

Forman Fifth LLC v Hong Shik Kim

2010 NY Slip Op 32287(U)

June 7, 2010

Supreme Court, Queens County

Docket Number: 21456/2009

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

<p>FORMAN FIFTH LLC d/b/a 319 FIFTH AVENUE REALTY,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>HONG SHIK KIM, et al.,</p> <p style="text-align: center;">Defendants.</p>	x	<p>Index Number <u>21456</u> 2009</p> <p>Motion Date <u>March 10,</u> 2010</p> <p>Motion Cal. Number <u>12</u></p> <p>Motion Seq. No. <u>1</u></p>
	x	

The following papers numbered 1 to 11 read on this motion by plaintiff Forman Fifth LLC d/b/a 319 Fifth Avenue Realty for an order granting summary judgment dismissing defendants' affirmative defenses and granting a money judgment to plaintiff in the sum of \$1,696,500.92, together with interest of nine percent per annum since June 16, 2009, and setting the matter down for an inquest as to legal fees incurred in this action.

	<u>Papers Numbered</u>
Notice of Motion-Affidavit - Exhibits (A-L).....	1-4
Opposing Affirmation - Affidavits - Exhibits (A-K).....	5-8
Reply Affirmation - Exhibits (A-B).....	9-11

Upon the foregoing papers the petition and cross motion are determined as follows:

On July 17, 1997, 319 Fifth Avenue Realty, "as agent," entered into a written commercial lease agreement whereby it leased a portion of the basement, ground floor, and mezzanine in the premises known as 319 Fifth Avenue, New York, New York to 319 Smile Corp. The lease term commenced on July 30, 1997 and ended on July 31, 2012, and was executed by Richard Forman, as agent for owner, and by defendant Hong Shik Kim, as president of 319 Smile Corp. (the "tenant"). The tenant, pursuant to the lease terms, was required to pay a monthly fixed rent, based on an escalating schedule, and additional rent

consisting of water and sewer charges and real estate taxes. Defendants Hong Shik Kim and Julie Soon Kim executed a separate written personal guaranty, dated July 17, 1997.

The leased real property was previously owned by 319 Fifth Avenue Corp., who in furtherance of its liquidation and pursuant to a deed dated July 31, 1979, conveyed ownership of the property to the following: Howard L. Forman, as Trustee under paragraph Eighth of the Last Will and Testament of Benjamin Forman, Howard L. Forman and Melvin M. Forman, as Trustees under paragraph Ninth of the Last Will and Testament of Benjamin Forman, Howard L. Forman, Patricia Forman and Victor Whitehorn, as Trustees under paragraph Tenth of the Last Will and Testament of Benjamin Forman, Melvin Forman and Gladys Kozinn. These trustees and individuals were also listed in the deed as stockholders in 319 Fifth Avenue Corp. Following the conveyance of the real property, the trustees and individuals operated the building located at 319 Fifth Avenue under the trade or fictitious name of 319 Fifth Avenue Realty. Although the 1997 lease named 319 Fifth Avenue Realty “as agent,” it did not disclose the name of its principal. Thereafter, on April 30, 2002, members of the Forman family formed Forman Fifth LLC, and on November 4, 2005, said limited liability company registered its assumed name of 319 Fifth Avenue Realty with the New York State Department of State. On June 1, 2004, the surviving trustees and individual owners executed a deed whereby their interest in said real property was conveyed to Forman Fifth LLC.

In April 2004, 319 Fifth Avenue Realty commenced an action against the tenant in the Civil Court of the City of New York, County of New York (L & T Index No. 65361/04) to recover possession of the subject premises, for a warrant of eviction, and for a money judgment of \$214,762.09, for rent, additional rent and attorney’s fees. 319 Fifth Avenue Realty alleged therein that the tenant had failed to pay rent and additional rent between July 2002 and April 2004. In an order dated August 4, 2004, Judge Jeffrey Oing found that as the lease referred to “319 Fifth Avenue Realty, as owner,” it was the proper party to bring the action, and dismissed the tenant’s affirmative defenses of lack of standing. The tenant acknowledged that it was in arrears in the rent, but that it had made payment in the amount of \$185,081.97 on June 14, 2004. The court granted the landlord’s motion for summary judgment for a money judgment for rent and additional rent, denied the tenant’s cross motion to dismiss the action and directed the parties to appear for a trial as to all remaining issues.

On September 9, 2005, 319 Fifth Avenue Realty commenced a summary holdover proceeding against the tenant in the Civil Court of the City of New York, County of New York (L & T Index No. 089531/05), based upon certain defaults under the lease, which it had terminated on July 31, 2005. The Hon. Joan Kenney, in an order dated January 3, 2006, denied the tenant’s cross motion to dismiss the action on the grounds that 319 Fifth Avenue Realty was not a proper party and lacked standing to commence the proceeding, and granted

319 Fifth Avenue Realty's motion to dismiss certain affirmative defenses. Judge Kenney determined that these defenses had no merit, as the tenant executed a lease agreement with 319 Fifth Avenue Realty. She also stated that as the court in a prior proceeding (decision and order of August 4, 2004 in L & T Index No. 65361/04) determined that 319 Fifth Avenue Realty was a proper party to commence a summary proceeding, the tenant was "estopped from arguing otherwise at this juncture."

The holdover proceeding was tried by the Hon. Geoffrey Wright, who granted 319 Fifth Avenue Realty a judgment of possession and warrant of eviction on November 29, 2006. The tenant sought a stay of the warrant of eviction pending its appeal to the Appellate Term, First Department, and moved for an order fixing an undertaking, pursuant to CPLR 5519(a)(6). 319 Fifth Avenue Realty, in opposition, sought use and occupancy for the period commencing August 1, 2005, at the holdover rate of double the monthly rent, as set forth in the lease. Judge Wright, in an amended decision and order dated November 9, 2007, stated that as to use and occupancy, "the lease, in paragraph 65(E), contains the agreement of the parties on the rent, use and occupancy to be paid when the tenant holds over after the Petitioner has terminated the lease. That rent is double the base rent then being paid. In this case, that amount is \$83,964.66." Judge Wright ordered the tenant to pay said sum per month from August 1, 2005, as the parties had agreed what the rent should be in the event the tenant holds over. As a condition of granting the stay pending the appeal, the tenant was directed to post a bond in the sum of \$500,000.00, in view of the possible liability of 319 Fifth Avenue Realty to complete alterations that the tenant had failed to complete. The court directed that the bond be secured, filed and served on 319 Fifth Avenue Realty by December 21, 2007, or all stays would be vacated.

The Appellate Term, in an order dated January 10, 2008, granted the tenant's motion for a stay pending appeal and did not require an undertaking as the tenant was to pay use and occupancy at the rate of \$83,964.66 per month. The tenant paid use and occupancy of \$83,964.66 for the months of January and February 2008, and thereafter requested that the Appellate Term reduce the amount. The Appellate Term, in an order dated April 10, 2008, reduced the use and occupancy to \$43,557.16 per month. In November 2008, the tenant failed to pay use and occupancy, water, sewer and real estate taxes. The Appellate Term, in an order dated November 24, 2008, denied the tenant's appeals and affirmed Judge Wright's order entered on January 9, 2007, which awarded possession to the landlord, and his order dated November 9, 2007, which directed the tenant to pay use and occupancy of \$83,964.66. The Appellate Term stated that:

The record amply supports a determination that tenant defaulted in its performance under the governing commercial lease agreement by, inter alia, failing to 'close' pending work permits for several years and by failing to cure

the multiple violations issued against the subject premises by the Department of Buildings. Nor did tenant demonstrate that it proceeded to remedy its defaults 'with reasonable diligence and good faith' as required under paragraph of the lease agreement. Tenant's mere retention of an engineer within the specified 15-day cure period did not, on this record and without more, establish the requisite diligence, particularly given the engineer's candid concession at trial that the contemplated remedial work was not diligently undertaken and tenant's failure to adequately explain the substantial temporal delay involved.

The liquidated damages clause, providing for use and occupancy at two times the rent in the event of a holdover, was not an unenforceable penalty since damages could not have been anticipated in 1997 when the lease was executed, and the amount fixed was not plainly or grossly disproportionate to the loss (*see Tenber Assoc. v Bloomberg, LP*, 51 AD3d 573, 859 NYS2d 61 [2008]).

The tenant vacated the premises on December 10, 2008, and 319 Fifth Avenue Realty thereafter moved in the holdover proceeding for a money judgment in the sum of \$1,602,217.38 for accrued use and occupancy for the period of August 1, 2005 through December 31, 2008, and for legal fees and expenses incurred in the sum of \$94,283.54. The amount sought for use and occupancy reflected the amount due at the rate of \$83,964.66 per month, after crediting the tenant for payments of \$1,840,333.68 for the period of August 2005 through December 2008. Judge Wright, in a decision and order dated June 4, 2009, determined that compelling circumstances existed for the court to retain jurisdiction over the tenant after the execution of the warrant of eviction; stated that the motion was one to enforce a prior order; granted 319 Fifth Avenue Realty's motion; and directed the Clerk of the Court to enter a money judgment in favor of 319 Fifth Avenue Realty and against the tenant, in the sum of \$1,602,217.38 in rent, use and occupancy, and the sum of \$94,283.54 in legal fees. A judgment in the total amount of \$1,696,500.92 was entered in the Civil Court, New York County, on June 16, 2009. Neither the former tenant nor the guarantors paid any portion of the money judgment.

Forman Fifth LLC d/b/a 319 Fifth Avenue Realty ("319 Fifth Avenue Realty") commenced the within action on August 11, 2009, and seeks to recover the sum of \$1,696,500.92 from defendants Hong Shik Kim and Julie Soon Kim based upon the judgment entered against the tenant and the personal guaranty executed by defendants on July 17, 1997. Defendants, in their verified answer, have interposed the following affirmative defenses: that plaintiff lacks standing or is not a proper party to this action; that 319 Fifth Avenue Realty does not have standing to enforce the guaranty as it is not a lawful assignee or successor of the original landlord under the lease; that the proper venue under the guaranty is New York County; and statute of limitations.

319 Fifth Avenue Realty now seeks an order granting summary judgment dismissing the affirmative defenses and granting a money judgment in the sum of \$1,696,500.92, with interest of nine percent per annum from June 16, 2009, and directing an inquest for legal fees. It asserts that as the tenant and defendants failed to pay any portion of the money judgment, and defendants, pursuant to the terms of the guaranty, are jointly and severally liable for the entire amount of the money judgment entered against the tenant, and for legal fees and costs incurred in this action. 319 Fifth Avenue Realty has submitted documentary evidence with respect to its ownership of the real property located at 319 Fifth Avenue and asserts that this issue was previously decided in the holdover proceeding, and, therefore, defendants' first and second affirmative defenses should be dismissed. 319 Fifth Avenue Realty further asserts that as defendants reside in Queens County, venue in this County is proper, and, therefore, the third affirmative defense should be dismissed. Finally, 319 Fifth Avenue Realty asserts that the fourth affirmative defense of statute of limitations is legally and factually incorrect, and should be dismissed.

Defendants, in opposition, assert that other than the legal fees incurred in the prior litigation, 319 Fifth Avenue Realty is not entitled to recover under the guaranty, as the claim does not arise from the tenant's lease obligations or defendants' obligations under the lease guaranty. It is further asserted that 319 Fifth Avenue Realty has not suffered any damages as a result of the litigation with the tenant, as it was paid all rent due from 1997 until November 2008, retained the tenant's security deposit of \$250,000.00, and it re-let the premises for a far higher rent than that provided in the tenant's lease. They assert that 319 Fifth Avenue Realty's claim is based upon a superfluous post-eviction judgment of the Landlord and Tenant Court which was based upon the tenant's failure to comply with the condition for staying the pending eviction that had been imposed by the same judge, pursuant to CPLR 5519(a)(6). Further, they assert that the stay order retroactively and sua sponte ordered use and occupancy at twice the rate the tenant had already paid throughout the holdover proceeding. Defendants assert that the tenant's rights and obligations under CPLR 5519(a)(6) cannot be considered a payment due or obligation under the lease; that they made all payments during the holdover period until November 2008; that the order directing the doubling of the use and occupancy was only in effect for two months as the Appellate Term reduced the amount to the normal monthly rent; and that the order relied on by 319 Fifth Avenue Realty is not based upon the tenant's failure to pay interim use and occupancy. Defendants, thus, assert that the money judgment entered against the tenant cannot be enforced against the guarantors.

Defendants also assert that the guaranty sets venue in New York County, and not Queens County. In a footnote to his affirmation, defendants' counsel asserts that while the Civil Court permitted 319 Fifth Avenue Realty to proceed in the holdover proceeding, "it does not follow that plaintiff Forman Fifth LLC can seek to enforce a judgment issued to 319 Fifth

Avenue Realty,” as these are separate entities. Defendants contend that 319 Fifth Avenue Realty was not formed until April 30, 2002, and did not acquire title to the real property until June 1, 2004.

319 Fifth Avenue Realty’s counsel, in his reply affirmation, asserts that the lease and guaranty were signed by 319 Fifth Avenue Realty, the fictitious name of Forman Fifth LLC; that on the date the money judgment was issued to the tenant, Forman Fifth LLC owned the premises; the fictitious name certificate had been filed, and 319 Fifth Avenue Realty was validly operating under the assumed name of 319 Fifth Avenue Realty. 319 Fifth Avenue Realty, thus, asserts that it is entitled to enforce the judgment issued to its fictitious name and that the first and second affirmative defenses must be dismissed. As regards the third affirmative defense, it is asserted that although the guaranty contains a choice of forum and venue, this clause is for the 319 Fifth Avenue Realty’s benefit. In addition, the guaranty does not make venue exclusive in New York County, and defendants have not served a demand or timely moved for a change of venue. pursuant to CPLR 511. 319 Fifth Avenue Realty further asserts that under the broad terms of the guaranty, the guarantors are liable for the payment of the money judgment, and that the payment of use and occupancy at double the monthly rent in the event of a holdover is an obligation under the lease and not a condition imposed by the court for the stay pending the appeal.

At the outset, the court finds that Forman Fifth LLC d/b/a 319 Fifth Avenue Realty has standing and is a proper party to commence and maintain this action to recover on the guaranty. The guaranty was entered into by defendants and 319 Fifth Avenue Realty “as agent” for an undisclosed principal, the collective owners of the real property. Those owners subsequently formed Forman Fifth LLC and registered 319 Fifth Avenue Realty as its assumed name. Both of these entities were in existence at the time the money judgment was entered in the Civil Court, and at the time the within action was commenced. This court lacks jurisdiction to review the Civil Court orders which permitted 319 Fifth Avenue LLC to proceed in the holdover proceedings against the tenant 319 Smile Corp. Moreover, the money judgment obtained by 319 Fifth Avenue Realty against the corporate tenant may not be collaterally attacked here. Therefore, that branch of the 319 Fifth Avenue Realty’s motion which seeks to dismissal of the first and second affirmative defenses based upon standing is granted.

The guaranty provides that “[e]ach Guarantor hereby agrees that the Supreme Court of the State of New York, in the County of New York, shall have jurisdiction to hear and determine any claims or disputes pertaining directly or indirectly to this Guaranty or to any matter arising therefrom.” A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching; or it is shown that a trial

in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court (*KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.*, ___ AD3d ___, 897 NYS2d 649 [2010]; *Trump v Deutsche Bank Trust Co. Ams.*, 65 AD3d 1329, 1331 [2009]). Here, the within action was properly brought in the Supreme Court. To the extent that the guaranty states that venue is to be placed in New York County, this term is for the benefit of 319 Fifth Avenue Realty, and as it is not exclusive, it does not prohibit venue in Queens County. Since defendants are residents of Queens County, venue is proper. Defendants have not served a demand to change venue nor moved for a change of venue pursuant to CPLR 511. Therefore, that branch of 319 Fifth Avenue Realty's motion which seeks to dismiss defendants' third affirmative defense, is granted. Likewise, that branch of 319 Fifth Avenue Realty's motion which seeks to dismiss the fourth affirmative defense of statute of limitations is granted, as defendants have failed to oppose this branch of the motion and there is no evidence that the action on the guaranty is time barred.

Moreover, defendants' assertion that the payment of use and occupancy was merely a condition of the stay of the Civil Court orders under CPLR 5519, is rejected. Judge Wright, in his order of November 9, 2007, directed that the tenant pay use and occupancy at twice the monthly rent based upon the lease terms, and the Appellate Term, in its order of November 24, 2008, explicitly recognized this term as a liquidated damages clause contained in the lease. The only issue to be determined, thus, is whether the Civil Court judgment which represents unpaid rent, use and occupancy and attorney's fees, is subject to the guaranty.

It is well established that "[a] guaranty is to be interpreted in the strictest manner" (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]), particularly in favor of a private guarantor (*see 665-75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD2d 270, 271 [1999]; *Eleventh Ave. Realty Corp. v Schlanger*, 265 AD2d 270, 271 [1999]), and cannot be altered without the guarantor's consent (*see White Rose Food v Saleh*, 99 NY2d at 591). In this regard, a "guarantor should not be bound beyond the express terms of his guarantee" (*665-75 Eleventh Ave. Realty Corp.*, 265 AD2d at 271-75; *Eleventh Ave. Realty Corp.*, 265 AD2d at 271 [internal quotation marks and citation omitted]). Here, the guaranty provides, in pertinent part, that:

...each Guarantor hereby, jointly and severally, irrevocably and unconditionally guarantees to Landlord the prompt payment of all sums due or to become due to the Landlord from the Tenant under the Lease and any amendment or supplement thereto, and also hereby jointly and severally, irrevocably and unconditionally guarantees the prompt and due performance of all of the Tenant's obligations under the Lease and any amendment or supplement thereto...

Landlord shall have no obligation to apply any security which may be held pursuant to the Lease in mitigation of any Guarantor's liability hereunder and each Guarantor expressly acknowledges that any such security may be used in respect of liability under the Lease other than the liability imposed on the Guarantors hereunder.

Each Guarantor also agrees jointly and severally: to indemnify and hold Landlord harmless against all obligations, demands and liabilities, by whomsoever asserted, and against all losses in any way suffered, incurred or paid by Landlord as a result of or in any way arising out of, or following, or consequential to transactions with the Tenant, whether under the Lease or otherwise...that the Guarantors shall be liable to Landlord for reasonable attorneys' fees and expenses, and other costs and expense, if an action or proceeding is brought to enforce this Guaranty or any claim hereunder, or under any other instrument or guaranty relating to the debts and obligations hereby guaranteed...; that this Guaranty is a continuing guaranty which shall remain effective for so long as the Lease shall be in effect and thereafter for so long as Landlord shall have any claim or basis therefor for damages thereunder or related thereto or to the relationship of Landlord and Tenant between Landlord and Tenant.

Interpreting the guaranty in the strictest manner, the first paragraph cited above only applies to rent payments and other payments and obligations that were to be performed while the lease was in effect. It has no application, where, as here, the landlord terminated the lease due to the tenant's default. The third paragraph of the guaranty cited above, however, is so broadly written as to permit 319 Fifth Avenue Realty to recover here. The Civil Court, in its order of June 4, 2009, determined that the landlord was entitled to recover unpaid rent, use and occupancy that accrued during the trial of the holdover action and the subsequent appeal, as well as attorney's fees, totaling \$1,602,217.38, pursuant to the terms of the lease, and the Civil Court judgment reflects these amounts. Therefore, as the guarantors agreed to be liable for "all losses in any way suffered, incurred or paid by Landlord as a result of or in any way arising out of, or following, or consequential to transactions with the Tenant, whether under the Lease or otherwise," the guaranty is enforceable against defendants. Consequently, that branch of 319 Fifth Avenue Realty's motion which seeks summary judgment on its claim against defendants, as guarantors, in the sum of \$1,602,217.38, is granted.

319 Fifth Avenue Realty's request for statutory interest of nine percent per annum since June 16, 2009, is denied. 319 Fifth Avenue Realty may not seek to recover statutory interest from the date of the entry of the Civil Court judgment, as this is not an action to enforce a money judgment, and defendants did not guaranty the payment of statutory interest

on a judgment entered against the former tenant. Lastly, that branch of the 319 Fifth Avenue Realty's motion which seeks an inquest as to attorney's fees is granted as the guaranty provides that the guarantors are responsible for attorney's fees incurred in the enforcement of the guaranty. The inquest shall be held on August 4, 2010 at 10:00 A.M. in Courtroom 63, Part 19, of the General Courthouse, 88-11 Sutphin Boulevard, Jamaica, New York. 319 Fifth Avenue Realty's counsel is directed to bring with him all papers documenting the legal fees incurred in this action.

Dated: June 7, 2010

J.S.C.