

1407 Broadway Real Estate LLC v Sicari

2009 NY Slip Op 30603(U)

March 19, 2009

Supreme Court, New York County

Docket Number: 109825/08

Judge: Carol R. Edmead

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

PRESENT: Edmead
Justice

PART 35

1407 Broadway Real Estate LLC
by Gettinger Management LLC,

INDEX NO.

109825/08

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

Anthony Sicari

The following papers, numbered 1 to _____ were read on this motion to

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

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff 1407 Broadway Real Estate LLC by Gettinger Management LLC seeking summary judgment, pursuant to CPLR §3212, against defendant Anthony Sicari is denied; and it is further

ORDERED that plaintiff's motion dismissing defendant's First, Second, and Sixth Affirmative Defenses, pursuant to CPLR §3211(a) and (b), is granted; and it is further

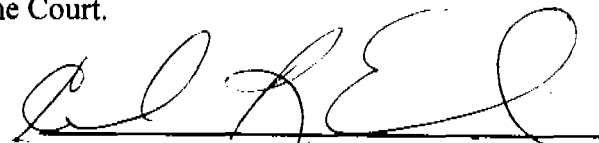
ORDERED that plaintiff's motion dismissing defendant's Third, Fourth, Fifth and Seventh Affirmative Defenses, pursuant to CPLR §3211(a) and (b), is denied; and it is further

ORDERED that the parties appear in Part 35 for a Preliminary Conference on April 28, 2009 at 2:15 p.m., and it is further;

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: 3/19/09



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

FILED
PAGES NUMBERED
MAR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
1407 BROADWAY REAL ESTATE LLC
by GETTINGER MANAGEMENT LLC,

Plaintiff,

Index No. 109825/08

-against-

ANTHONY SICARI,

Defendant.

DECISION/ORDER

FILED
MAR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff 1407 Broadway Real Estate LLC by Gettinger Management LLC ("plaintiff") seeks an order 1) granting plaintiff summary judgment, pursuant to CPLR §3212, against defendant Anthony Sicari ("defendant") on plaintiff's first cause of action, in the sum of \$137,386.41, together with interest, and as to liability on plaintiff's second cause of action, and a hearing to assess the amount of damages, including legal fees, on the second cause of action; and 2) dismissing all of defendant's affirmative defenses, pursuant to CPLR §3211(a) and (b).

Factual Background¹

Plaintiff is the landlord of a building located at 1407 Broadway, New York, New York ("the Building") and of the commercial premises known as Store #7 therein ("the Premises"). At all times relevant herein, defendant was the president of Silk Denim, LLC ("Silk Denim"). On or about March 10, 2006, Silk Denim entered into a lease for the Premises with plaintiff's predecessor in interest ("the Lease"). In connection with the Lease, defendant executed a

¹Information taken from plaintiff's Motion and Complaint and defendant's Answer.

guaranty agreement, dated April 10, 2006 (“the Good Guy Guaranty”), whereby defendant guaranteed to plaintiff the full performance and observance of all of the agreements to be performed by Silk Denim while Silk Denim was in possession of the Premises, including the timely payment of all fixed rent, additional rent, use and occupancy and other sums payable by Silk Denim to plaintiff, pursuant to the Lease.

In June 2007, plaintiff commenced a summary non-payment proceeding against Silk Denim in Civil Court, New York County, seeking a judgment of \$60,836.99 for rent and ~~additional rent owed through June 2007. On August 22, 2007, a judgment was entered against~~ Silk Denim in the sum of \$94,760.22 for rent and additional rent due and owing through August 2007. On November 27, 2007, Silk Denim was evicted from the Premises, pursuant to a Certificate of Eviction.² Plaintiff argues that it is owed rent and additional rent from February 1, 2007 through November 30, 2007, for a total of \$137,386.41 (Motion, ¶8).

In July 2008, plaintiff filed a Complaint against defendant, as guarantor of the Lease, for \$137,386.41. In its Complaint, plaintiff alleges that defendant is in default of the Good Guy Guaranty, in that he has failed and refused to pay plaintiff the rent and additional rent due. Plaintiff also alleges that, pursuant to the Good Guy Guaranty, defendant agreed to pay reasonable attorneys’ fees and expenses incurred by plaintiff in connection with any action to enforce the Good Guy Guaranty. As its first cause of action, plaintiff seeks judgment against defendant for \$137,386.41, together with such additional monies that may accrue. As its second cause of action, plaintiff seeks judgment against defendant for reasonable attorneys’ fees incurred

² The monthly rent for February 2007 through April 2007 was \$14,750.17. The monthly rent for May 2007 through November 2007 was \$15,192.67 (“Statement of Account”).

and to be incurred in an amount to be determined at trial, but in no event less than \$7,500.

By his Answer dated September 12, 2008, defendant denied the material allegations of the Complaint and asserted seven defenses. Defendant alleged that 1) plaintiff failed to obtain personal jurisdiction over defendant due to non-effective or improper service; 2) each of plaintiff's claims is barred by the doctrines of waiver, laches, estoppel and unclean hands; 3) each of plaintiff's claims is barred, in whole or in part, by "the express and/or implied terms of the agreement," regardless of whether such terms are set forth as a defense in the Answer; 4) ~~plaintiff failed to comply with the terms and provisions of the agreement;~~ 5) ~~plaintiff breached~~ the terms and conditions of the agreement; 6) any damages allegedly sustained by plaintiff were caused, in whole or in part, by "the conduct, carelessness, recklessness, intervening and/or superseding acts, willful conduct, wrongdoing, and/or default of the plaintiff, its agents and others for whom plaintiff was responsible, and therefore, the amount of any damages otherwise recoverable by plaintiff should be extinguished or reduced to the extent such conduct caused plaintiff's alleged damages"; and 7) plaintiff's claims are barred by the doctrines of "set-off and recoupment" (Answer, ¶¶ 6-12).

Plaintiff's Motion

First, plaintiff argues that it is entitled to summary judgment as to liability and damages on its first cause of action because the facts underlying the case are undisputed. It is undisputed that in breach of the Lease, the Tenant failed to pay the rent and additional rent due and owing through November 30, 2007 (motion, ¶ 15). It is undisputed that, as shown in the annexed Statement of Account, the unpaid rent and additional rent is \$137,386.41. It is also undisputed that defendant has failed to pay any of the sums due under the Good Guy Guaranty.

Second, plaintiff argues that it is entitled to summary judgment as to liability on its second cause of action, because, as set forth in the Good Guy Guaranty, defendant is obligated and agreed to pay reasonable attorneys' fees, costs and expenses incurred by plaintiff in enforcing any of the covenants and provisions of the Lease. The Good Guy Guaranty further provides that defendant's obligations include plaintiffs attorneys' fees and disbursements incurred because of any defaults by Silk Denim under the Lease.

Third, plaintiff argues that all of defendant's Affirmative Defenses should be dismissed ~~as conclusory or baseless. As to the First Affirmative Defense, defendant has failed to assert any~~ facts in support of his claim that the Court lacks personal jurisdiction over defendant. Therefore, the defense is inadequately pleaded, and must be dismissed.

Defendant's Second Affirmative Defense alleging that plaintiff is barred by the doctrines of waiver, laches, estoppel and unclean hands, is wholly conclusory and unsupported by any facts. Moreover, plaintiff did not, in any manner, sit on its rights to enforce the Good Guy Guaranty.

As to its Third Affirmative Defense, defendant fails to provide any factual basis in support of its claim that plaintiff's claims are barred, in whole or in part, by the express or implied terms of the agreement. Thus, defendant's First, Second and Third Affirmative Defenses should be dismissed as conclusory and without supporting factual allegations.

As to the Fourth and Fifth Affirmative Defenses, defendant fails to cite any provisions of the agreement to support its claim that plaintiff breached the agreement. (There are none, plaintiff adds.) As the Fourth and Fifth Affirmative defenses are deficient on their face, conclusory and baseless, they, too, should be dismissed.

The Sixth Affirmative Defense alleging that any damages sustained by plaintiff were caused by plaintiff's carelessness appears to be nothing but a "stock" affirmative defense (that provides absolutely no facts), to a negligence action. As set forth in the Complaint, this action is to enforce contractual obligations found in the underlying Lease and the Good Guy Guaranty of that Lease. As such, the Sixth Affirmative Defense should be dismissed in its entirety.

The Seventh Affirmative Defense alleges, without elaboration, the doctrines of "set-off" and "recoupment." This bare-bones assertion, without any reference to any specific monies ~~or proof, is insufficient as a matter of law. Therefore, it should be dismissed as insufficient and~~ conclusory.

Defendant's Opposition

Defendant contends that he paid plaintiff \$60,000 as a security deposit when Silk Denim first moved into the Premises in March 2006. At that time, plaintiff and plaintiff's predecessors were made aware of problems with asbestos in the ceiling and especially in the bathrooms. They refused to remove the asbestos, and defendant advised them that he didn't think he could continue to use the space with the asbestos in the ceiling. In addition, at the time Silk Denim moved in as the Tenant, defendant also advised plaintiff and plaintiff's predecessors that the Premises needed handicap accessibility for Silk Denim's customers. Again, plaintiff refused to comply with defendant's request, even though defendant's concerns were discussed at the time of the Lease's execution (Opposition ("Opp.") ¶¶ 5-8).

Defendant argues that plaintiff breached the terms of the Lease. Defendant contends that plaintiff failed "in all respects" to replace the carpet where needed, repair all of the floors where needed and paint the entire space. As a result, defendant felt it necessary to remove Silk Denim

from the Premises for the safety of its workers and customers (Opp. ¶ 11).

Defendant admits that he signed the Good Guy Guaranty to which plaintiff refers. However, the Good Guy Guaranty is signed by “Anthony Sicari” with the indication of “Pres.” following the signature (Opp. ¶ 12, citing Good Guy Guaranty). Prior to moving into the Premises, defendant was contacted by Bob Forman (“Mr. Forman”), the building manager of the Premises, and Mark Krizer of Millenium Realty (“Mr. Krizer”), who worked for plaintiff. Defendant contends that Messrs. Forman and Krizer solicited defendant to rent the Premises, and told defendant that there would be no personal liability or guarantee involved if defendant rented the Premises (Opp. ¶¶ 13-15).

Defendant contends that at the time he signed the Lease, he was not represented by an attorney; however, plaintiff was represented by an attorney. When defendant appeared at plaintiff’s offices, he was given a stack of papers and was pressured to sign them. Defendant also contends that at no time did he sign the purported Good Guy Guaranty in his capacity as an individual, but in his capacity as Silk Denim’s President (Opp. ¶16). When he signed the Lease, defendant specifically made it known to Mr. Krizer and Bob Gettinger (“Mr. Gettinger”), who represented plaintiff, that he wanted no personal liability (Opp., ¶ 17). Messrs. Gettinger and Krizer reiterated that there would be no personal guarantee and that defendant should sign the document in his corporate capacity.

Defendant also contends that time was an issue for Mr. Gettinger and Mr. Krizer. When defendant asked that his personal attorney review the document, Mr. Gettinger and Mr. Krizer said there was no need and that the Lease needed to be signed right away. They also told defendant that it would be “all corporate,” and they had no issue with defendant’s signing as

“Anthony Sicari, President” (Opp. ¶¶ 19).

In September 2007, defendant vacated the premises due to the problems with the asbestos and the refusal of the landlord to provide handicap accessibility (Opp. ¶ 20). Defendant also alleges that he had no notice of this action. Had he had notice, he would have appeared, defendant contends. And if defendant had appeared, he would have had defenses with regard to the allegations in the Complaint and for the offset for the \$60,000 security deposit he paid.

Defendant also admits that he signed a “Personal Guaranty” (“Personal Guaranty or ~~“Addendum A”~~”). ~~Defendant argues that Addendum A contains a time limitation that bars~~ plaintiff’s action (Opp. ¶ 23). Addendum A states:

This guaranty shall be deemed a guaranty of payment, and shall be for the period from March 15, 2006 through March 31, 2007 notwithstanding the continuation of the Lease. The obligations hereunder shall survive the expiration of the guaranty, with respect to any defaults under the Lease through March 31, 2007.
(Lease, p. 34)

Defendant argues that the language of Addendum A precludes plaintiff from pursuing any claim past a default of March 31, 2007. Yet, plaintiff claims that defendant defaulted commencing on February 2007 and continuing, and that was the basis of the underlying Landlord Tenant Action for which plaintiff received the Judgment.

Defendant also argues that when read together, both Guaranties create an ambiguity that should be construed against the party who drafted the document. While the Good Guy Guaranty contains no limitations of time, the Personal Guaranty does. Therefore, the documents create an ambiguity of what was actually agreed on by the parties, defendant argues.

Plaintiff’s Reply

Plaintiff argues that the allegations in defendant’s opposition papers are barred as a matter

of law and by the terms of the Lease and Good Guy Guaranty sued upon herein. Defendant admits that the Tenant, Silk Denim, executed the Lease for the Premises, and that he signed the Good Guy Guaranty (reply, ¶ 3). Defendant does not deny that Silk Denim failed to pay the sums due under the Lease, which are sought herein, or that he failed to pay anything on the Good Guy Guaranty. Further, defendant's allegations are "conclusory, without factual support, completely meritless and insufficient to raise any triable issue, or to forestall summary judgment and the dismissal of defendant's Affirmative Defenses, plaintiff contends.

First, plaintiff contests defendant's contention that he did not sign the Good Guy Guaranty in his personal capacity. Defendant's allegation that he signed the Good Guy Guaranty only in his capacity as president of Silk Denim, rather than in his personal capacity, would mean that Silk Denim gave a guaranty of its own Lease obligations, which makes absolutely no sense and raises no triable issue. There would be no practical or legal reason for plaintiff to have Silk Denim guaranty its own obligations under the Lease. Any such guaranty would be meaningless, and plaintiff neither sought nor obtained any such guaranty from Silk Denim. Moreover, the text of the Good Guy Guaranty explicitly and repeatedly distinguishes between "the Tenant" (Silk Denim) and the guarantor (defendant). The Good Guy Guaranty was not executed in the name of Silk Denim, but only in defendant's name. Neither the name "Silk Denim" nor the word "Tenant" appears in connection with the signature line on the Good Guy Guaranty. The text, "Pres," merely served to identify defendant, since the text is not accompanied by any words limiting the effect of the Good Guy Guaranty.

Defendant's assertions that plaintiff's representatives stated that defendant would not be personally liable and that defendant would not have to provide a personal guaranty for the Lease

are barred by the parol evidence rule, which bars defendant from relying on oral statements allegedly made prior to the time defendant signed the Good Guy Guaranty. The parol evidence rule prohibits defendant from contradicting or adding to the Good Guy Guaranty, based on any such alleged statements.

Further, a review of Addendum A further demonstrates the meritless nature of the assertions defendant has made regarding the Good Guy Guaranty sued upon herein. Defendant admits that he executed Addendum A, a time-limited guaranty of the Lease. Plaintiff has not sued upon Addendum A in this action. However, Addendum A is dated "5/18", a month after the subject Good Guy Guaranty, dated April 10, 2006, and more than two months after the Lease, dated March 10, 2006. Defendant executed Addendum A in the same manner as he executed the Good Guy Guaranty, placing the text, "Pres", after his name (Reply ¶ 9). There would be no sensible reason for plaintiff to have defendant sign the May 2006 Addendum A, for the purpose of obtaining a meaningless promise from Silk Denim to guaranty its own obligations.

Defendant's assertion that he was rushed and/or pressured into signing the Good Guy Guaranty is disproved by the fact that the Lease was signed on, and bears a date of, March 10, 2006, while the Good Guy Guaranty bears a date of April 10, 2006 (and Addendum A is dated May 2006). For all of the above reasons, defendant's assertions regarding his signature do not raise any triable issue of fact. Further, defendant's conclusory implication of duress in connection with his signing the Good Guy Guaranty is woefully insufficient as plaintiff fails to assert both a wrongful threat and the effect of precluding the exercise of his free will.

Second, plaintiff argues that terms of the Good Guy Guaranty completely bar defendant's assertions concerning the condition of the Premises, including his assertions regarding asbestos

in the ceiling, handicap access and the adequacy of plaintiff's performance of the Landlord's work provided for in the Lease. All of defendant's assertions consist of purported defenses of the Tenant, Silk Denim, to plaintiff's claims under the Lease. However, the Good Guy Guaranty bars defendant from raising any defenses of the Tenant, and, pursuant to the terms of the Good Guy Guaranty, defendant has waived all defenses. In particular, defendant waived all defenses by agreeing in the Good Guy Guaranty that defendant "*does hereby, absolutely, irrevocably and unconditionally guarantee to Landlord, its successors and assigns, (a)(i) the payment of Base Rent and Additional Rent (as such terms are defined in the Lease) payable under the Lease . . . and (b) the full and prompt payment of all damages and expenses that may arise in connection with or as a consequence of any of the foregoing (Good Guy Guaranty, p.35, emphasis added).*" Citing caselaw, plaintiff contends that defendant has clearly waived all defenses and counterclaims by the creditor to the enforcement of the Good Guy Guaranty.

In addition, the Good Guy Guaranty specifically bars defendant from asserting any defenses that the Tenant might have raised, in that the Good Guy Guaranty provides: "this Guaranty shall remain in full force and effect without regard to, and shall not be impaired or affected by . . . (g) any limitation on Tenant's liability under the Lease which may now or hereafter be imposed by any statute, regulation or rule of law, or any illegality, irregularity, invalidity or unenforceability, in whole or in part, of the Lease or any term thereof; or (h) any other circumstance, whether or not Guarantor, Tenant or Landlord shall have had notice or knowledge thereof" (Good Guy Guaranty, p. 35). Citing caselaw, plaintiff further argues that where as here, the guarantor is sued alone, the guarantor cannot avail himself of an independent cause of action existing in favor of his principal as a defense or counterclaim. Therefore, as a

matter of law, defendant does not have the right to set-off a purported claim of the Tenant since defendant is not the Tenant, and the Tenant is not a party to this action. Further, defendant's assertions concerning the condition of the Premises are barred because they consist of attempts by defendant to assert, as defenses for defendant, independent causes of action purportedly held by the Tenant, Silk Denim.

Plaintiff also argues that defendant's assertions concerning asbestos, handicap access and the performance of the Landlord's pre-term work also are barred by Paragraphs 15(a), 18 and 25 of the Lease. Paragraph 15(a) requires the payment of rent without any set-off, offset or deduction. Paragraph 18 provides that there will be allowance to Tenant for any failure of the Landlord to make any repairs or alterations to the premises. Paragraph 25 indicates that the Tenant "accept[s] possession of the Premises in its 'as is' condition" and that the Landlord is not obligated to perform any work to prepare the premises for tenancy. Therefore, the Tenant would be barred from raising those assertions in an action against it. Since the Tenant would be barred, and defendant steps into the shoes of the Tenant, defendant is also barred.

Plaintiff further contends that defendant's assertions as to the condition of the Premises cannot ground any legitimate claim that the Tenant, Silk Denim, had any constructive eviction defense, because defendant has admitted that the Tenant remained in the Premises for well over a year after the May 1, 2006 commencement of the Lease. Citing caselaw, plaintiff argues that to ground a constructive eviction claim or defense, a tenant must promptly vacate the premises once the complained of condition allegedly arises. A tenant cannot remain in possession for an unreasonable period of time and claim that the premises were "un-tenantable." Although defendant contends that the alleged conditions existed at the commencement of the Lease term,

defendant also states that the Tenant remained in possession for a lengthy period thereafter. This bars any constructive-eviction defense for the Tenant, and likewise bars Defendant from raising any such defense in this action on the Good Guy Guaranty. The conditions alleged by defendant do not rise to the level sufficient to establish that the Tenant had any constructive eviction defense.

Defendant has failed to allege, as required, that the conditions were such that Silk Denim was deprived of the beneficial enjoyment or actual possession of the demised premises. Further, ~~defendant's allegations as to the condition of the Premises must be rejected for the separate~~ reason that they are completely undocumented and conclusory.³

Third, plaintiff argues that defendant is not entitled to credit for the security deposit. Pursuant to the Lease, plaintiff is entitled to hold and apply the security deposit to the post-vacatur obligations that shall accrue under the Lease until the April 30, 2011 expiration date originally set forth in the Lease (Lease, pp. 8-9 ¶¶ 8(a)-(c)). In addition, the Good Guy Guaranty specifically provides that "nothing in this Guaranty shall be deemed to limit . . . Landlord's right to retain and/or apply the security deposit under the Lease" (Good Guy Guaranty, p. 35). The Good Guy Guaranty also remains in effect without regard to any substitution or release, in whole or in part, of any security for the Lease which may be held at any time by Landlord or "any exercise, non-exercise or delay in exercise by Landlord of any right, power, or remedy under or in respect of the Lease" (Good Guy Guaranty, p. 35). Thus, defendant is not entitled to a credit

³ Plaintiff also denies the existence of an asbestos condition and a requirement on plaintiff's part to make any alterations for handicap access. Plaintiff performed all of the work required of it by the Lease, and defendant never complained about any of the foregoing matters until this motion. Further, defendant failed to provide any documentation to support his claims about the condition of the Premises or show that either he or the Tenant ever complained about such conditions.

for the security deposit.

Fourth, plaintiff argues that there is no ambiguity or triable issue arising from the fact that, in order to protect itself, plaintiff required defendant to provide two separate guarantees for the Lease. Plaintiff required that defendant provide the Personal Guaranty of Addendum A with an end date of March 31, 2007, through which defendant would be liable regardless of whether the Silk Denim remained in possession of the Premises. Plaintiff also required Defendant to provide the Good Guy Guaranty, sued upon herein, under which defendant would remain liable, ~~regardless of the date, until Silk Denim vacated the Premises. Defendant is clearly liable under~~ the Good Guy Guaranty sued upon herein, and the existence of the time-limited Addendum A is irrelevant.

Fifth, plaintiff argues that defendant is liable for all arrears accruing through November 27, 2007, when the Tenant, Silk Denim, was evicted. Defendant does not deny that the Tenant was evicted on November 27, 2007. Thus, under the terms of the Good Guy Guaranty, defendant is liable for the arrears that accrued through November 27, 2007. Defendant's conclusory, undocumented, and false claim that the Tenant vacated in September 2007 fails to raise a triable issue of fact, especially in light of defendant's failure to deny that Tenant was evicted on November 27, 2007.

Sixth, plaintiff argues that defendant fails to address plaintiff's second cause of action. Defendant does not contest that if the court finds any liability on the part of defendant under the Good Guy Guaranty, then he is liable for plaintiff's attorneys fees and expenses. Thus, summary judgment should be entered as to liability on plaintiff's second cause of action upon the determination that defendant owes but has failed to pay sums due under the Good Guy Guaranty.

Seventh, plaintiff argues that defendant's opposition papers do not address that branch of the instant motion seeking dismissal of defendant's Affirmative Defenses. Therefore, plaintiff's affirmative defenses should be dismissed.

Analysis

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbindler*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212(b)). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show

facts sufficient to require a trial of any issue of fact (CPLR § 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman at 560, 562*; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist

(*Zuckerman at 562*). The defendant “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Liability of a Guarantor

Generally, a person who signs a contract in his capacity as an officer of the corporation is not held personally liable for the contract unless the evidence is clear that he intended to be personally liable (*Herman v Ness Apparel Co., Inc.*, 305 AD2d 217, 218 [1st Dept 2003] [“A

person who signs a writing solely as a corporate officer is not personally obligated on any contract evidenced by the writing even though the text of the writing states that the officer is to be personally obligated”]; *see also Boas & Assoc. v Vernier*, 22 AD2d 561, 563 [1965]; *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961] [“[A]n agent for a disclosed principal ‘will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal’”]). First Department caselaw “illustrates the principle that the presence or absence of a reference to corporate office above or below a person's signature on an instrument does not necessarily determine the capacity in which the person signed the instrument” (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 7 [2004] citing *PNC Capital Recovery v Mechanical Parking Systems, Inc.*, 283 AD2d 268, 270-271 [1st Dept 2001]).

Here, the Good Guy Guaranty is identified as a “*Personal* ‘Good Guy’ Guaranty” (*emphasis added*), and the language of the document clearly indicates that “guarantor” is to be liable for payment obligations due under the “Lease” (Good Guy Guaranty, p. 35). It is uncontested that defendant signed the Good Guy Guaranty as “Anthony Sicari.” It is also uncontested that following defendant’s signature is the word “Pres.” (Lease, p. 34; Good Guy Guaranty, p. 36). However, where “there is evidence that a person signed a guaranty as an individual and not on behalf of a corporation, the inclusion of ‘president’ after his signature is merely descriptive” (*Chemical Bank v Masters*, 176 AD2d 591 [1st Dept 1991]). Thus, as to guaranties, “an interpretation of an instrument that would result in making a person or entity the guarantor of his, her or its own debt must be rejected” (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d at 7-8 [2004]; *see also PNC Capital Recovery v Mechanical Parking Systems*,

Inc., 283 AD2d 268, 270-271 [1st Dept 2001] [“an interpretation that [corporate officer] signed the Guaranty solely in his capacity as president of the corporation would compel the illogical conclusion that the purpose of the Guaranty was to provide that in case of [the corporation’s] default, the company would guaranty its own indebtedness, rendering the entire Guaranty meaningless”]).

Here, defendant argues that he signed the Lease and the Good Guy Guaranty in his capacity as “President,” as opposed to in his personal capacity, and thus, cannot be held personally liable. Plaintiff also maintains that plaintiff’s agent assured defendant that he would not be held personally liable. However, defendant’s argument essentially amounts to a claim that the Tenant, Silk Denim, was guaranteeing its own obligations under the Lease, and a similar argument was rejected by the First Department (*PNC Capital Recovery v Mechanical Parking Sys., Inc.*, 283 AD2d 268, 726 NYS2d 394 [2001] [“The defendant’s next argument, that writing the word ‘president’ next to his name on the signature line of the Guaranty showed that he did not intent [*sic*] to be personally bound, is without merit” (*id.* at 271)]; *Chemical Bank v Masters*, 176 AD2d 591 [1st Dept 1991] [“the individual guarantor’s writing the word ‘V. Chairman’ next to his signature did ‘not evidence an intention to sign in a purely corporate capacity which would, in any event, be inconsistent with the nature of the guaranty’”]; *Chemical Bank v Kaufman*, 142 AD2d 526, 530 NYS2d 582 [1st Dept 1988] [“Defendant’s contention that he signed his guarantee in a corporate capacity, and cannot therefore be held personally liable, is also without merit. The addition of the word “Pres” immediately after his signature was merely descriptive and does not affect his liability on his personal guarantee”]).

The First Department dealt with an analogous situation more recently in *150 Broadway*:

Obviously, if Bodner and Waldinger signed the lease itself in their individual capacities, it would have been a meaningless act for them to separately affix their signatures to a provision guaranteeing their own personal indebtedness. Even if the printed text of the Guaranty could be considered boilerplate, the signatures that follow it cannot be regarded as nugatory. The only possible interpretation of these signatures is that Bodner and Waldinger specifically assented to the Guaranty, for the benefit of 150 Broadway. Accordingly, 150 Broadway's rights against Bodner and Waldinger individually are limited to the rights afforded to it by the Guaranty. (14 AD3d at 8).

Therefore, defendant failed to raise an issue of fact so as to overcome plaintiff's showing that defendant signed the Good Guy Guaranty in his personal capacity, rendering him personally liable for the Lease obligations of the Tenant, Silk Denim.

However, the amount for which defendant may be held liable remains at issue. In interpreting a contract, the Court must "enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway NY Assocs. L.P. v Bodner*, 14 AD2d at 6). The test for ambiguity in a written agreement is well settled: "A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank*, 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]).

Further, the Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v Jamie Towers Housing Co., Inc.*, 294 AD2d 268, 269 [1st Dept. 2002]; *Barrow v Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3d Dept 1989] ["Thus, it is equally settled law that specific clauses of a contract are to be read consistently with the over-all manifest purpose of the parties' agreement" (*id.*)]). The fundamental, neutral precept of contract interpretation is that agreements are construed in accord

with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]).

Arguably, both guaranties may be read in conjunction with each other (*see Dietrich v Chemical Bank*, 115 Misc 2d 713, 715 [1981]). New York courts have held that, under certain situations, individual agreements can and should be read as one unified agreement. "A contract can be comprised of separate writings or documents if the writings make it clear that they are to be read in conjunction with other writings to determine the intent of the parties" (*Dietrich v Chemical Bank*, 115 Misc.2d 713, 715 [1981]). ~~The intent of the parties is dispositive (see~~ *Commander Oil Corp. v Advance Food Service Equipment*, 991 F2d 49, 52 -53 [1993] [holding that an asset purchase agreement and a lease should be read together as one instrument]).

A guaranty, by definition, is a secondary obligation to answer for the debt of another, the primary obligation, in this case, the Lease (*see Michaels v Chemical Bank*, 110 Misc 2d 74, 76 [1981]). Based on the terms of both the Personal Guaranty and the Good Guy Guaranty, it is clear that each obligates defendant to pay the same obligation under the same instrument, *i.e.*, the Tenant's obligation under the Lease. However, when read together, the Good Guy Guaranty and the Personal Guaranty create an ambiguity as to the period for which defendant may be held liable for the Tenant's rent and additional rent obligations under the Lease.

The Lease provides, in capital letters, that: "general conditions, rules and regulations, and addendum(s) annexed hereto, are hereby incorporated herein by reference." Defendant signed the Good Guy Guaranty, "Addendum B" sued upon herein, on April 10, 2006. However, it is uncontested that a month thereafter, plaintiff caused defendant to sign the Personal Guaranty "Addendum A" for the same Lease, on May 18, 2006. Therefore, arguably, both

Addendums/Guaranties are incorporated into the Lease and are to read together as a whole.

According to plaintiff, under the Good Guy Guaranty (Addendum B), on which it sues, defendant “would remain liable, regardless of the date, until Silk Denim vacated the Premises” (Plaintiff’s Reply, p. 4, fn. 2). Plaintiff also acknowledges that it “required” the subsequent Personal Guaranty, (Addendum A)⁴ “with an end date [March 17, 2007] through which Defendant would be liable whether or not the Tenant, Silk Denim, had surrendered possession of the Premises” (*id.*). Thus, under the Good Guy Guaranty, defendant is liable for the period of Tenant’s default until the Tenant vacated the Premises, *i.e.*, November 17, 2007.

However, under the later Personal Guaranty, defendant remains liable for the Tenant’s default until March 17, 2007, regardless of when the Tenant vacates. Thus, it cannot be determined, as a matter of law, whether the parties intended for defendant to remain liable for the Tenant’s Lease obligations through and until the date of Tenant’s vacatur of the premises, or through and until March 17, 2007. And, no explanation is provided as to why both Guarantees, containing contradictory terms, exist. Therefore, plaintiff is not entitled to summary judgment on his claim for payment due and owing through November 2007, and to that extent, as to the term of defendant’s personal liability, plaintiff’s motion is denied.

Dismissal of Affirmative Defenses

According to CPLR §3211(b) a “party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” The “standard of review on a motion to dismiss an affirmative defense pursuant to CPLR 3211(b) is akin to that used under

⁴“This guaranty shall be deemed a guaranty of payment, and shall be for the period from March 15, 2006 through March 31, 2007 notwithstanding the continuation of the Lease. The obligations hereunder shall survive the expiration of the guaranty, with respect to any defaults under the Lease through March 31, 2007.”

CPLR 3211(a)(7), *i.e.*, whether there is any legal or factual basis for the assertion of the defense. (See, *Winter v Leigh-Mannell*, 51 AD2d 1012 [1976]). The truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied” (*Matter of Ideal Mutual Ins. Co. v Becker*, 140 AD2d 62, 67 [1st Dept 1988]). “If there is any doubt to the availability of a defense, it should not be dismissed’ [citation omitted]” (*see Nahrebeski v Molnar*, 286 AD2d 891 [4th Dept 2001]).

Further, statements that will not defeat, mitigate or reduce the plaintiff’s remedy are insufficient as a defense (~~see NY Jur, Pleading §138; *Walsh v Judge*, 223 AD 423, 425 [1st Dept 1928]~~). Thus, allegations of a plaintiff’s wrongdoing are insufficient as defenses if the alleged wrongdoing is unrelated to the claim made against the defendants; instead the plaintiff’s actions must in some way justify the defendant’s actions to be properly pleaded as defenses (*TNT Communications Inc. v Management Television Systems, Inc.*, 32 AD2d 55 [1st Dept 1969], *order aff’d*, 26 NY2d 639 [1970] [plaintiff’s alleged violation of antitrust laws did not justify defendant’s appropriation of trade secrets and hence was not a proper defense]). Finally, if a defendant asserts an affirmative defense, he also must be able to prove it (*Cornell Univ. v Dickerson*, 100 Misc 2d 198 [1979] [holding that an ex-student seeking to avoid repayment of his student loans was not entitled to interpose the affirmative defense of duress where the university terminated him as a student and withheld his degrees because he presented no evidentiary facts regarding this claim, such as when, where, or by whom the duress was inflicted]).

Here, defendant’s First Affirmative Defense alleges that the Court lacks personal jurisdiction over defendant. However, defendant fails to assert any facts in support of this defense in either his Answer or in opposition to the motion. Therefore, plaintiff’s request that

the Court dismiss the First Affirmative Defense is granted.

Defendant's Second Affirmative Defense alleges that plaintiff is barred by the doctrines of waiver, laches, estoppel and unclean hands. Again, defendant fails to fails to assert any facts in support of this defense in either his Answer or in opposition to the motion. Therefore, plaintiff's request that the Court dismiss the Second Affirmative Defense is granted.

Defendant's Third Affirmative Defense alleges that plaintiff's claims are barred, in whole or in part, by the express or implied terms of the agreement. As discussed above, defendant has raised an issue of material fact regarding his personal liability for the Tenant's obligations under the Lease. Therefore, plaintiff's request that the Court dismiss the Third Affirmative Defense is denied.

The Fourth and Fifth Affirmative Defenses allege that plaintiff breached "the agreement" (Answer ¶¶ 9-10). Defendant alleges that plaintiff failed to replace the carpet, repair all of the floors, and paint the entire space pursuant Paragraph 45 of the Lease (Opp. ¶ 11). While defendant demonstrates that plaintiff breached the Lease, the issue before the court is defendant's obligations under the Personal or Good Guy Guaranty (Complaint ¶ 13).

It is well settled that a "guarantor waives any defenses and counterclaims in an action by the creditor . . . where the guarantor 'absolutely and unconditionally' guarantees payment" (63 NY Jur 2d, Guaranty and Suretyship §362; *see also, New York Life Ins. Co. v Media/Communication Partners Ltd. Partnership*, 204 AD2d 235 [1st Dept 1994] ["under the express terms of the Guaranty, defendant was precluded from raising the defense of fraudulent inducement. The Guaranty Agreement states, *inter alia*, that defendant's obligation is 'absolute and unconditional'"]; *Silbert v Silbert*, 85 AD2d 661, 662 [1st Dept 1981] ["By the terms of the

guarantee, the defendants waived their right to assert any setoff, counterclaim or defense of any kind or nature to an action brought on the note and guarantee.”]).

As to the Good Guy Guaranty, it clearly states that defendant as guarantor “*does hereby, absolutely, irrevocably and unconditionally guarantee to Landlord, its successors and assigns, (a)(i) the payment of Base Rent and Additional Rent (as such terms are defined in the Lease) payable under the Lease . . . and (b) the full and prompt payment of all damages and expenses that may arise in connection with or as a consequence of any of the foregoing*” (p. 35). Although ~~the Personal Guaranty does not contain any language that absolutely and unconditionally~~ guarantees payment, defendant is barred from raising the condition of the premises as an affirmative defense.

The Lease provides that “Base Rent shall be payable without previous demand or any set-off, offset, abatement or deduction whatsoever” (Lease, p. 15, ¶ 15(a)). The Lease also provides that:

Tenant shall accept possession of the Premises in its "as is" condition, which shall exist on the date hereof, subject to violations, whether or not of record, and Landlord shall have no obligation to perform any work or make any installations in order to prepare the Premises for Tenant's occupancy. The taking of possession of the Premises by Tenant shall be conclusive evidence as against Tenant that at the time such possession was so taken, the Premises and the Building were in good and satisfactory condition, and that Landlord has substantially completed the performance of any work which is to be performed by Landlord pursuant to the Lease.
(Lease, p. 25, ¶ 32)

Further, the Lease states:

There shall be no allowance to Tenant for a diminution of rental value and no liability on the part of Landlord by reason of inconvenience, annoyance, interruption of, or injury to business arising from Landlord, Tenant or others making, or failing to make, any repairs, alterations, additions or improvements in or to any portion of the Building or Premises, or in or to fixtures, appurtenances, or equipment thereof.
(Lease, p. 15, ¶ 18(a))

The above language would bar the Tenant, in defending against a claim for unpaid rent, from raising allegations that there were asbestos or handicap-access problems at the commencement of the Lease term, and from claiming that there was any problem with the Landlord's work (*see Nat's Pizzeria, Inc. v 165 Lexington Ave. Assocs.*, 304 AD2d 389, 757 NYS2d 548 [1st Dept 2003]). Although the Lease required the plaintiff to perform certain work concerning the bathrooms, flooring, painting and carpet, any defense to payment based on a claim that plaintiff failed to so perform is barred by the terms of the Lease.⁵ Thus, defendant is also barred from raising the allegations. Thus, the Fourth and Fifth Affirmative Defenses are dismissed.

The Sixth Affirmative Defense alleges that any damages allegedly sustained by plaintiff were caused, in whole or in part, by "the conduct, carelessness, recklessness, intervening and/or superseding acts, willful conduct, wrongdoing, and/or default of the plaintiff, its agents and others for whom plaintiff was responsible, and therefore, the amount of any damages otherwise recoverable by plaintiff should be extinguished or reduced to the extent such conduct caused plaintiff's alleged damages" (Complaint, ¶ 12). Defendant has stated a defense for a tort cause of action. As plaintiff asserts a contract cause of action, defendant's Sixth Affirmative Defense does not defeat, mitigate or reduce plaintiff's remedy. Accordingly, plaintiff's request that the Court dismiss the Sixth Affirmative Defense is granted.

Finally, defendant's Seventh Affirmative Defense alleges that plaintiff's claims are barred by the doctrines of "set-off" and "recoupment." Defendant's opposition implies that he is seeking recoupment or set-off of the \$60,000 security deposit he paid upon signing the Lease

⁵ The Lease does not require plaintiff to perform any asbestos removal work or provide handicap accessibility; thus, any alleged failure of plaintiff to address such issues is not a defense to payment of rent or additional rent.

(opp., ¶ 4). The Good Guy Guaranty specifically states that “nothing in this Guaranty shall be deemed to limit . . . Landlord's right to retain and/or apply the security deposit under the Lease” (p. 35). The Good Guy Guaranty further provides that “this Guaranty shall remain in full force and effect without regard to, and shall not be impaired or affected by . . . (d) any substitution or release, in whole or in part, of any security for the Lease which may be held at any time by Landlord . . . (e) any exercise, non-exercise or delay in exercise by Landlord of any right, power, or remedy under or in respect of the Lease” (*id.*). Thus, pursuant to the terms of the Good Guy Guaranty, defendant is not entitled to a credit for the security deposit (reply, ¶ 38) (*see Weiner v*

Tae Han, 291 AD2d 297 [1st Dept 2002] [“Appellants argue that the IAS court, in granting plaintiff summary judgment upon their guarantees, erred in failing to credit them for their lease security deposit. The argument, however, is without merit, since under the terms of both the subject lease and guarantees, plaintiff was entitled to apply the defendants’ security deposit to posteviction rent of the tenant, which obligation was not secured by the guarantees”]).

Given that defendant’s ability to assert this defense rests on the whether defendant’s obligation arises under the Good Guy Guaranty or under the Personal Guaranty, it cannot be said that this defenses is precluded as a matter of law, at this juncture. Accordingly, plaintiff’s request that the Court dismiss the Seventh Affirmative Defenses is denied.

Hearing to Assess Damages

According to CPLR §3212(c), “[i]f it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may . . . order an immediate trial of such issues of fact raised by the motion, before a referee, [or] before

the court.” If the only issues of fact that exist in the case relate to damages rather than to liability, summary judgment will be granted on the liability question. If the plaintiff has prevailed, the court is then required to direct an “immediate hearing” of the damages question (*see Lloyd v Imperial Auto Collision, Inc.*, 120 AD2d 354, 355 [1st Dept 1986] [“It is plain that there is no defense as to liability in this action. The only real issue is that of damages. . . . Accordingly we have remanded this action for a trial on the issue of damages only” (*id.*)]

Here, the Court finds personal liability on the part of the defendant as guarantor. Further, ~~the Court finds that triable issues of fact exist as to the term of defendant’s personal liability, and~~ thus, plaintiff’s request for a hearing to be scheduled on damages is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff 1407 Broadway Real Estate LLC by Gettinger Management LLC seeking summary judgment, pursuant to CPLR §3212, against defendant Anthony Sicari is denied; and it is further

ORDERED that plaintiff’s motion dismissing defendant’s First, Second, Fourth, Fifth and Sixth Affirmative Defenses, pursuant to CPLR §3211(a) and (b), is granted; and it is further

ORDERED that plaintiff’s motion dismissing defendant’s Third and Seventh Affirmative Defenses, pursuant to CPLR §3211(a) and (b), is denied; and it is further

ORDERED that the parties appear in Part 35 for a Preliminary Conference on April 28, 2009 at 2:15 p.m., and it is further;

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: March 19, 2009



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
MAR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK