390 Park Ave. Assoc., LLC v Sopher
2011 NY Slip Op 32003(U)
July 13, 2011
Supreme Court, New York County
Docket Number: 601708/2009
Judge: Joan A. Madden
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SCANNED ON 7/18/2011

[* 1]

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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 601708/2009

390 PARK AVENUE ASSOCIATES

vs

SOPHER, JACOB I.

Sequence Number : 002

SUMMARY 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	

FILED
JUL 18 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 13, 2011

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

---X

390 PARK AVENUE ASSOCIATES, LLC,
Plaintiff,

-against-

Index No. 601708/09

JACOB I. SOPHER and QUIK PARK COLUMBIA GARAGE CORP.,
Defendants.

---X

FILED
JUL 18 2011
NEW YORK
COUNTY CLERK'S OFFICE

Joan A. Madden, J.

In this action, plaintiff 390 Park Avenue Associates, LLC ("390 Park" or "Owner") moves for summary judgment against defendants Jacob I. Sopher ("Sopher") and Quik Park Columbia Garage Corp. ("Quik Park") (together, the "Guarantors") seeking (i) a determination that the Guarantors breached their guaranty of the obligations of Park Avenue Garage LLC (the "Garage" or "Tenant") under a lease agreement (the "Lease") by failing to pay attorneys' fees incurred by 390 Park in connection with the Garage's default on its rent obligations, and (ii) a hearing to determine the amount of the attorneys' fees due and owing. The Guarantors oppose the motion and cross move for an order granting summary judgment dismissing the complaint and determining that they are not liable for 390 Park's attorneys' fees incurred during a bankruptcy proceeding (the "Bankruptcy Proceeding") filed by the Garage, entitled In re: Park Avenue Garage, LLC, No. 08-14354-rdd (Bankr., S.D.N.Y.) (the "Bankruptcy Proceeding"), since 390 Park was not the prevailing party.

On December 22, 1998, 390 Park and the Garage entered into a twenty-year lease agreement (the "Lease"), whereby 390 Park, as landlord, leased to the Garage, as tenant, space on the lower level of a building (the "Building") owned by 390 Park and located at 390 Park Avenue, New York, New York. Sopher is the managing member of the Garage.

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The Lease consists of a form agreement and a rider. The Lease provides that the Garage is to pay increasing fixed annual rents each year in equal monthly installments with an annual rent of $450,000.00 to be paid in the first year in monthly installments of $37,500.00. Rider, Article 41. Article 19 of the Lease provides that:

> "[i]f Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease...and if Owner, in connection therewith or in connection with any other default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding and **prevails in any such action or proceeding**, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant therefor...." (emphasis supplied).

Also on December 22, 1998, 390 Park entered into a guaranty agreement (the "Guaranty") with Sopher, who is the managing shareholder of Quik Park in addition to being the managing member of the Garage.

The preamble of the Guaranty states that 390 Park "is unwilling to enter into the Lease unless" Sopher and Quik Park agree to the terms of the Guaranty. The Guaranty provides in relevant part that:

> **Paragraph 2.a.** Sopher and Quik Park "jointly and severally guarantee to [390 Park] ... the prompt and punctual payment of all [rent], additional rent and all other sums and charges payable pursuant to the Lease...."
>
> **Paragraph 4.a.** "The validity and enforceability of this Guaranty and the obligations of the Guarantors hereunder shall not terminate and not be affected or impaired by reason of... any offsets or defenses of [the Garage in connection with the Lease]."
>
> **Paragraph 4.b.** The "obligations of the Guarantors under this Guaranty shall not be affected or impaired by... any disability or other defense of [the Garage]."
>
> **Paragraph 4.d.** Sopher and Quik Park "waive and surrender any defense of their liability [under the Guaranty]...and hereby expressly waive and relinquish all other rights and remedies accorded by applicable law to guarantors and sureties, it being the purpose

and intent of the parties hereto that the obligations of [the] Guarantors hereunder are absolute and unconditional under any and all circumstances."

Paragraph 7. Guarantors shall pay all of [390 Park's] costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements) in enforcing this Guaranty if [390 Park] is the prevailing party.

390 Park maintains that since the term of the Lease commenced, the Garage has defaulted on its rent obligations on multiple occasions. This controversy is related to three proceedings arising in connection with defaults by the Garage on its rent obligations.

The Civil Court Proceeding

On or about June 9, 2008, 390 Park commenced a summary non-payment proceeding against the Garage (the "Civil Court Proceeding") in the Civil Court, New York County. By a decision dated October 24, 2008 (the "Civil Court Decision"), on a cross motion for summary judgment made by 390 Park, Hon. Peter H. Moulton directed a money judgment in favor of 390 Park against the Garage for $408,651.02 in rent, additional rent, late fees, interest and other sums due and owing (the "Civil Court Money Judgment"). The Civil Court Decision also directed the forthwith issuance of a warrant of eviction.[1]

The Bankruptcy Proceeding

On November 3, 2008, the Garage voluntarily filed a petition (the "Chapter 11 Petition") pursuant to Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court, Southern District of New York (the "Bankruptcy Court") before Hon. Robert D. Drain ("Judge Drain"), to preserve its interest in the Lease. The Garage continued its operations during the pendency of the Bankruptcy Proceeding.

[1] The Civil Court Decision was amended on October 31, 2008, to direct a "judgment of possession, issuance of the warrant, stayed five days *nunc pro tunc* from October 24, 2008, the date of the original decision in this matter." Amended Civil Court Decision, 11.

Asserting that the Garage filed for bankruptcy in bad faith, 390 Park filed a motion (the "First Dismissal Motion") in the Bankruptcy Court to dismiss the bankruptcy proceeding (the "Bankruptcy Proceeding"), or in the alternative, granting relief from the automatic stay or converting the case to a Chapter 7 proceeding. 390 Park maintained on that motion, and still maintains in the instant action, that the Bankruptcy Proceeding was filed for the improper purpose of protecting Sopher's financial interests and not to allow the Garage to reorganize as no reorganization (at least without the involvement of third parties) was possible since the Garage is a single purpose entity with no employees and with the Lease as its sole asset. 390 Park also asserted that the majority of the Garage's debts were owed to Sopher and companies in which Sopher held an ownership interest and/or a position as an executive.

In a hearing on the First Dismissal Motion, which took place on December 9, 2008 (the "First Dismal Motion Hearing"), an attorney for the Garage, Robert R. Leinwand, Esq. ("Leinwand"), explained to Judge Drain that the Garage intended to reorganize by assuming the Lease and assigning it to an operator. By Order dated January 7, 2009, the Bankruptcy Court denied the First Dismissal Motion without prejudice.

On or about May 12, 2009, the Garage moved to assume the Lease (the "Assumption Motion") pursuant to Section 365(d)(4) of the Bankruptcy Code, which had become part of the bankruptcy estate following the Garage's filing for Chapter 11 protection. The Garage alleged that the cure obligations owed to 390 Park were in the amount of $495,187.77 (the "Undisputed Cure Amount"). 390 Park opposed the motion, arguing that the Garage failed to provide adequate assurances as to future performance and that there were additional arrears owing (the "Additional Arrears") which amounted to $405,638.35 in excess of the Undisputed Cure

Amount, for a total of $900,826.12, representing, *inter alia*, the Civil Court Money Judgment, attorneys' fees for the Civil Court and Bankruptcy Proceedings, and unpaid rent.

By order dated June 1, 2009 (the "Assumption Order"), Judge Drain permitted the Garage to assume the Lease. The assumption was conditioned upon the Garage curing all existing monetary defaults under the Lease and paying the Undisputed Cure Amount in equal monthly installments over a period of five months, paying all current rent and additional rent obligations as they become due, and posting a three month security deposit in the amount of $190,737.06 (which was not required by the Lease). The Assumption Order specifies that the Lease shall be deemed rejected if the Garage defaults with respect to any payment term after seven days notice. The Assumption Order also provides that the amount of the Additional Arrears would be either resolved consensually or determined by the Bankruptcy Court. 390 Park subsequently appealed the Assumption Order and sought to have the Lease with the Garage terminated, but its appeal was denied.

In February 2010, the U.S. Trustee filed a motion to dismiss the Bankruptcy Proceeding (the "Second Dismissal Motion") or to convert it to a Chapter 7 proceeding based on the Garage's failure to file a plan of reorganization. 390 Park joined in and supported this Second Dismissal Motion by filing a response with the Bankruptcy Court. The Garage did not oppose the Second Dismissal Motion, but filed its own motion (the "Motion to Fix") to fix the amount of Additional Arrears as no more than $8,993.20.

390 Park opposed the Motion to Fix and filed opposition papers seeking to reserve determination of the Motion to Fix until the Second Dismissal Motion was decided. 390 Park argued that by fixing the amount of the Additional Arrears, the Bankruptcy Court would be allowing the Garage to benefit from the protections of Chapter 11 which it did not qualify for

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and which would be obtained as the result of the Bankruptcy Petition which was filed in bad faith. 390 Park alternatively asserted that to the extent that the amount of the Additional Arrears must be determined, an evidentiary hearing should be held. 390 Park maintained that the amount of Additional Arrears was $365,295.16, which included in part: $55,369.47 in unpaid real estate taxes, $140,011.04 in attorneys' fees for the Civil Court Proceeding, and $113,881.27 in attorneys' fees for the Bankruptcy Proceeding.

On April 6, 2010, during a hearing on the Second Dismissal Motion, an exchange took place between 390 Park's counsel, Ralph Berman Esq. ("Ralph Berman"), and Judge Drain on the issue of 390 Park's entitlement to attorneys' fees for the Bankruptcy Proceeding. Judge Drain said to Ralph Berman, "I am telling you right now, I don't see any recovery on the fees of the [Bankruptcy Proceeding]." Transcript of Second Dismissal Motion Hearing - April 6, 20.

On April 8, 2010, the day on which the parties concluded the hearing on the Second Dismissal Motion, Judge Drain said that 390 Park "didn't prevail on what [it was] asking for which was termination of the lease...." Transcript of Second Dismissal Motion Hearing - April 8, p. 12.

On or prior to April 23, 2010, the Guarantors reached an agreement with 390 Park on the Motion to Fix (the "Consensual Resolution on the Motion to Fix"), which set the amount of the Additional Defaults as $18,305.90.[2] 390 Park withdrew its claim for attorneys' fees arising from the Bankruptcy Proceeding against the Garage with prejudice, but without prejudice to any claim for such fees that may be asserted against third parties (i.e. the Guarantors). On April 23, 2010, Judge Drain issued his decision in accordance with the Consensual Resolution on the Motion to Fix.

[2] This amount includes $25,218.60 for real estate taxes less $6,912.70 to the Garage for a disputed ICIP credit.

On May 13, 2010, Judge Drain granted the Second Dismissal Motion and directed the Garage to make payment of fees to the U.S. Trustee and precluded the Garage from filing for Bankruptcy within 180 days.

The First Guaranty Action

Shortly after the Chapter 11 Petition was filed, pursuant to the terms of the Guaranty, 390 Park commenced an action against the Guarantors (the "First Guaranty Action") in this court. 390 Park asserted causes of action for outstanding rent and additional rent in the amount of $462,592.35 (including the Civil Court Money Judgment and additional unpaid rent of $53,941.33) and for attorneys' fees and expenses incurred in the Civil Court Proceeding and the First Guaranty Action.

By a decision and order, dated May 18, 2009 (the "First Guaranty Decision"), Hon. Michael D. Stallman ("Justice Stallman") granted 390 Park's motion for summary judgment on its cause of action for outstanding rent and additional rent in the amount of $462,592.35. However, Justice Stallman determined that 390 Park was not entitled to the full amount of interest it sought on this judgment. Justice Stallman also granted summary judgment in favor of 390 Park on its claim for attorneys' fees and costs and directed that this cause of action be severed and referred to a Special Referee to hear and determine.

On March 23, 2010, April 16, 2010, and April 20, 2010, a fee hearing (the "Fee Hearing") was conducted before Special Referee Steven Liebman ("Special Referee Liebman"), pursuant to the First Guaranty Decision. However, 390 Park asserts that it only submitted evidence regarding the amount of attorneys' fees and expenses it incurred through April 16, 2010, which was the last date for which 390 Park had written documentation. By decision and

order dated May 6, 2010, Special Referee Liebman determined the amount of fees and costs owing to be $200,559.53, and a judgment for this amount was entered on June 1, 2011.

The Second Guaranty Action (The Present Action)

On or about May 28, 2009, prior to the resolution of either the Bankruptcy Proceeding or the First Guaranty Action, 390 Park commenced this action (the "Second Guaranty Action"). The complaint asserts three causes of action against the Guarantors. The first and second causes of action for, respectively, rent and additional rent accrued since the commencement of the Bankruptcy Proceeding in the amount of $151,537.91 and late charges and interest for the period following the commencement of the Bankruptcy Proceeding through the date of the trial are not pursued by 390 Park which acknowledges that the Garage has essentially brought its rent account current. The third cause of action, which is at issue here, seeks attorneys' fees and expenses incurred "in enforcing the Lease and the Guaranty, including, but not limited to, [attorneys'] fees and expenses from the Bankruptcy Proceeding," excluding those addressed by the court in the First Guaranty Action. Complaint ¶¶28-30. In their answer, the Guarantors assert denials and affirmative defenses, including in relevant part, the equitable doctrine of unclean hands, and the doctrines of waiver and estoppel, including collateral estoppel.

In the instant motion, 390 Park asserts that the Guarantors are liable to 390 Park for attorneys' fees and expenses incurred in the Bankruptcy Proceeding, as well as attorneys' fees and expenses incurred in the First Guaranty Action (excluding those awarded therein) and in this Second Guaranty Action. 390 Park also asserts that the Guarantors are not entitled to assert any defenses in this action as to their liability as guarantors since they waived this right in Paragraph 4 of the Guaranty.

390 Park asserts that, under the terms of the Guaranty, the Guarantors must pay 390 Park's attorneys' fees and expenses for the Bankruptcy Proceeding based on Article 19 of the Lease which requires the Garage to pay 390 Park's attorneys' fees and costs incurred in proceedings by 390 Park against the Garage in which 390 Park is prevailing party and which arise in connection with the Garage's breach of its Lease obligations. 390 Park argues that it was the prevailing party in the Bankruptcy Proceeding as the Bankruptcy Proceeding was dismissed without any reorganization being achieved and with an order prohibiting the Garage from filing for bankruptcy protection within 180 days, and that Judge Drain ordered the Garage to pay the Undisputed Cure Amount and $18,305.90 of Additional Arrears and to post a security deposit of $190,737.06 which was not required by the Lease. 390 Park also appears to argue that the ultimate dismissal of the Bankruptcy Petition for failure to file a plan of reorganization shows that the Bankruptcy Petition was filed in bad faith or for an improper purpose which entitles 390 Park to attorneys' fees and expenses.

The Guarantors oppose the motion and cross move for summary judgment. The Guarantors argue that 390 Park is not entitled to collect attorneys' fees and expenses for the Bankruptcy Proceeding as it was not the prevailing party in that proceeding since it sought termination of the Lease, and the Garage was permitted to assume the Lease, despite 390 Park's opposition on this issue. In support of this argument, the Guarantors cite Judge Drain's statement that 390 Park "didn't prevail on what [it was] asking for which was termination of the lease…." Additionally, the Guarantors assert that 390 Park's unsuccessful appeal of the Assumption Order further demonstrates that it was not the prevailing party.

The Guarantors also argue that even if the outcome of a proceeding is "favorable" to a party, such outcome does not make it the prevailing party. They further assert that the dismissal

of the Bankruptcy Proceeding did not render 390 Park the prevailing party since the Bankruptcy Proceeding was only dismissed as a consequence of the Garage's assumption of the Lease and satisfaction of its obligations thereunder, and there was no finding of bad faith by the Bankruptcy Court. The Guarantors also maintain that the result of the Bankruptcy Proceeding was not a negative consequence for the Garage, as it was permitted to assume the Lease and "satisfied all financial obligations that the Court determined it owed (which were slightly less than half of what [390 Park] was claiming due)." Opposition Papers ¶52.

The Guarantors further argue, inter alia, that 390 Park is barred by collateral estoppel from recovering the legal fees incurred in the Bankruptcy Proceeding as it withdrew, with prejudice, its claim for such fees against the Garage.

In reply, 390 Park asserts that the Guarantors' waiver of defenses in the Guaranty precludes them from asserting various arguments and defenses, including that 390 Park is barred by collateral estoppel from seeking attorneys' fees in the Bankruptcy Proceeding on the basis that 390 Park withdrew its claims against the Garage for attorneys' fees, and that any event it did not so without prejudice to seeking such fees from the Guarantors.

Discussion

Under the terms of the Lease, 390 Park's entitlement to attorneys' fees turns on whether it was the prevailing party in the Bankruptcy Proceeding. A determination of prevailing party status must be made in "consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope." Excelsior 57th Corp. v. Winters, 227 A.D.2d 146, 146-7 (1st Dep't 1996). A party may be found to be the prevailing party, even if it does not succeed on all its claims. See Lynch v. Leibman, 177 A.D.2d 453 (1st Dep't 1991). However, it has been held that in order "to be considered a prevailing party, there must be

success with respect to the central relief sought." 25 E. 83 Corp. v. 83rd St. Assocs., 213 A.D.2d 269 (1st Dep't 1995); see also Nestor v. McDowell, 81 N.Y.2d 410 (1993). In some actions there is no clear "prevailing party," and under these circumstances the courts deny requests for attorneys' fees. See 54 Greene Street Realty Corp. v. Shook, 8 A.D.3d 168 (1st Dep't 2004)(landlord's request for attorneys' fees denied as there was no prevailing party in the action).

A review of the proceedings in the Bankruptcy Court shows that a central aim sought by 390 Park was to have the Bankruptcy Proceeding dismissed and to have the Lease rejected and terminated as between 390 Park and the Garage. That the rejection of the Lease in the Bankruptcy Proceeding was a central aim of 390 Park is supported by 390 Park's opposition and appeal of the Assumption Order. This conclusion is further supported by Judge Drain's statement that 390 Park "didn't prevail on what [it was] asking for [in the Bankruptcy Proceeding,] which was termination of the lease...". See Transcript of Second Dismissal Motion Hearing - April 8, p. 12. In addition, 390 Park's argument that the assumption of the Lease does not bear upon the determination of prevailing party status since it is the right of the debtor to assume a lease in bankruptcy is unavailing as a debtor's decision to assume or reject a lease requires court approval, which 390 Park opposed. See Bankruptcy Code Sections 365(a) & 1107(a).

Another important issue in the Bankruptcy Proceeding was the determination of the amount of the Additional Arrears. While the amount of Additional Arrears was settled consensually by the parties at $18,305.90, approximately $10,000 in excess of the amount asserted by the Garage, such amount was substantially lower than the amount sought by 390 Park in its opposition to the Motion to Fix, which was $365,295.16.

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Next, while the Bankruptcy Proceeding was ultimately dismissed, this dismissal occurred only after the Garage's Assumption Motion was granted and the amount of Additional Arrears was determined to be $18,305.90, and there is no indication in the Second Dismissal Order that the Bankruptcy Court found that the Bankruptcy Petition was filed in bad faith. The Garage did not even oppose the dismissal of the Bankruptcy Proceeding at this stage. Thus, in consideration of the full scope of the dispute litigated, the dismissal of the Bankruptcy Proceeding did not render 390 Park the prevailing party.

In view of the above, it cannot be said that 390 Park was the prevailing party such that it is entitled to legal fees relating to the Bankruptcy Proceeding. As such, 390 Park's claim for attorneys' fees, insofar as it relates to fees incurred in the Bankruptcy Proceeding, must be denied and the parties' remaining arguments on this issue need not be addressed herein. Furthermore, as attorneys' fees arising from the Bankruptcy Proceeding are the central contested issue in this Second Guaranty Action, 390 Park did not prevail on this issue, it is not entitled to attorneys' fees arising herein. See 25 E. 83 Corp. v. 83rd St. Assocs., supra; Nestor v. McDowell supra.

On the other hand, 390 Park is entitled to reasonable attorneys' fees incurred during the Fee Hearing in relation to the First Guaranty Action, to the extent such fees were not sought at the Fee Hearing. It is established that such "fees on fees" may be recovered when, as here, they are provided for in an agreement. See Baker v. Health Management Systems, Inc., 98 N.Y.2d 80, 88 (2002); Sage Realty Corp. v. Proskauer Rose LLP, 288 A.D.2d 14 (1st Dep't 2001). Accordingly, the amount of such fees is referred to Special Referee Liebman to hear and report with recommendations, and any claim by 390 Park to fees incurred at the hearing herein directed shall be sought during such hearing or waived.

Conclusion

In view of the above, it is

ORDERED that 390 Park's motion is denied except to the extent of granting it summary judgment on that part of its third cause of action seeking attorneys' fees incurred in the First Guaranty Action that were incurred but not sought during the Fee Hearing before Special Referee Liebman; and it is further

ORDERED that the issue of the amount of such attorneys' fees incurred in the Fee Hearing in relation to the First Guaranty Action is referred to Special Referee Liebman to hear and report with recommendations; and it is further

ORDERED that to the extent 390 Park seeks further fees incurred during the hearing directed by this court, 390 Park shall seek such fees at the time of the hearing or shall waive any right to such fees; and it is further

ORDERED that the powers of the Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@court.state.ny.us) for placement at the earliest possible date on calendar of the Special Referee Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the References link under Courthouse procedures), shall assign this matter to Special Referee Liebman to hear and report as specified above; and it is further

ORDERED that counsel for 390 Park shall, within 15 days of this decision and order submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise

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counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear at the hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the rules of that Part; and it is further

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a))(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc) and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completed; and it is further

ORDERED that the motion to confirm or reject the Report of the Special Referee shall be made within the time specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the cross motion of Sopher and Quik Park to dismiss the complaint is granted, except for that part of the third cause of action relating to fees incurred, but not sought, at the Fee Hearing in the First Guaranty Action.

Dated: July 13 2011

J.S.C.

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