

**447 Fulton, LLC v 399 Jay St., Inc.**

2011 NY Slip Op 30993(U)

April 6, 2011

Supreme Court, New York County

Docket Number: 602735/2008

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

EMILY JANE GOODMAN

PRESENT:

PART 17

Index Number : 602735/2008

447 FULTON LLC

vs

399 JAY STREET INC

Sequence Number : 003

VACATE/ STAY ORDER/ JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

*is denied*

*Appealed*

FILED

APR 15 2011

NEW YORK COUNTY CLERK'S OFFICE

*[Signature]*

Dated: 4/6/11

*4/6/11*

EMILY JANE GOODMAN

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: I.A.S. PART 17

-----X  
447 Fulton, LLC

Plaintiff,

Index No. 602735/08

- against -

399 Jay Street, Inc and Shahin Rahimian

Defendants.

-----X  
**EMILY JANE GOODMAN, J.S.C.:**

Defendant Rahimian moves to reargue this Court’s Decision and Order, dated 6/21/10, granting summary judgment in favor of Plaintiff for Rahimian’s breach of guaranty. Plaintiff opposes the motion. Reargument is granted and upon reargument, the Court adheres to its original decision (except to the extent that the Decision stated that liability was conceded as it was not).

In connection with this motion and in opposition to the prior motion, Defendant argues that if he is liable under the undated Limited Guaranty, executed August 24, 2006 (the Limited Guaranty), the amount he owes is limited to \$18,199.68, which represented the accrued rent through May 31, 2008, after deducting \$40,500.00 for a security deposit held by Plaintiff. Alternatively, he argues that he is not liable at all under the Limited Guaranty, because of a Settlement Agreement, entered into between Plaintiff Landlord and Tenant 399 Jay Street, Inc. (Defendant Tenant), dated May 30, 2008 (the Settlement Agreement), without Defendant’s consent.

The Limited Guaranty provides, in relevant part:

1. Guarantor guarantees to Landlord, its successors and assigns, that it shall pay to Landlord all rent and additional rent that has accrued or may accrue under the terms of the herein Lease (hereinafter referred to as Accrued Rent), to the latest date that Tenant and its assigns and subleases, if any, shall have completely performed all of the following:
  - (i) Vacated and surrendered the Premises to Landlord clean and free of all mechanics liens and trade fixtures, and
  - (ii) Delivered the keys to the Premises to Landlord, at Landlord's office at 430 West Broadway, New York, New York 10012, and
  - (iii) Paid to Landlord all Accrued Rent to and including the date which is the later of (a) the actual receipt by Landlord of said Accrued Rent, (b) the surrender of the Premises and receipt by Landlord of the keys to the Premises.

It is agreed that any security deposit shall not be computed as a deduction from any amount payable by Tenant or Guarantor under the terms of this Guaranty of the lease.

The Settlement Agreement provides, in relevant part:

1. 399 Jay Street, Inc. hereby tenders the keys to the premises known as and located at 397-399 Jay Street, Brooklyn, New York, which is operating as Fine Women 's Apparel, Chanttel Boutique (the "Premises") and represents that the Premises will be vacant and broom clean by midnight on May 30, 2008. 447 Fulton, LLC hereby accepts the keys, reserving all rights under the lease between the parties.
2. 399 Jay Street, Inc. acknowledges owing \$58,699.68 for all rent and additional rent (not including any late charges) through May 31, 2008.
3. 447 Fulton, LLC acknowledges that it is holding a security deposit in the amount of \$40,500 pursuant to the lease between the parties. 399 Jay Street, Inc. hereby waives its right to the return of same.

4. Provided that 399 Jay Street, Inc. and/or Farhmand Nasibi a/k/a Fred Nasibi and/or Shahin Rahimian on or before June 30, 2008 gives 447 Fulton, LLC a payment plan to pay \$18,199.68 which payment is acceptable to 447 Fulton, LLC, and thereafter timely makes all payments set forth in the payment plan such that the \$18,199.68 is fully and timely paid, 447 Fulton, LLC shall apply the \$40,500 security deposit to the outstanding balance and 399 Jay Street, Inc. and the guarantor shall be released from any further payment. Notwithstanding the foregoing, if the Premises is not vacant and broom clean, 447 Fulton, LLC reserves the right to reduce the security deposit by the amount needed to make the Premises vacant and broom clean.
5. In the event a payment plan is not provided or the payments are not made, 447 Fulton, LLC reserves the right to collect all sums to which it is entitled under the lease between the parties dated August 28, 2006.

Defendant maintains that, at most, he is liable for \$18,199.68 (the capped amount) because the Settlement Agreement refers to Plaintiff's right to collect all sums due under the lease "[i]n the event a payment plan is not provided **or** the payments are not made" (emphasis added) and Defendant Tenant offered a payment plan of \$500.00 per week.<sup>1</sup> However, despite the wording of paragraph 5, which as Defendant correctly points out, does not refer to a payment plan which is **both** provided by the Defendant Tenant **and**

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<sup>1</sup> In support of the motion for summary judgment, Plaintiff stated "Defendant 399 Jay Street, Inc. failed to enter into any payment plan with plaintiff and failed to make any payments of the balance stated in the Agreement." In reply, as a result of Tenant's statement that "[t]he plan submitted was \$500 per month, but the landlord rejected that offer and counter-offered that it would accept a lump sum payment of \$9,099.84" Plaintiff stated "I do not recall the tenant making a payment plan offer of \$500 per month. If such a payment plan offer were made, it was offered at the time of the negotiation and signing of the Stipulation. Such an offer would have been rejected as unreasonable by the plaintiff." Defendant Tenant never indicated the date the proposal was allegedly made. Notably, the Settlement Agreement requires that the proposal be made by June 30, 2008.

accepted by Plaintiff, it is nonetheless clear that the capped amount in paragraph 4 does not apply merely because the Defendant Tenant “provides” a payment plan. Paragraph 4 delineates specific conditions which must be met in order for the capped amount to apply, and it is undisputed that all of those conditions were never met, as no amount was paid after the execution of the Settlement Agreement (regardless of whether a proposal was made and Defendant Tenant vacated and returned the keys). Paragraph 4 would be rendered meaningless if Defendant’s interpretation is accepted.<sup>2</sup>

As to Defendant’s argument that the Settlement Agreement acted as a release of Defendant’s obligations under the Limited Guaranty, Defendant points to the fact that the Settlement Agreement permitted the use of the security deposit as a deduction in calculating the amount due, while the Limited Guaranty stated that “[i]t is agreed that any security deposit shall not be computed as a deduction from any amount payable by Tenant or Guarantor under the terms of this Guaranty of the lease.” Defendant contends that it does not matter if the computation may have inured to his benefit. Defendant also points to the provision allowing the security deposit to be used for purposes of making the premises vacant and broom clean.

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<sup>2</sup>Although Defendant previously argued that Plaintiff acted in bad faith in not accepting the alleged proposal, the Court cannot find such bad faith where Defendant Tenant had at a minimum one month to secure monies, despite the allegations of its dire financial condition, and where the Plaintiff would not have been unreasonable in rejecting a payment of \$500 per month, where it would take approximately three years to make full payment.

As Plaintiff correctly observes, a guarantor is not released from any obligations where the agreement made without the guarantor's consent, if the agreement is an accommodation, or, does not materially or substantially alter the guarantor's obligations (see Bjer Pension v Schneierson, 74 NY2d 312 [1989]; see also Midland Steel Warehouse Corp. v Godinger Silver Art Ltd., 276 AD2d 341 [1st Dept 2000] [a material or substantial alteration of the terms of a contract, for whose performance a guarantor is bound, when made without the guarantor's consent, releases the guarantor from his obligation]). The Settlement Agreement provided the Defendant Tenant (and thereby Defendant) with a chance to cap liability by paying \$18,199.68, instead of paying \$58,699.68 owed through May 31, 2008, where the lease did not permit the Defendant Tenant to apply the security deposit to the rent owed. Because all the Settlement Agreement did was offer leniency, and because leniency by a creditor with a debtor does not discharge a guarantor's obligation (see Becker v Faber, 280 NY 146, 150 [1939]), Defendant is not relieved of liability.<sup>3</sup>

It is hereby

ORDERED that the motion for reargument is granted, and upon reargument, the Court adheres to its original decision (except to the extent that the Decision stated that liability was conceded as it was not); and it is further

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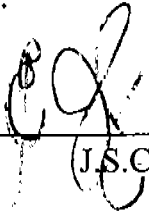
<sup>3</sup>The Settlement Agreement paragraph 3 materially alters paragraph 31 of the lease regarding the rights to the security deposit. However, this does not affect the obligations of Defendant.

ORDERED that Plaintiff submit a proposed Judgement on notice.

**This constitutes the Decision and Order of the Court.**

Dated: April 6, 2011

ENTER:



J.S.C.

**EMILY JANE GOODMAN**

**FILED**

**APR 15 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**