

**Partnership 1995 II L.P. v Fabulous Fruit Bouquets,
Inc.**

2013 NY Slip Op 30277(U)

January 29, 2013

Supreme Court, New York County

Docket Number: 115234/09

Judge: Joan A. Madden

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

PRESENT: How Joan A. M. deW
Justice

PART 11

Index Number : 115234/2009

PARTNERSHIP 1995

vs.

FABULOUS FRUIT BOUQUETS

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the
Answered Memorandum Decision + order.*

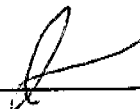
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

FEB 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 29, 2013

, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
PARTNERSHIP 1995 II L.P.,

Plaintiff,

INDEX NO. 115234/09

-against-

FABULOUS FRUIT BOUQUETS, INC.,
and JAMES NOTARIS, AS GUARANTOR
Defendants.

FILED

FEB 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

-----X
JOAN A. MADDEN, J.:

Defendant James Notaris ("Notaris") moves for an order: (i) granting summary judgment dismissing the complaint as against him, or, in the alternative, limiting his potential liability pursuant to the terms of a guaranty agreement, (ii) granting summary judgment to him on his counterclaim against plaintiff Partnership 1995 II L.P. ("Partnership 1995") based on Partnership 1995's alleged violations of The Fair Debt Collection Practices Act (the "FDCPA"), and (iii) imposing sanctions against Partnership 1995 and its counsel for the interposition of claims against him in his individual capacity. Partnership 1995 opposes the motion, which is granted in part and denied in part.

Background

Defendant Fabulous Fruit Bouquets, Inc. ("Fabulous Fruit") entered into a lease agreement (the "Lease") for a retail space, located at 4-6 Bond Street, Great Neck, New York (the "Premises") in May 2005. The Premises is owned by Partnership 1995, which is solely owned by Notaris, and is managed by BLDG Management Co. Inc. ("BLDG Management"). The preamble to the Lease defines Fabulous Fruit as "Tenant" and "Landlord" as "[BLDG Management], as agent for Partnership 1995...."

The Lease requires Notaris to execute a limited guaranty of Fabulous Fruit's obligations, which is to be considered a part of the Lease. Lease, Article 32. The Lease also provides that

when Fabulous Fruit quits the Premises, it is required to surrender it “vacant, broom clean, in good order and condition [and to] remove all Tenant’s Property [from the Premises...].” Lease, Section 1.2. The Lease, by its terms, is set to expire on July 31, 2015. With respect to Fabulous Fruit’s surrender of the Premises, Section 21.2 of the Lease provides that:

“No act or thing done by Landlord or Landlord’s agents during the [term of the Lease] shall be deemed an acceptance of a surrender of the Premises and no agreement to accept such surrender shall be valid unless such acceptance is in writing and signed by Landlord. No employee of Landlord or Landlord’s agent shall have any power to accept keys for the Premises prior to the expiration of this Lease, and the delivery of keys to any such agent or employee shall not operate as a[n] expiration of this Lease or a surrender of the Premises.”

Notaris executed the Lease on Fabulous Fruit’s behalf, and his name and title of President of Fabulous Fruit are printed beneath the signature line for the tenant, Fabulous Fruit. At or about the time that he executed the Lease in May 2005, Notaris also executed a Limited “Good Guy” Guaranty Agreement (the “Guaranty”), as provided for in the Lease, in his personal capacity, which guaranteed the “full performance and observance of all agreements to be performed and observed by [Fabulous Fruit] in the Lease.” The Guaranty states in pertinent part that:

“Notwithstanding the foregoing, this Guaranty shall bind [Notaris] only for performance and observance of the agreement to be performed and observed under the Lease that accrue while [Fabulous Fruit] is in possession of the premises. This Guaranty shall not apply to any performance or observance after [Fabulous Fruit] surrenders possession of its premises in the condition required by the terms of the Lease. The Guarantor shall also pay any and all costs and expenses, including attorney’s fees that Landlord may incur in enforcing this Guaranty.”

On June 16, 2008, Fabulous Fruit submitted a letter (the “Termination Letter”) addressed to the attention of Robert A. Rapuano (“Rapuano”), in his capacity of Vice President of BLDG Management, which states that Fabulous Fruit “has elected to terminate the [Lease],” as a result

of limitations placed upon the use of the space by the Village of Great Neck and elsewhere, which prevented Fabulous Fruit from operating at a profit. The Termination Letter also states that Fabulous Fruit was prepared to surrender the space as directed by Rapuano, or in lieu of such direction, Fabulous Fruit would leave its keys inside the Premises. Additionally, Fabulous Fruit authorized BLDG Management, on behalf of Partnership 1995, to retain the Security Deposit on the condition that it be applied toward any rental obligations owed by Fabulous Fruit pursuant to the Lease.

Neither Partnership 1995 nor BLDG Management formally responded to the Termination Letter in writing, and Fabulous Fruit asserts that it vacated the Premises on June 16, 2008, delivered its key, and left the premises in an empty, broom-swept condition consistent with the requirements of the Lease.

Partnership 1995 asserts in the complaint that Fabulous Fruit “vacated the... [Premises] on or about July 8, 2008. Complaint, ¶7. Steven Maietta (“Maietta”), an agent for the Premises, asserts that he went to the Premises on July 8, 2008, and that the keys to the Premises were given to him at that time. Maietta Aff. at ¶¶3-4. Partnership 1995 maintains that Fabulous Fruit did not surrender the Premises in the condition required by the Lease as Fabulous Fruit failed to remove a freezer box from the Premises that was “approximately 6 feet long, 3 feet high and 2 feet deep.” Maietta Aff. at ¶17.

On or around October 14, 2009, Partnership 1995 sent Fair Debt Collection Notices (the “Collection Notices”) to Notaris and Fabulous Fruit. The Collection Notices assert that Fabulous Fruit and Notaris owe rent arrears in the amount of \$60,035.26.

On or around October 14, 2009, Partnership 1995 commenced this action against Fabulous Fruit and Notaris to recover (i) unpaid rent in the amount of \$59,796.08, pursuant to the terms of the Lease, for the period from March 1, 2008, through and including October 31, 2009, (ii) additional rents in the sum of \$655.70 and \$583.48 for water sewer charges and late charges on rent owed for the period from March 1, 2008, through June 30, 2008, respectively, (iii) additional rent accruing through the date of trial pursuant to the Lease, and (iv) legal fees pursuant to the terms of the Lease which were demanded, but not yet paid. The complaint includes the specific allegation that Partnership 1995 and Fabulous Fruit entered into the Lease (Complaint, ¶3), but does not allege that Notaris was a party to the Lease. The complaint also alleges that Notaris “guaranteed the lease obligations of [Fabulous Fruit]” (Complaint, ¶5). The complaint does not allege that any personal property was left behind by Fabulous Fruit after it left the Premises in contravention of Section 1.2 of the Lease.

In their joint answer, in addition to denying Partnership 1995’s claims, Fabulous Fruit and Notaris assert counterclaims against Partnership 1995. Fabulous Fruit and Notaris allege that Partnership 1995 violated the provisions of the FDCPA by characterizing Notaris as a party to or guarantor of the Lease and alleging “false, deceptive, and misleading representations as to the character, amount and legal status of the debts alleged by [Partnership 1995].” Answer, ¶¶17-19, 24. Fabulous Fruit and Notaris further allege that these actions have caused and will continue to cause harm to them for which there is no adequate remedy at law and seek an order i) dismissing Notaris as a defendant in this action, (ii) enjoining Partnership 1995 from pursuing further action against Notaris, and (iii) dismissing this action in its entirety based on violations of the FDCPA.

On this motion, Notaris seeks an order (i) granting summary judgment dismissing the complaint against him, or, in the alternative, limiting his potential liability under the Guaranty to any rent incurred prior to June 16, 2008, less Fabulous Fruit's Security Deposit, (ii) granting summary judgment on his counterclaim asserting violation of the FDCPA, and (iii) imposing sanctions due to the interposition of claims against Notaris in his individual capacity.

Notaris argues that he cannot be held personally liable under the Lease since he signed the Lease in his capacity as President of Fabulous Fruit and not in his personal capacity, as evident from the fact that his signature appears in the space provided for the tenant, which is designated as Fabulous Fruit, and Notaris' title of President appears after his name below the signature space.

Notaris further argues that the Guaranty is unenforceable as it was only in effect while Fabulous Fruit was in possession of the Premises, and Fabulous Fruit vacated the Premises before the commencement of this action. Alternatively, Notaris argues that the Guaranty is only applicable to debts incurred by Fabulous Fruit prior to June 16, 2008, the date on which Fabulous Fruit vacated the Premises, as the Guaranty, by its terms, is limited to the period in which Fabulous Fruit remained in possession of the Premises.

Notaris further argues that as Partnership 1995 never challenged the assertions relevant to the surrender of the Premises in the Termination Letter, namely that the Premises was surrendered in proper condition pursuant to the Lease on June 16, 2008, they admit these assertions to be factually accurate and there are no issues of material fact to prevent a determination of Notaris' limited liability.

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Additionally, Notaris argues that the amount of the Security Deposit must be subtracted from any amount that he is determined to owe for the period in which Fabulous Fruit remained in possession of the Premises, and that after this amount is subtracted from the amount of rent outstanding, no further rent remains due for the period that Fabulous Fruit was in possession of the Premises.

In opposition, Partnership 1995 argues that under the Guaranty, Notaris is liable for the debts of Fabulous Fruit, as there was no surrender of the Premises, and that Notaris' alleged liability is based on the Guaranty and not on allegations that Notaris was a party to the Lease in his personal capacity.

Partnership 1995 also maintains that a tenant's decision to vacate the Premises is not equivalent to a surrender for legal purposes as a surrender requires the acceptance of the proposed surrender by the landlord. Maietta states in his affidavit that his acceptance of the keys from Fabulous Fruit was not an acceptance of a claimed surrender, although he admits that he was aware that Fabulous Fruit was moving out. Maietta Aff. at ¶6. Partnership 1995 argues that, under the terms of the Lease, an acceptance of such a surrender would only be effective if it was in writing as required under the Lease, and that any agreement modifying this requirement would also have to be in writing.

Partnership 1995 also argues that the Guaranty remains in effect as the Premises was not delivered in the condition required by the Lease since Fabulous Fruit left behind the freezer. Maietta states that when he received the keys from Fabulous Fruit, he informed the person delivering them that Fabulous Fruit failed to remove the freezer, but that the freezer was not removed. Maietta Aff. ¶¶16-18. Thus, Partnership 1995 asserts that Fabulous Fruit failed to

deliver the Premises in the condition required by the Lease, and, as such, the Guaranty remains in effect.

Alternatively, Partnership 1995 contends that Notaris owes at least \$14,411.26 pursuant to the terms of the Lease. Notaris provides a spreadsheet detailing the outstanding balance due under the Lease (the "Rent History"), which appears to consist primarily of charges for unpaid rent, late fees, and water and sewer charges. The Rent History shows that the last date by which Fabulous Fruit had fully satisfied its obligations under the Lease was December 1, 2006.

In reply, Notaris asserts that Partnership 1995 effectively admits in Maietta's affidavit that it received the Termination Letter, which establishes that on June 16, 2008, Fabulous Fruit vacated the Premises, delivered its key, and provided written notice that it was surrendering possession of Premises. Notaris further argues that the language of the Guaranty, which states that the Guaranty only applies while Fabulous Fruit is in possession of the Premises, shows that the Guaranty ceased to be effective as soon as Fabulous Fruit moved out and surrendered its keys. Notaris also argues that Partnership 1995 failed to formally notify Notaris or Fabulous Fruit of any defects in the condition of the Premises after it was vacated, and points out that Maietta's affidavit is the first document submitted in this action which contains the allegation that the Premises was not surrendered in the condition required by the Lease since the freezer was left behind.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d

851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

On a motion for summary judgment to enforce a written guaranty, “the creditor must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty.” Davimos v. Halle, 35 A.D.3d 270, 272 (1st Dep’t 2006); accord Kensington House Co. v. Oram, 293 A.D.2d 304 (1st Dep’t 2006); City of New York v. Clarose Cinema Corp., 256 A.D.2d 69 (1st Dep’t 1998). Moreover, “[a] guaranty is to be interpreted in the strictest manner.” White Rose Food v. Saleh, 99 N.Y.2d 589, 591 (2003). The terms of a guaranty are to be strictly construed in the guarantor’s favor, and the “guarantor should not be bound beyond the express terms of his guarantee.” 665-75 Eleventh Ave. Realty Corp. v. Schlanger, 265 A.D.2d 270, 271 (1st Dep’t 1999) quoting Wesselman v. Engel Co., 309 N.Y. 27 (1955).

As a preliminary matter, Notaris’ argument that he is entitled to dismissal of all Partnership 1995’s claims against him on the basis that these claims were made after Fabulous Fruit vacated the Premises must be rejected as the Guaranty does not relieve Notaris from liability for such debts. The Guaranty, by its terms, makes Notaris liable for debts incurred by Fabulous Fruit while it is in possession of the Premises, even if they are not sought for collection until after Fabulous Fruit surrenders the Premises. Russo v. Heller, 80 A.D.3d 531, 532 (1st Dep’t 2011)(“‘Good Guy’ guaranties are commonly understood to apply to obligations which accrue prior to the surrender of the lease premises, and this obligation, once accrued, persists

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even after surrender of the premises”). Additionally, contrary to Notaris’ argument, Preamble Properties, L.P. v. Thomas K. Woodard Antiques Corp., 293 A.D.2d 330 (1st Dep’t 2002) and L & B 57th Street, Inc. v. E.M. Blanchard, Inc., 143 F.3d 88 (2nd Cir. 1998), are consistent with this determination as these cases held that the limited guarantors’ were not responsible for the payment of base rent after the surrender date, but did not find that they were not liable for rental obligations incurred before the surrender date.

However, based on the record, the court finds that Notaris is entitled to summary judgment limiting his liability under the Guaranty to those obligations incurred by Fabulous Fruit during the period when Fabulous Fruit was in possession of the Premises together with any costs and expenses, including attorneys’ fees incurred in enforcing the Guaranty. Here, the Guaranty provides that it binds Notaris “only for performance and observance of the agreement to be performed and observed under the Lease that accrue while [Fabulous Fruit] is in possession of the premises (emphasis added).” In addition, the Guaranty provides that it “shall not apply to any performance or observance after [Fabulous Fruit] surrenders possession of its premises,” and its only restriction on such surrender is that the Premises be “in the condition required by the terms of the Lease.” Thus, while Section 21.2 of the Lease provides that Partnership 1995’s acceptance of a surrender of the Premises would not be valid, unless there was a writing signed by Partnership 1995, this section does not apply with respect to the Guaranty, which the court is required to construe narrowly and based on its express terms. See White Rose Food v. Saleh, 99 at 591. Thus, the Guaranty cannot be construed to bind Notaris for any debts incurred by Fabulous Fruit after such time as Fabulous Fruit vacated the Premises in the condition required by the Lease.

Here, the record shows that the Fabulous Fruit left the Premises in the condition required by the Lease, and Partnership 1995's belated attempt to argue to the contrary, based on its argument that a freezer was left at the Premises, is unavailing. Furthermore, it is undisputed that Partnership 1995 received the Termination Letter expressing that Fabulous Fruit desired to surrender the Premises as directed by Partnership 1995, and Partnership 1995 admits that Fabulous Fruit surrendered its keys to an agent of Partnership 1995 on July 8, 2008, and moved off the Premises on the same day. Thus, Notaris' liability for any rent, late fees, or other debts, which Fabulous Fruit may have incurred, pursuant to the Lease, ended in the latest on July 8, 2008, after Fabulous Fruit vacated the Premises.

In addition to making Notaris liable for Fabulous Fruit's obligations under the Lease while Fabulous Fruit was in possession of the Premises, the Guaranty provides that Notaris "shall also pay any and all costs and expenses, including attorney's fees that [Partnership 1995] may incur in enforcing this Guaranty." Thus, Notaris is liable to Partnership 1995 for these costs and expenses including reasonable attorneys' fees.

Although Notaris is liable under the Guaranty for rent and other unpaid obligations incurred by Fabulous Fruit during its possession of the Premises and for expenses and reasonable attorneys' fees incurred by Partnership 1995 in enforcing the Guaranty, the amount of this liability cannot be determined on this record. Not only do the parties dispute that date that Fabulous Fruit vacated the Premises, the court is also unable to determine the amount for which Notaris is liable under the Guaranty based on the Rent History submitted by Partnership 1995, which appears to conflict with the amounts alleged to be due and owing in the complaint. In addition, the record does not provide a basis for calculating the amount of expenses, costs and

reasonable attorneys' fees incurred by Partnership 1995 in enforcing the obligations under the Guaranty.

As for Notaris' argument that he is entitled to summary judgment on his counterclaim for alleged violations of the FDCPA by Partnership 1995, the court finds there is insufficient factual or legal support for such argument. Next, as under the Guaranty, Notaris is liable only for the failure of the tenant to perform its obligations during its period of possession, Notaris is not entitled to an offset in the amount of the Security Deposit. Finally, Notaris' request for sanctions is denied.

Conclusion

In view of the above, it is

ORDERED that Notaris' motion for summary judgment is granted only to the extent that the court finds that Notaris' liability is limited to the amount of rent and other obligations due and owing under the Lease for the period that Fabulous Fruit was in possession of the Premises and for reasonable attorneys' fees and other costs and expenses incurred by Partnership 1995 in enforcing the Guaranty, with the amount of liability to be determined at the time of trial; and it is further

ORDERED that Notaris' motion for summary judgment on his counterclaim is denied; and it is further

ORDERED that Notaris' request for sanctions is denied; and it is further

ORDERED that the parties shall proceed to mediation.

Dated: January 29, 2013

FILED


J.S.C.

FEB 06 2013

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