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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART 47**

NEC FINANCIAL SERVICES, INC.,

INDEX NO.:018859/08

Plaintiff,

MOTION DATE:2-25-09
SUBMIT DATE:5-27-09
SEQ. NUMBER - 001

-against-

FIRST FIDELITY MORTGAGE GROUP, LTD., d/b/a FIRST FIDELITY MORTGAGE GROUP d/b/a FFMG MORTGAGE GROUP, FRANK LAGREGA, a/k/a FRANK S. LAGREGA, JR., a/k/a FRANK DAVID LAGREGA, JR., a/k/a FRANK LAGREGGA, Individually, and BART D. KAPLAN, P.C.,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 1-29-09..... 1
Memorandum of Law in Support of Motion, dated 1-29-09...2
Statement in Support of Request for Assignment to Commercial Division, dated 1-29-09.....3
Affirmation in Opposition, dated 3-6-09.....,,,,,.....4
Reply Affirmation, dated 3-25-09.....5

This motion by the plaintiff pursuant to CPLR 3212 for summary judgment against defendant Bart D. Kaplan, P.C. ("Kaplan. P.C.") for the relief demanded in the complaint and

striking its answer, and pursuant to CPLR 3215 for a judgment by default against defendant First Fidelity Mortgage Group, Ltd., ("First Fidelity") for the relief demanded in the complaint is granted in its entirety.

This is an action on an office equipment lease. This plaintiff has sued First Fidelity as the lessee, and the other parties as guarantors. The lease was for 39 months, beginning in January, 2006. Twenty-nine (29) payments were made and then ceased. The plaintiff now moves for summary judgment against one of the guarantors, Kaplan, P.C., and for a default judgment against First Fidelity. The lease recites that it is to be governed and enforced under the law of the State of New Jersey.

Initially, the Court notes that notwithstanding the reference to New Jersey law the proper procedural standard to be applied here is the law of the forum, New York. *See, e.g., Tanges v Heidelberg N.Am.,* 93 NY2d 48, 53 (1999). As summary judgment is often referred to as the "procedural equivalent of a trial" (*Dykeman v Heht* 52 AD3d 767 [2d Dept. 2008]) and as a "procedural device" (*Matter of Tradale CC,* 52 AD3d 900 [2d Dept. 2008], the Court will apply New York law with respect to the burdens applicable to the movant and opponent.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). However, standing alone an attorney's affirmation that is not based upon personal knowledge is of no probative value or of evidentiary significance. *JMD Holding Corp.*

v Congress Fin. Corp., 4 NY3d 373 (2005); *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455(2d Dept. 2006). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v City of New York, supra*), and the defending party must do more than merely parrot the language of a pleading or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). It should not attempt to resolve matters of credibility. *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987).

The Court finds that the plaintiff has made out its *prima facie* case for judgment against Kaplan, P.C. as a matter of law. It presents the lease, with a schedule "A" naming the equipment leased. It also presents the affidavit of Hershel Salan, plaintiff's Vice President, with a certificate of acceptance of the equipment signed by First Fidelity's president, Frank LaGrega, and a Guaranty signed by both LaGrega and Kaplan, P.C. The Guaranty identifies plaintiff as the lessor and First Fidelity as the Obligor, and recites, among other things, that the guaranty is given to induce the lessor to enter into... "one or more equipment lease agreements"(defined as part of the "obligations"), and that the guarantor is "fully aware of the terms and conditions of the Obligations." The Guaranty further recites that the guarantor is by way of the guaranty a "primary obligor" under the equipment lease.

The foregoing establishes the lease contract, the acceptance thereof and of the equipment, a stream of payments and then a default, and an unconditional guaranty by Kaplan, P.C. Under New Jersey substantive law, the clear terms of the agreements presented establishes plaintiff's right to enforcement of the guaranty upon the lessee's default. *See, Center 48 Ltd. Partnership v May Dept. Stores,* 355 NJ Super 390 (Ap Div 2002); *Housatonic Bank & Trust Co. v Fleming,* 234 NJ Super 79 (1989). This is consistent with more general New Jersey law that where the terms of a contract are clear and unambiguous, the courts must enforce those terms as written. *Karl's Sales and Serv. v Gimbel Bros., Inc.,* 249 NJ Super 487 (Ap Div 1991).

In response, the defendant Kaplan, P.C. has failed to raise a question of fact as to its obligation to the plaintiff. Bart D. Kaplan, president of Kaplan, P.C. submits an affidavit in which he admits signing the guaranty presented by the plaintiff, on January 25, 2006. However, he states that this guaranty was supposed to refer to what he refers to as the "original lease" of certain items, which was not nearly as expansive as the list found in schedule "A." He claims that the

next day, January 26, the plaintiff sent a new contract with the "expansive" list of items to be lease. He states that he would not sign a shorter-form guaranty incorporated on this lease itself because he did not think First Fidelity should be leasing all the items in schedule "A."

The Court finds that this amounts to no more than a feigned issue that is insufficient to stave off the motion. *Village Bank v Wild Oaks Holding, Inc., supra*; *Barclays Bank of N.Y. v Sokol, supra.* In effect, Kaplan does not dispute the terms of the guarantee he signed, or even the terms of the underlying lease itself, but argues that this guaranty applies to another lease that was never executed because the parties thereto expanded the list of equipment to be included. However, he presents no proof of the existence of a "first" or "other" lease, or that it varied from the one presented by the plaintiff except for the contents of schedule "A". In that regard, he does not mention any particular item that was added to the original list, or for that matter what was contained in the original list.

Thus, while a guarantor will not be held to a guaranty where there has been a material modification to the underlying contract, to which he did not agree (*Center 48 Ltd. Partnership v May Dept. Stores, supra*), there is nothing to support his contention that he never agreed to guaranty payments for a lease of the items in schedule "A". His claim that disclosure of documents allegedly in the possession of LaGrega will support him is, in effect, a procedural resort to CPLR 3212(f), but without a statement what is contained in such documents, and some explanation as to why this disclosure was not sought or obtained at some time prior to the making of this motion, the Court will not delay a determination of the motion on this ground. *See, Companion Life Ins. Co. v All State Abstract Corp.*, 35 AD3d 519 (2d Dept. 2006).

Moreover, even though he admits that he was made aware the very next day of the alleged changes to what was to be leased, Kaplan does not claim that he sought to disown the guaranty he

signed, either verbally or in writing. As noted, 29 monthly payments were made before the default, and there is no allegation, let alone any proof, that Kaplan P.C. repudiated its guaranty during the time that First Fidelity was performing under the lease. It thus effectively ratified the guaranty it undisputedly gave notwithstanding a change to schedule "A", even crediting Kaplan's claim that some other, lesser list of items was initially contemplated. *See, Roddy v Clemons,* 2007 WL 3034251 (NJ Super, Ap Div 2007), citing Restatement (Second) of Contracts, § 287 (1981). Further, no authority is presented that his failure to sign the second, short-form guaranty invalidates the guaranty he did execute.

The remaining legal contentions of Kaplan, P.C. are without merit. Even assuming that the copy of the complaint served on this party was missing a page containing the allegations supporting the fifth cause of action, there is no assertion that the one filed with the Clerk did not contain this page, which clearly states a cause of action under the guaranty. Next, the fact that the plaintiff did not set forth New Jersey case law in its motion papers or accompanying memorandum of law, while less than admirable, does not detract from the proof presented, as discussed above.[1] Finally, the bankruptcy filing of LaGrega is of no moment, as the automatic stay generally does not affect co-defendants (*see, Teachers Ins. & Annuity Assn. of Am. v Butler,* 803 F 2d [2d Cir 1986]), and there is no showing that any federal court has extended the stay to proceedings against any other party to the present action.

That branch of the motion that is for a default judgment against First Fidelity is granted, there being no opposition thereto.

As the complaint seeks attorney's fees, an inquest thereon is required as against both

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[1] It should also be noted that the one substantive case cited by Kaplan, P.C. in support of its position regarding the alleged material alteration of the lease is a New York case.

Kaplan, P.C. and First Fidelity unless the plaintiff chooses to waive the same. Accordingly, absent such waiver it is ordered that, subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for an inquest on **July 15, 2009**, at 9:30 A.M.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to an inquest is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

Entry of judgment shall await the outcome of the inquest on attorney's fees.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 10, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
JUN 12 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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