

**347 W. 36th St. LLC v Dibenedetto**

2010 NY Slip Op 32145(U)

August 11, 2010

Supreme Court, New York County

Docket Number: 108969/09

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. EILEEN A. RAKOWER

PART 15

Index Number : 108969/2009  
347 WEST 36TH STREET LLC  
vs.  
DIBENEDETTO, STEVE  
SEQUENCE NUMBER : 001  
SUMMARY JUDGEMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

in 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

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

**FILED**  
AUG 13 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/11/10

  
HON. EILEEN A. RAKOWER

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 15

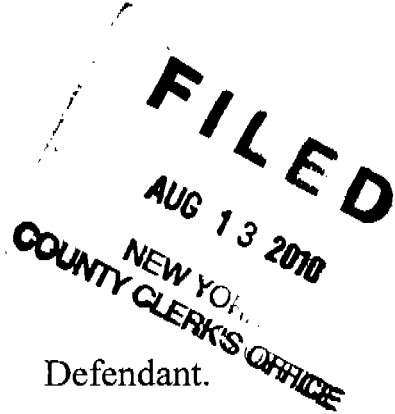
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347 WEST 36<sup>TH</sup> STREET LLC,

Plaintiff,

Index No.  
108969/09

- against -



Seq No.: 001

STEVE DIBENEDETTO,

Decision and  
Order

Defendant.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for damages pursuant to a commercial lease and a personal guaranty signed by defendant. Issue was joined by service of defendant's *pro se* answer dated July 17, 2009, asserting a general denial. Plaintiff now moves for summary judgment on the complaint pursuant to CPLR 3212. Defendant filed no opposition to the motion. However, defendant brought before this Court an Order to Show Cause seeking to stay this motion, asserting he has not found an attorney to represent him, and has not yet formulated opposition to the motion. This court, after oral argument on the record on August 10, 2010, denied the order to show cause. Indeed, despite being served with the within motion on June 21, 2010 and consulting with an attorney regarding bringing the order to show cause, defendant presented no proposed opposition, no outline of any argument in support of such opposition, nor any cohesive plan to hire counsel to oppose the motion.

Defendant entered into a commercial lease for premises located at 347 West 36<sup>th</sup> Street in the County and State of New York on September 29, 2004. Concurrently, defendant signed a personal Guaranty, guaranteeing the obligations of the Tenant under the lease. The lease term was for a period of five years, terminating on September 30, 2009. Defendant surrendered the premises on December 31, 2008, but the premises were not relet. Plaintiff now seeks all rent and additional rent

outstanding pursuant to the terms of the lease, and guaranteed by the personal guaranty of defendant, totaling \$42,571.84 as well as legal fees provided for under paragraph 19 of the lease.

Plaintiff, in support of its motion, submits: the affidavit of Sylvia Bonet, Director of Asset Management for the managing agent of plaintiff; the pleadings; the subject lease; the subject guaranty; and the "arrears statement" for the subject premises. Plaintiff asserts that the lessee failed to pay rents and additional rents owing on the subject premises, and that pursuant to the guaranty signed by defendant, it is entitled to a judgment as against the guarantor.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." (*City of New York v. Clarose Cinema Corp.*, 256 AD2d 69, 71 [1<sup>st</sup> Dept., 1998]).

The guaranty states, in relevant part:

1. The undersigned does hereby guarantee, the full, faithful and timely payment and performance by Tenant of all the payments, covenants and other obligations of Tenant under or pursuant to the Lease.
3. The Guarantor's obligations hereunder shall remain fully binding although Landlord may have waived one or more defaults by Tenant, extended the time of performance by Tenant, released, returned or

\* 4 ]  
misapplied other collateral at any time given the security for Tenant's Obligations, including other guaranties and/or released Tenant from the performance of its obligations under the Lease.

4. This Guaranty shall remain in full force and effect notwithstanding the institution by or against Tenant, of bankruptcy, reorganization, readjustment, receivership or insolvency proceedings of any nature, or the disaffirmance of the Lease in any such proceedings or otherwise.

6. This Guaranty is irrevocable, continuing, indivisible and unconditional and, except as otherwise provided herein, may be proceeded upon immediately after failure by the Tenant to pay, perform or comply with any of the Obligations, without any prior action or proceeding against the Tenant.

8. The Guarantor has not and will not set up or claim any defense, counterclaim, set-off or other objectino of any kind to the suit, action or proceeding at law, in equity or othersie, or to any demand or claim that may be instituted or made under and by virtue of the Guaranty.

Plaintiff submits the affidavit of Ms. Bonet, wherein she states, in relevant part:

In violation of the Lease, Defendant has failed to pay to Plaintiff rent and additional rent due and owing through September 2009, in the sum of \$42,571.84.

Additionally, Ms. Bonet points to paragraph 19 of the Lease, and asserts that plaintiff has incurred legal fees, costs, expenses and disbursements by reason of Defendant's breach of the Lease, which are the liability of the Lessee and recoverable from Defendant.

Plaintiff has shown, prima facie, that the Tenant failed to make payments of rent and additional rent pursuant to the Lease, and that Defendant guaranteed such payment. Where the movants have established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See, Access Capital v. DeCicco*, 302 AD2d 48, 53-54 [1<sup>st</sup> Dept. 2002]).

Wherefore it is hereby

ORDERED that plaintiff's motion for summary judgment is granted without opposition; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Steve Dibenedetto in the sum of \$42,571.84; and it is further

ORDERED that the portion of the plaintiff's action that seeks the recovery of attorney's fees (the Third Cause of Action) is severed, summary judgment is granted as to liability, and an assessment of the damages on the Third Cause of Action is directed; and it is further

ORDERED that a hearing to fix the amount of damages on the Third Cause of Action is to be held in this Court, Room 308 of 80 Centre Street, New York County, on Tuesday, September 21, 2010 at 9:30 am. Plaintiff is directed to serve a copy of this order with notice of entry upon Defendant.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 11, 2010



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EILEEN A. RAKOWER, J.S.C

**FILED**  
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COUNTY CLERK'S OFFICE