty which is sufficient to raise a triable issue of fact. Jovic has not met this burden. The affirmative defenses asserted by Jovic in its answer, which Jovic does not defend on this motion, are unavailing. The first affirmative defense asserting lack of personal jurisdiction on the grounds of insufficient service is waived based on Jovic’s failure to move to dismiss on this ground within 60 days of his answer. See CPLR 3211(e); B.N. Realty Assocs. v. Lichtenstein, 21 AD3d 793, 796 (1st Dept 2005). The second affirmative defense alleging Jovic’s lack of record or recollection as to the Guaranty is controverted by evidence of the written guaranty signed by Jovic.

Next, under the terms of the Guaranty, Jovic is not entitled to reduce the amount owed under the Guaranty by the security deposit. Specifically, the Guaranty provides that “the Landlord shall not be required to resort to any security held under the Lease and the Guarantor’s

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liability is hereunder is primary,” and that “any security deposited under Article 31 of the Lease or elsewhere shall not be computed as a deduction from any amount payable by Tenant or Guarantor under the terms of this Guaranty or the Lease.” Moreover, the Lease provides that the Landlord is entitled to apply the security deposit to post-eviction rent owed by the Tenant. See Weiner v. Tae Hon, 291 AD2d 297 (1st Dept 2002)(holding that guarantor was not entitled to reduce amount owed under guaranty of lease obligations when lease provided that owner could apply security deposit to post-eviction rent and guaranty provided that the owner shall not be required to resort to the security or other remedies before proceeding against the guaranty).

Thus, as Jovic has not asserted a viable defense to the claims asserted by the Landlord, the Landlord is entitled to summary judgment.

With respect to the claim for attorneys’ fees and costs, summary judgment is warranted as to liability only, since a hearing is required regarding the reasonable value of the services rendered. Matter of First National Bank of East Islip v. Brower, 42 NY2d 471 (1977); Community Natl. Bank & Trust Co. v. J.M.F. Trading, Inc., 167 A.D.2d 193 (1st Dept. 1990).

Finally, as Jovic’s obligation to pay under the Guaranty is joint and several, and he has not alleged that he paid in excess of his obligation under the Guaranty, his motion to assert cross claims for contribution against his co-defendants is denied. Parish v. Rudolph, 282 AD2d 233 (1st Dept 2001)(in order for a co-guarantor of an obligation to state a cause of action for contribution against co-guarantor of same obligation, plaintiff co-guarantor must allege that she paid in excess of her own proportionate share of liability).

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment on the first cause of action is granted, and the Clerk of the Court is directed to enter a judgment in favor of plaintiff 1460 Second Avenue, LLC and against defendants Sherif Nezaj, Sokol Hadzija and Nikola Jovic in the sum of \$157,570.79, together with interest as calculated by the Clerk, and costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that summary judgment is granted as to liability only on the second cause of action for attorneys' fees and costs; and it is further

ORDERED that the issue of the amount of attorneys' fees and costs is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that when the parties appear at the hearing before the Special Referee, counsel for the Landlord shall provide copies of its specific billing and time records, together with a summary and breakdown of the categories of legal services provided, and the hours attributed to each category of services, and counsel shall arrange for the requisition of the Court files so that they are available at the hearing for the Referee's inspection and evaluation of written work performed; and it is further

ORDERED that the Referee's report and recommendations shall include specific findings identifying counsel's hourly rate and a breakdown of the nature and category of the legal services performed, and the hours attributed to each category; and it is further

ORDERED that counsel for the Landlord shall, on or before February 17, 2009, serve a copy of this order with notice of entry, together with a completed Information Sheet² upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is

²Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date; and it is further

ORDERED that failure to comply with the immediate proceeding paragraph will result in the dismissal of the second cause of action; and it is further

ORDERED that Jovic's cross motion to amend his answer to assert cross claims for contribution against the other defendants is denied.

A copy of this decision and order is being mailed by my chambers to counsel for the parties, and to the defaulting defendants.

DATED: January 13, 2009



J.S.C.

FILED
JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK