

Ninth Ave. Realty, LLC v Guenancia
2010 NY Slip Op 33927(U)
November 12, 2010
Sup Ct, New York County
Docket Number: 102725/10
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

Justice

PART 15

Index Number : 102725/2010

NINTH AVENUE REALTY, LLC

VS.

GUENACIA, GEORGES M.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 102725/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED

1, 2, 3, 4

FILED

NOV 17 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/12/10

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

-----X
NINTH AVENUE REALTY, LLC,

Plaintiff,

Index No.
102725/10

Seq No.: 001

- against -

Decision and
Order

GEORGES M. GUENANCIA and GERARD BLANES

Defendants.

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

Plaintiff brings this action to enforce an unconditional guaranty for the payment of rent and the performance of obligations of non-party tenant Blague Corp. ("Blague"), with respect to the premises located at 401-405 West 43rd Street, a/k/a 607-609 Ninth Avenue in the County and State of New York. Plaintiff, owner of the subject building, now moves for summary judgment pursuant to CPLR 3212, as against defendant Georges M. Guenancia. Mr. Guenancia opposes. Defendant Gerard Blanes does not submit papers.

Plaintiff and Blague entered into a commercial lease agreement dated May 6, 2008 for the subject premises. One day earlier, on May 5, 2008, Mr. Guenancia and Mr. Blanes had signed an unconditional guaranty. Blague defaulted on the lease agreement, and, on January 11, 2010 the Honorable Justice Jose A. Padilla issued a judgment against Blague in the amount of \$93,833.34 after striking Blague's answer and dismissing its counterclaims and defenses. On February 26, 2010, plaintiff commenced the instant action as against Mr. Guenancia and Mr. Blanes, seeking to: (1) enforce the civil court judgment pursuant to the terms of the guaranty; and (2) recapture rent concessions given to Blague in the amount of \$50,000, pursuant to Paragraph 40(G) of the lease. Plaintiff also seeks interest on both the judgment and the recapture amount, plus attorney's fees and costs.

Plaintiff, in support of its argument, submits: the pleadings; the Affidavit of Mitchell Rothken, Managing Agent for plaintiff; a copy of the lease; a copy of the guaranty; and a copy of the civil court judgment. Plaintiff asserts that Blague defaulted on the rental agreement¹, and that pursuant to the terms of the lease and the guaranty, Mr. Guenancia is liable for payment of the judgment and repayment of the rent concessions.

Mr. Guenancia, in opposition, submits only an attorney's affirmation and his answer. Mr. Guenancia argues that there has been no discovery in this case and that there is "relevant and material information and/or documents which are solely within the knowledge and control of the plaintiff."

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 [1st Dept., 1998]).

The guaranty states, in relevant part:

each of the undersigned . . . does hereby . . . unconditionally guarantee to Landlord . . . the full and timely payment, performance and observance of, and compliance with all of Tenant's obligations under the Lease, including, without Limitation, the full and prompt payment of all

¹Plaintiff does not provide the date of default.

fixed annual rent, Additional Rent and all other charges and sums due and payable by Tenant under the Lease (including, without limitation, Landlord's reasonable attorney's fees and disbursements).

Section 40(G) of the "Inserts to Lease," states, in relevant part;

if Tenant, at any time during the term of this Lease after Tenant has been granted all of a portion of the rent credit described in section F of this article, breaches any monetary or material non-monetary covenant, condition or provision of this Lease and failure to cure such breach . . . Landlord shall . . . be entitled to the repayment of any rent credit theretofore enjoyed by Tenant, which sum shall be deemed additional rent hereunder . . .

There is no dispute that Blague defaulted on the lease, or that the guaranty was unconditional. As a result of the default plaintiff was issued a judgment in the amount of \$93,833.34. Further, Mr. Rothken asserts in his affidavit that Blague was given a two month rent concession in the amount of \$50,000, which is recoverable from Mr. Guenancia as additional rent under the lease and the Guaranty. However, plaintiff fails to show that such amount was not sought, and encompassed, in the \$93,833.34 judgment.

In opposition, Mr. Guenancia fails to raise an issue of fact. Mr. Guenancia states generally that there is "relevant and material information and/or documents which are solely within the knowledge and control of the plaintiff," but fails to specify what, if any, information would aide him in opposing the instant motion. It is well settled that "the mere hope" that a party might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment pursuant to CPLR 3212(f). (*Pow v. Black*, 182 AD2d 484, 485[1st Dept. 1992])(internal quotes and citations omitted).

Wherefore, it is hereby

ORDERED that the motion for summary judgment is granted in part and denied in part; and it is further

ORDERED that the Clerk of the court is directed to enter judgment, on the first

cause of action, in favor of NINTH AVENUE REALTY, LLC and against defendant GEORGES M. GUENANCIA, in the amount of \$93,833.34, with interest as prayed for allowable by law at the rate of 9% per annum from the date of January 11, 2010 until the date of entry of this judgment, as calculated by the clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs; and it is further

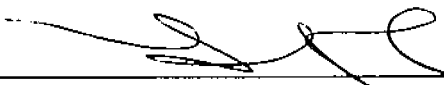
ORDERED that the portion of the plaintiff's action that seeks the recovery of attorneys' fees is severed and the issue of the amount of reasonable attorneys' fees plaintiff may recover against defendants is referred to a Special Referee to hear and report; and it further

ORDERED that 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,² upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the action continues as to the second cause of action only.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

November 12, 2010


Eileen A. Rakower, J.S.C.

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²Copies are available in Rm. 119M at 60 Centre Streets and on the Court's website at www.nycourts.gov/supctmanh.