

**Marcus Ave. Acquisition LLC v Devery & Devery,  
PLLC**

2011 NY Slip Op 30748(U)

March 16, 2011

Supreme Court, Nassau County

Docket Number: 18550-09

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 19  
NASSAU COUNTY

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**MARCUS AVENUE ACQUISITION LLC,**

**Decision and Order**

**Plaintiff,**

**MOTION SUBMITTED:**

**January 7, 2011**

**-against-**

**MOTION SEQUENCE:01**

**INDEX NO. 18550-09**

**DEVERY & DEVERY, PLLC, BRIAN DEVERY,  
IND. AND STEPHANIE DEVERY, IND.,**

**Defendants.**

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**The following papers and the attachments and exhibits thereto have been read on this motion:**

Notice of Motion	1
Memorandum of Law	2

Plaintiff Marcus Avenue Acquisition LLC ("the Landlord") moves, pursuant to CPLR 3212, for an order granting it summary judgment on the causes of action contained in its complaint and pursuant to CPLR 3211 (a)(7) to strike the counterclaim of the Defendants, Devery & Devery, PLLC, Brian Devery and Stefanie Devery ("Defendants"). For the reasons that follow, the Landlord's motion, which is unopposed, is granted in part and denied in part.

On June 14, 2004, Fair Oak, LLC and Devery & Devery, PLLC ("Tenant") entered into a lease agreement (the "Lease") for commercial space located at 1981 Marcus Avenue in Lake Success, New York (the "Premises") (Ex "A," to Plaintiff's Motion). The Lease period was for a term of five years, commencing on August 1, 2004 and terminating July 31, 2009 (Ex "A" to Plaintiff's Motion). The Lease called for the payment of base rent with annual increases of 3.5%, as well as the payment of additional rent, which included a portion of the real estate taxes and a

[\* 2]

12% yearly late fee ("late fees"). The Lease also provided that the Tenant was responsible for attorneys' fees "in connection with the imposition, collection or payment of any Base Rent, Additional Rent and/or said interest" and that such fees would be "deemed Additional Rent" (Ex. "A" at pp 16-17).

On the same day that the Lease was executed, Defendant Brian Devery and Defendant Stefanie Every ("Guarantors") executed a Guarantee ("Guarantee") of the Tenant's obligation under the Lease.<sup>1</sup> Specifically, the Guarantors "absolutely and unconditionally" guaranteed the payment and performance of the Tenant's obligations pursuant to the Lease. These obligations included the payment of base rent, additional rent and any other charges accruing under the Lease (Ex "A" to Plaintiff's Motion).

The Tenant defaulted in its rental payment in July 2008 (Affidavit in Support at ¶ 5). Upon the default in payment, the Landlord commenced a summary proceeding for rent and use and occupancy in District Court, entitled *Marcus Avenue Acquisition, LLC v Devery & Devery PLLC*, Index No. SP39/09. A Stipulation of Settlement ("Stipulation") between the Landlord and the Tenant was executed where to the Tenant was to vacate the premises and pay the Landlord \$19,567.75 on or before March 31, 2009 (Ex. "C" to Plaintiff's Motion). The sum of \$19,567.75 represented that amount of rent due by the Tenant through February 28, 2009. The Tenant vacated the premises but failed to make payment in accordance with the terms of the Stipulation (Affidavit in Support at ¶ 6). A money judgment in the amount of \$19,567.25 was subsequently entered against the Tenant (Ex. "D" to the Plaintiff's Motion). In the Stipulation, the Landlord reserved all rights to recovery available to it under the lease.<sup>2</sup>

Thereafter, the Landlord commenced the instant action against the Tenant and the Guarantors (Ex. "E" to Plaintiff's Motion). The first cause of action seeks payment by the Guarantors of the lease payments upon which a judgment was entered against the Tenant in the amount of \$19,567.75. The second cause of action seeks payment in the amount of \$12,307.27 for the remainder of the base rent and additional rent due from March 1, 2009 through July 31, 2009. The third cause of action seeks costs and legal fees in the amount of \$1,209.50 associated with the summary proceeding in District Court. The fourth cause of action seeks attorneys' fees related to the instant action. The fifth cause of action seeks late fees from March 1, 2009 through

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<sup>1</sup> The Lease was assigned to the Plaintiff, Marcus Avenue Acquisition LLC.

<sup>2</sup>The Stipulation provides that "[a]ll parties agree that this settlement shall not affect any and all rights of the parties not determined herein with regard to the written lease agreement between the parties and specifically any and all claims of the Petitioner with regards to rent and/or additional rent, not settled herein are preserved against all parties and guarantors" (Ex. "C" to Plaintiff's Motion at ¶ 12).

[\* 3]

August 31, 2009, which, up until the filing of the complaint, totaled \$1,476.87.<sup>3</sup> The sixth and seventh causes of action seek judgment against Guarantors Brian Devery and Stefanie Devery, in the amount of \$48,983.89, as guarantors of the underlying Lease obligations (Ex. "E" to Plaintiff's Motion).

The Defendants answered the complaint with general denials and affirmative defenses and asserted a counterclaim against the Landlord alleging that its failure to mitigate damages caused the Defendants to suffer financial losses (Ex. "F" to Plaintiff's Motion).

The Landlord now moves for summary judgment and to strike the Defendants' counterclaim. The Defendants did not oppose the motion.

### Discussion

The Landlord demonstrated its *prima facie* entitlement to judgment as a matter of law on the first cause of action in its complaint seeking recovery against the Guarantors by establishing the existence of the absolute and unconditional guarantee, the underlying debt, and the guarantors' failure to make payments under the guarantee (*Signature Bank v Galit Properties, Inc.*, 80 Ad3d 689 [2d Dept 2011]; *Provident Bank v Grannasca*, 55 AD3d 812 [2d Dept 2008]).

Furthermore, with respect to the second, fifth, sixth and seventh causes of action, the affidavit submitted by David Glaser, the director of the managing agent for the Landlord, established that, for the period of time from March 1, 2009, through July 28, 2009, the Tenant owed the Landlord base rent and additional rent under the Lease. The evidence further demonstrated that the Tenant failed to pay the Landlord pursuant to the terms of the Lease and that the Guarantors, who guaranteed the full performance of the Lease, including the Tenant's obligation to pay base rent, additional rent and any other charges accruing under the Lease, failed to pay pursuant to the terms of the Guarantee.

Although the Defendants are liable for the Tenant's obligations under the Lease, there is nevertheless a question as to the amount of base rent and additional rent owed. The Landlord indicated that it leased the subject premises after the Tenant vacated (Affidavit in Support of Motion at ¶ 15; Ex. "G" to Plaintiff's Motion). It is unclear, however, as to when the premises were re-let to another tenant. If the premises were re-let prior to July 28, 2009, the Tenant, might be entitled to some credit for rent paid to the Landlord by the new tenant (Ex. "A" at p 27). In the absence of such evidence, the Court cannot ascertain the amount of base rent and additional rent

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<sup>3</sup> The Landlord seeks leave of court to submit evidence at the time of trial for this court to determine the full amount of late fees due and owing.

[\* 4]

due. Accordingly, summary judgment is granted to the extent that the court hereby determines that the Defendants shall be liable to the Plaintiff for any amounts owed under the lease during the relevant time period and which can be established at trial. These obligations include the payment of base rent and additional rent through July 28, 2009, as well as late fees, all to be determined at trial to be held on Tuesday, April 26, 2011, in the Nassau County Supreme Court, 100 Supreme Court Drive, at 9:30 A.M. (CPLR 3212 [c]).<sup>4</sup>

#### *Attorneys' Fees in the Summary Proceeding*

In the third cause of action, the Landlord seeks to recover \$1,209.50 in attorneys' fees associated with the underlying summary proceeding in District Court. Pursuant to the express language of the Lease, the Tenant agreed to "pay upon demand by Landlord any attorney's fees incurred by Landlord in connection with the imposition, collection or payment of any Base Rent, Additional Rent and/or said interest, said attorney's fees to be deemed Additional Rent" (Ex. "A" to Plaintiff's Motion at p 17). The attorneys' fees at bar are reasonable under the circumstances and, accordingly, summary judgment is granted as to the third cause of action.

#### *Attorneys' Fees in the Instant Action*

With respect to the legal fees and costs associated with the instant action, to wit, the enforcement of the Guarantee itself, the Guarantors agreed to pay all expenses, including legal fees (Ex. "B"). The Landlord's claim for legal fee is supported by the retainer agreement as well as the Landlord's attorney's affirmation, both of which are annexed to the Landlord's motion papers. However, the award of attorneys' fees is contingent, *inter alia*, upon the sum actually recovered (Ex. "I" at ¶ 7; Retainer Agreement at p 1). As that amount has yet to be determined, the amount of legal fees awarded with respect to the instant action shall be determined at trial (CPLR 3212 [c]).

#### *The Defendants' Counterclaim*

The branch of the Plaintiff's motion to strike the counterclaim asserted in the Defendants' answer is granted, the landlord being under no duty to mitigate damages where there is a breach of a commercial lease (*11 Park Place Assoc. v Barnes*, 202 AD2d 292 [1<sup>st</sup> Dept 1994]). Moreover, the Lease specifically states that the Landlord "shall in no event be liable in any way whatsoever for failure to re-let the Demised Premises . . . It is expressly stipulated and agreed that Tenant shall be and remain liable for all of its obligations under this Lease following termination, eviction

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<sup>4</sup>The court notes that it is unclear, based on the parties' submissions, whether the damages sought in some of the causes of action in the complaint are duplicative.

[\* 5]

or abandonment, it being understood and agreed that, anything contained in this Lease to the contrary notwithstanding, that Landlord has no duty to mitigate Tenant's damages and may simply leave the Demised Premises vacant until the end of the originally stated Term and demand all, rent from tenant" (Ex. "A" to Plaintiff's Motion at p 28). Accordingly, the Defendants counterclaim is dismissed (*Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130 [1995]).

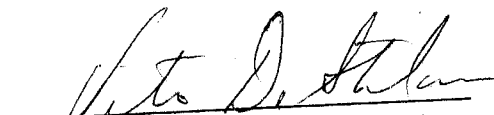
It is therefore ordered that the branch of Plaintiff's motion pursuant to CPLR 3212 for summary judgment is granted except that: the extent of damages relating to the second, fourth, fifth, sixth and seventh causes of action shall be determined at trial (CPLR 3212 [c]).

It is further ordered that the branch of Plaintiff's motion pursuant to CPLR 3211(a)(7) is granted and the counterclaim is dismissed.

This matter is referred to the Calendar Control Part (CCP) for a trial on the issue of damages to be held on April 26, 2011. The Plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of the same together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a court Attorney/Referee, as he or she deems appropriate.

This constitutes the decision and order of the Court.

Dated: March 16, 2011

  
Hon. Vito M. DeStefano, J.S.C.

**ENTERED**  
MAR 21 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE