

Mark Hotel, LLC v Weber
2009 NY Slip Op 32346(U)
October 8, 2009
Supreme Court, New York County
Docket Number: 107758/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Mark Hotel, LLC

- v -
Barry Weber

INDEX NO.

10-1158/09

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

CR 3213

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

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

FILED
OCT 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

PC scheduled for 11/5/09 in
Part 10 @ 9:30 am, 60C Room 232

Dated: Oct 8, 2009

JG
HON. JUDITH J. GISCHE, 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):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
Mark Hotel, LLC,

Plaintiff (s),

-against-

Barry Weber,

Defendant (s).
-----x

DECISION/ORDER
Index No.: 107758-09
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

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NEW YORK

Papers	Numbered
Pltf n/m (CPLR 3213) w/ JL affirm, SM affid, exhs	1
Def's opp/ proposed verified answer, exhs	2
Pltf's reply w/JL affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff, the Mark Hotel ("landlord") against defendant Barry Webber, the personal guarantor ("guarantor") of a lease agreement for commercial space at landlord's building. The court has before it the landlord's motion for summary judgment in lieu of a complaint. CPLR § 3213. The motion is opposed by the guarantor, who argues that the motion should be denied and this case be converted to a conventional action.

Applicable Law

Where an action is commenced under CPLR § 3213, the instrument upon which it is based must be for the payment of money only. An unconditional guaranty is an

instrument for the payment of money only, whether or not it recites a sum certain. European Am. Bank v. Cohen, 183 AD2d 453, 453 (1st Dept 1992). Although the need to consult the underlying loan documents to establish the amount of liability does not affect the availability of CPLR § 3213 [European Am. Bank v. Cohen, *supra*], to establish its prima facie case against guarantor the lender must set forth the notes, an unconditional guaranty to pay and nonpayment thereof. Bank Leumi Trust Co. of New York v. Rattet & Liebman, 182 AD2d 541 (1st Dept 1992). To defeat the motion, the guarantor must come forward with proof showing the existence of a triable issue of fact with respect to a bona fide defense. Bank Leumi Trust Co. of New York v. Rattet & Liebman, 182 AD2d at 542.

Arguments presented

It is agreed by the parties that Barry Webber signed a document called a "Limited Guaranty," guaranteeing the following:

"the full payment, performance and observance of all the agreements to be performed and observed by Tenant in the attached Lease, including the 'Rules and Regulations' as therein provided, and including the payment of any actions against Tenant, without requiring any notice to Guarantors¹ of nonpayment or, nonperformance, or proof, or notice of demand, to hold the undersigned responsible under this guaranty, all of which the undersigned hereby expressly waive and expressly agree that the legality of this agreement and the agreement of the Guarantors under this guaranty shall not be ended, or changed by reason of the claims to Owner against Tenant of any of the rights or remedies given to Owner as agreed in the attached lease. The

¹The guaranty uses plural terms because initially, Edith Webber was going to also personally guaranty the lease. Her name, however, was crossed out and initialed by Barry Webber.

Guarantors further agree that this guaranty shall remain and continue in full force and effect as to any renewal, change or extension of the Lease. As a further inducement to Owner to make the Lease, Owner and Guarantors agree that in any action or proceeding brought by either Owner or the Guarantors against the other on any matters concerning the Lease or of this guaranty that Owner and the undersigned shall and do waive trial by jury. Notwithstanding the provisions of this guaranty, Guarantors shall be relieved of all liability in respect of obligations under the lease occurring after Tenant possession to Landlord and return the keys (it being understood that the guarantors shall be responsible for the payment of rent and additional rent up to the date of surrender), it being further understood that Landlord shall be entitled to retain the security deposit (it being understood that said security deposit shall not be an offset against any rent or additional rent due) and be entitled to reasonable legal fees for any action brought under this guarantee."

The "lease" the guaranty refers to is the lease agreement dated as of August 26, 1993 between Judson Realty, Inc., landlord's predecessor in interest and Edith Weber & Associates, Inc. ("tenant") for Store #3 at the Mark Hotel, 25 East 77th Street, New York, New York ("store"). Sometime in August 2008, the tenant fell behind in paying rent and plaintiff herein brought a nonpayment petition against the tenant in Civil Court, New York County (L&T 90622-08). The guarantor was not a named party to that action.

The landlord and tenant settled that proceeding by entering into a written stipulation of settlement "so-ordered" by Judge Anil C. Singh, JCC on February 11, 2009 ("settlement"). In the settlement, tenant acknowledged owing the landlord unpaid rent of \$123,360 through February 11, 2009. The tenant also consented to the entry of a money judgment against it, in favor of the landlord, in that amount. The parties stipulated that the tenant had surrendered possession of the store to the landlord on

December 31, 2008.

Plaintiff seeks summary judgment against the guarantor based upon his personal guarantee of the terms of the lease. The guaranty holds the guarantor personally "responsible for the payment of rent and additional rent up to the date of surrender. . ." Thus, plaintiff seeks a money judgment against the guarantor for the rent and additional rent owed through December 31, 2008, the date the tenant surrendered possession. According to plaintiff, that amount is \$90,478.83, extrapolating the figures from the money judgment in the Civil Court.

In opposition to plaintiff's motion, and in its proposed verified answer, the guarantor raises several proposed defenses. First, that the settlement voided the guaranty because he was not a named party to that action. He contends further that even if the guaranty is not void, the settlement in Civil Court is not binding against him because he was not made a party to that action and he is not a party to that settlement.

The guarantor further alleges that the dispute is not capable of being resolved on an expedited basis, but should be converted to an ordinary action because plaintiff's claims are not for a "sum certain." The guarantor argues that although the landlord and tenant enter into an agreement which resolved their dispute, it affects him because he believes his obligation (if any) is at least \$13,000 less than the \$90,478.83 being demanded in this action, based upon the nonpayment petition which demanded unpaid rent of \$46, 474.98 through October 2008.

The guarantor also claims the guaranty is not just for the payment of money, but also for the "performance and observance of all the agreements to be performed by the Tenant in the [Lease] . . ." Thus, guarantor argues that since the settlement contains a

"reserv [ation] of all [landlord's] rights under the lease, including, without limitation, the right to recover rent and additional rent for periods hereafter pursuant to the lease . . ."

these action may not resolve all of plaintiff's claims against him and he has potential defenses, yet unknown.

Finally, guarantor argues the clause in the guaranty, allowing the landlord to keep the tenant's security deposit "but not . . . [as an] offset against any rent or additional rent due . . ." constitutes an impermissible penalty clause, not a liquidated damages clause. The guarantor argues that this allows the landlord to reap a windfall because it gets the full unpaid rent and additional rent claimed, plus the security.

Discussion

The guaranty that is the subject of this motion for summary judgment in lieu of a complaint is not for the payment of money only, but a guaranty of the "performance and observance of all the agreements to be performed by the Tenant in the [Lease] . . ."

Beach Lane Management, Inc. v. Wasserman, 13 Misc.3d 1217(A) (N.Y.Sup. 2006) (citing Times Square Associates v. Grayson, 39 A.D.2d 845 (1st Dept 1972)).

The guarantor has also presented several disputed issues of fact which, if proved, are defenses to the underlying debt that the landlord seeks to recover from him. The guarantor was not a party to the summary proceeding, he is not a signatory to the settlement agreement in that proceeding, and the guaranty does not contain a waiver of defenses. Compare, Hotel 71 Mezz Lender LLC v. Mitchell, 63 A.D.3d 44 (1st Dept 2009); Sterling Nat. Bank v. Biaggi, 47 A.D.3d 436 (1st Dept 2008); Palm Beach Mortg. Management, LLC v. Red Tulip, LLC, 18 A.D.3d 379 (1st Dept 2005).

Since plaintiff has not met its burden on this motion, which is to prove that it is entitled to the expedited treatment that CPLR § 3213 provides, this motion must be, and is hereby, denied. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151 (1975). The court will, however, convert this case to an ordinary action by deeming the motion and supporting papers the complaint. The opposition papers are deemed defendant's answer.

The court also schedules this case for a preliminary conference to be held on **November 5, 2009 at 9:30 a.m. in Part 10.** No further notices will be sent.

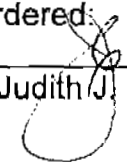
Conclusion

Plaintiff's motion for summary judgment in lieu of a complaint pursuant to CPLR § 3213 is denied for the reasons stated. This case is converted to an ordinary action. The preliminary conference will be held on **November 5, 2009 at 9:30 a.m. in Part 10.**

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 8, 2009

So Ordered:


Hon. Judith J. Gische, J.S.C.

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