

**560 Colonial LLC v All Star Med. Mgt. LLC**

2009 NY Slip Op 31730(U)

July 23, 2009

Supreme Court, New York County

Docket Number: 603211/08

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**

PART 1

J.S.C. Justice

Index Number : 603211/2008  
560 COLONIAL LLC  
vs.  
ALL STAR MEDICAL MANAGEMENT LLC  
SEQUENCE NUMBER : # 001  
DISMISS

INDEX NO. 603211-08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

1  
2, 3, 4  
5

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
AUG 04 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: JUL 23 2009

MARTIN SHULMAN  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 1

-----X  
560 COLONIAL LLC,

Plaintiff,

Index No.: 603211/08

-against-

DECISION/ORDER

ALL STAR MEDICAL MANAGEMENT LLC,  
REZA NAGHAVI and STEVEN SHAYANI,  
Defendants.

-----X  
**HON. MARTIN SHULMAN, J.S.C.:**

In this commercial landlord/tenant action, plaintiff moves for summary judgment<sup>1</sup> on its complaint, dismissal of defendants' affirmative defenses and counterclaims and to amend the complaint to include rent accruing after the commencement of this action. For the following reasons, this motion is granted.

**BACKGROUND**

Plaintiff 560 Colonial LLC ("Colonial" or "plaintiff") owns a commercial office building (the "building") located at 560 Northern Boulevard in the County of Queens, City and State of New York. See Notice of Motion, Exhibit A (complaint), ¶ 1. Defendant All Star Medical Management LLC ("All Star") is engaged in the business of providing medical services and is owned by individual defendants Dr. Steven Shayani, MD ("Shayani") and Dr. Reza Naghavi, MD ("Naghavi"). *Id.*, ¶ 2.

In February of 2006, Colonial and All Star executed a 10-year commercial lease for Suite 208 at the building (the "lease"). *Id.*, ¶ 3; Exhibit A. Colonial signed the lease via its manager, Saeed Arabian ("Arabian"), while Shayani signed the lease on behalf of All Star. *Id.*; Exhibit A. The relevant portions of the lease provide as follows:

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<sup>1</sup> Plaintiff improperly brings the motion pursuant to CPLR 3213. In its discretion, the court is treating the motion as being brought pursuant to CPLR 3212.

19. Fees and Expenses:

If Owner, ... in connection with any default by tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any action or proceeding, and prevails in any such action or proceeding, then Tenant will reimburse Owner for such sums so paid, or obligations incurred, with interest and costs. ...

Rider ...

Article 3 Rent

A. Fixed Annual Rent. Tenant shall pay Fixed Annual Rent in equal monthly installments, in advance on or before the first day of each month of the Term. ...

B. Additional Rent. All costs and expenses which Tenant assumes or agrees to pay and any other sum payable by Tenant pursuant to the Lease, including, without limitation, its share of Taxes and Operating Expenses and the Electric Common Area Rent, shall be deemed Additional Rent.

C. Rent. Fixed Annual Rent, Additional Rent, Taxes and Operating Expenses and any other accounts, which Tenant is or becomes liable to pay Landlord under this Lease, are herein referred to collectively as "Rent," and all remedies applicable to nonpayment of Rent shall be applicable thereto.

*Id.*

Contemporaneously with the lease, both Shayani and Naghavi executed personal guarantees for All Star's tenancy obligations (the "Shayani guaranty" and the "Naghavi guaranty", respectively). *Id.*; Exhibits B, C. The relevant portions of the Shayani guaranty and the Naghavi guaranty, which are identical, provide as follows:

11. The Guarantor does hereby unconditionally guaranty to the Landlord the due and punctual payment, performance and compliance with all of the terms, covenants and conditions to be paid, performed or complied with by Tenant under the Lease and all extensions or renewals

[\* 4 ]  
thereof, including reasonable attorneys' fees (collectively referred to herein as the "Obligations").

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14. The Guarantor has not and will not set up any claim or defense, counterclaim, set-off or other objection of any kind to the suit, action or proceeding at law, in equity or otherwise, or to any demand or claim that may be instituted or made under and by virtue of the Guaranty. All remedies of the Landlord by reason of or under the Guaranty are separate and cumulative remedies, and it is agreed that no one of such remedies shall be deemed in exclusion of any other remedies available to the Landlord.

*Id.*

In early 2007, professional disputes evidently arose between Drs. Shayani and Naghavi, which spilled over into a landlord/tenant dispute between All Star and Colonial. Colonial alleges that All Star ceased paying its rent, additional rent and other charges in approximately March of 2007. *Id.*; Arabian Affidavit, ¶ 14. In support of its motion, plaintiff submits a schedule of charges for unpaid rents through February of 2009. *Id.*; Schedule A. Shayani, however, alleges to have personally paid Colonial \$85,000.00 in September of 2007 in fulfillment of all of All Star's debts. See Shayani Affidavit in Opposition, ¶ 20. He presents copies of his cancelled checks. *Id.*; Exhibit C.

Colonial commenced this action on November 6, 2008 by filing the complaint, which sets forth causes of action for: 1) breach of the lease (against All Star); 2) legal fees (against All Star); 3) breach of the Naghavi guaranty (against Naghavi); 4) legal fees (against Naghavi); 5) breach of the Shayani guaranty (against Shayani); and 6) legal fees (against Shayani). See Notice of Motion, Exhibit 1. All defendants submitted

answers to the complaint. *Id.*; Exhibits 2, 3. All Star and Shayani's combined answer sets forth the affirmative defenses of: 1) accord and satisfaction; and 2) fraudulent inducement. *Id.*; Exhibit 2. Naghavi's answer sets forth the affirmative defenses of: 1) accord and satisfaction; 2) lack of standing; 3) failure to mitigate damages; 4) the statute of frauds; 5) the doctrine of unclean hands; 6) the doctrines of laches, waiver, estoppel and/or equitable estoppel; 7) failure to state a cause of action; and 8) modification or release. *Id.*; Exhibit 3. Naghavi's answer also sets forth counterclaims for: 1) a declaratory judgment that the Naghavi guaranty is void; and 2) breach of the implied covenant of good faith and fair dealing. *Id.* Colonial's motion is now before the court.

#### DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1<sup>st</sup> Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Transit Auth.*, 304 AD2d 340 (1<sup>st</sup> Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. *Andre v Pomeroy*, 35 NY2d 361 (1974); *Pirrelli v*

*Long Island R.R.*, 226 AD2d 166 (1<sup>st</sup> Dept 1996). However, the court's reluctance to employ summary judgment "only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated'." *Blechman v I.J. Peiser's & Sons, Inc.*, 186 AD2d 50, 51 (1<sup>st</sup> Dept 1992), quoting *Andre v Pomeroy*, 35 NY2d at 364. Here, the court finds that Colonial is entitled to summary judgment on the issue of liability on all six of its breach of contract claims.

Under New York law, "the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it'." *Eden Temp. Servs., Inc. v House of Excellence Inc.*, 270 AD2d 66, 67 (1<sup>st</sup> Dept 2000), quoting *Paz v Singer Co.*, 151 AD2d 234, 235 (1<sup>st</sup> Dept 1989). Further, it is well settled that "on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself." *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1<sup>st</sup> Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1<sup>st</sup> Dept 1995).

Here, Colonial has presented the lease, the Shayani guaranty and the Naghavi guaranty, all of which speak for themselves. The lease obligates All Star to pay Colonial "rent," consisting of "fixed annual rent, additional rent, taxes and operating expenses," and further obligates All Star to pay attorneys' fees in any action that Colonial commences to collect unpaid rent. The Shayani guaranty and the Naghavi guaranty render the individual defendants liable for All Star's rental obligations and for

attorneys' fees. The Shayani guaranty and the Naghavi guaranty also provide that neither individual defendant will raise an affirmative defense or counterclaim in any action that Colonial brings pursuant to those guarantees. Thus, it is clear that Colonial has established all of the elements of each of its causes of action against defendants.

In his opposition papers, Shayani argues that the Shayani guaranty is voidable because of the professional misconduct of third-party defendant David Pour, Esq. ("Pour")<sup>2</sup> who, he claims, fraudulently induced him to enter into said guaranty. See Defendants' Memorandum of Law (All Star/Shayani), at pp. 2-5. This argument is merely a recitation of Shayani's second affirmative defense. However, as previously mentioned, paragraph 14 of the Shayani guaranty specifically provides that Shayani unconditionally waived his right to assert any affirmative defenses in any action that Colonial might commence pursuant to the guaranty. See Notice of Motion, Exhibit B. The Appellate Division, First Department, has routinely upheld and enforced such unconditional waivers. See, e.g., *Sterling Nat'l Bank v Biaggi*, 47 AD3d 436 (1<sup>st</sup> Dept 2008); *Raven Elevator Corp. v Finkelstein*, 223 AD2d 378 (1<sup>st</sup> Dept 1996). Shayani raises no legal argument as to why the instant waiver should not be enforced. Therefore, the court rejects Shayani's first opposition argument.

Shayani also argues that he has already "satisfied in full any liability under the Shayani guaranty" by his payment of \$85,000.00 to Colonial. See Defendants' Memorandum of Law (All Star/Shayani), at pp. 5-10. However, this argument, which

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<sup>2</sup> For his part, Pour submits an affidavit in which he denies having committed any professional misconduct. See Pour Affirmation in Opposition. Shayani has commenced a third party action against Pour and his firm. Pour's motion to dismiss the third party complaint has been filed but is not yet submitted.

mirrors Shayani's first affirmative defense of accord and satisfaction, is also clearly barred by the waiver clause of the Shayani guaranty, and the court rejects it for this reason. The court further notes that Shayani's payment argument speaks to the issue of damages rather than to the issue of liability.

Naghavi's opposition papers first argue that "summary judgment is not appropriate in this case because several issues of fact exist about, *inter alia*: the terms of the lease; default under the lease ...", etc. See McDonald Affirmation in Opposition, at p. 4. However, these assertions are advanced by counsel, and Naghavi's own affidavit neither mentions these alleged issues of fact, nor presents any documentary or other evidence to support their existence. It is clear that "an attorney's affirmation ... is of no probative value in opposition to a motion for summary judgment." *Ramnarine v Memorial Ctr. for Cancer & Allied Diseases*, 281 AD2d 218, 219 (1<sup>st</sup> Dept 2001). Thus, the court rejects Naghavi's first argument.

The balance of Naghavi's opposition papers is devoted to a recitation of the allegations that underlie his affirmative defenses and counterclaims against Colonial. However, for the same reasons as discussed above, the court finds that paragraph 11 of the Naghavi guaranty contains a valid waiver of Naghavi's right to assert such affirmative defenses and counterclaims in this action. Therefore, the court rejects Naghavi's remaining opposition arguments as well. Accordingly, the court concludes that Colonial is entitled to summary judgment on its causes of action against defendants, as well as to summary judgment dismissing all of defendants' affirmative defenses and counterclaims herein.

As previously mentioned, however, Shayani has presented proof that he paid Colonial the sum of \$85,000.00 in September of 2007, which is during the period that Colonial claims that All Star was in default of the lease. See Shayani Affidavit in Opposition, Exhibit C. The court also notes that this payment bears on the issue of damages. Accordingly, the court finds that its grant of summary judgment to Colonial should be limited to the issue of liability, with the issue of damages to be referred to a Special Referee to hear and report. As to plaintiff's request to amend the complaint, at the hearing directed herein plaintiff shall be permitted to conform the pleadings to the proof (see CPLR 3025[c]) to reflect rent and additional rent due and owing through the hearing date.

The court has considered the parties remaining arguments and finds them unavailing. Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiff 560 Colonial LLC's motion is granted to the extent that plaintiff is awarded summary judgment on all six of its causes of action against defendants All Star Medical Management LLC, Steven Shayani and Reza Naghavi on the issue of liability, and summary judgment dismissing all of said defendants' counterclaims and affirmative defenses, and is otherwise denied; and it is further


ORDERED that the issue of the amount of liability for plaintiff's causes of action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: New York, New York  
July 23, 2009

ENTER:

  
Hon. Martin Shulman, J.S.C.

**FILED**

AUG 04 2009

COUNTY CLERK'S OFFICE  
NEW YORK