

<b>Martin Operating Corp. v TMM Group, Inc.</b>
2013 NY Slip Op 31087(U)
May 17, 2013
Sup Ct, New York County
Docket Number: 600130/2010
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 : 600130/2010  
MARTIN OPERATING  
vs.  
TMM GROUP  
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). 1, 2, 3  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 4, 5  
Replying Affidavits \_\_\_\_\_ | No(s). 6, 7

Upon the foregoing papers, it is ordered that this motion is

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

MAY 20 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/17/13

  
\_\_\_\_\_, J.S.C.  
**HON. EILEEN A. RAKOWER**

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 15

-----X  
MARTIN OPERATING CORP,

Index No. 600130/2010

Plaintiff,

-against-

DECISION and ORDER  
Mot. Seq. 1

TMM GROUP, INC. and CLAUDE GRUNITZKY,

Defendants.  
**FILED** X

HON. EILEEN A. RAKOWER:

MAY 20 2013

In this action, plaintiff Martin Operating Corp. ("Plaintiff") is seeking to recover for breach of a lease against defendants TMM Group, Inc. ("TMM") (collectively, "Defendants") and Claude Grunitzky ("Grunitzky"), as guarantor, in the amount of \$1,261,154.41. TMM vacated the subject premises in September 1, 2008. Plaintiff seeks to recover for the entire monies owed on the Lease through the end of its term.

Defendants move for an Order granting summary judgment in their favor and dismissing the within action on the grounds that there are no monies due and owing from them. In support of their motion, Defendants submit the affirmation of Sheila Randolph, which, among other exhibits, provides a copy of the Lease, deposition transcript of Martin Feinberg, Plaintiff's Bill of Particulars, and the affidavit of Claude Grunitzky.

Plaintiff cross moves for an Order granting summary judgment in its favor. Plaintiff submits the affirmation of Cory S. Dworken and the affidavit of Martin Feinberg, Plaintiff's Principal.

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]). “[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, ‘the facts must be viewed in the light most favorable to the nonmoving party’” (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

In interpreting a contract, the Court must “enforce a clear and complete written agreement according to the plain meaning of the terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document.” *150 Broadway NY Assocs. L.P. v. Bodner*, 14 A.D. 3d 1, 6, [1<sup>st</sup> Dept 2004]. “A contract is ambiguous ‘if the provisions in the controversy area reasonably or fairly susceptible of different interpretations or may have two or more different meanings.’” *Feldman v. National Westminster Bank*, 303 A.D. 2d 371 [2003], lv. denied 100 N.Y. 2d 505 [2003]. Further, the Court must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms. (*See James v. Jamie Towers Housing Co., Inc.*, 294 A.D. 268, 269 [1<sup>st</sup> Dept 2001]).

It is undisputed that Plaintiff and TMM entered into a lease, dated March 2007, for the third floor loft at 41 Great Jones Street, New York, NY, dated March 2007 (“the Lease”) for the term of ten (10) years and four (4) months. Grunitzky executed a “Good Guy” Guaranty (“Guaranty”).

Paragraph 80 of the Rider of the Lease provides, “Tenant’s obligation to pay BASE RENT shall commenced upon the LANDLORD’s substantial completion of the LANDLORD’s work specified in this paragraph 80. Such date shall be referred to as the RENT COMMENCEMENT DATE.” TMM took possession of the subject premises in June 2007 and made its first rent payment in connection with the Lease for the month of June 2007. The rent commencement date of the Lease is June 1, 2007.

Paragraph 28 of the Rider of the Lease states:

It is hereby agreed that notwithstanding anything herein contained to the contrary, that the total rent for the whole term hereby demised, is payable at the time of the making of this LEASE and the provisions herein contained for the payment of the rent in installments, provided for in this LEASE are for the convenience of the TENANT only and in default of the payment of the rent installments, as therein allowed, then the whole of the rent reserved for the whole of the period then remaining unpaid shall at the option of the LANDLORD at once become due and payable without any notice or demand and collection of said entire balance for the whole of the period then remaining unpaid may be enforced by means of summary proceedings to recover possession, or any other action, and the LANDLORD shall be entitled to a judgment to said entire balance in such summary proceeding or other law suit.

Grunitzky executed a "Good Guy" Guaranty to the Lease which provides that "GUARANTOR's liability pursuant to this paragraph I (hereinafter sometimes referred to as this "GUARANTY") *shall be limited to:* (2) the performance of those obligations and the payment of such fixed annual rent, ADDITIONAL RENT [as set forth in *paragraph 3, supra*] and other charges as accrue up to that date (hereinafter called the "SURRENDER DATE") that TENANT vacates and surrenders the DEMISED PREMISES in the condition required under this LEASE and removes TENANT's property therefrom, delivers the keys to LANDLORD and gives written notice to LANDLORD that TENANT is surrendering possession of the DEMISED PREMISES. (3) the payment of all costs and expenses referred to in subsection iii(8) as well as iii (4), and iii (5) . . . incurred by LANDLORD, including, without limitation, reasonable attorneys fees and expenses, in connection with enforcing the terms and provisions of this LEASE..."

It is undisputed that Plaintiff served TMM with a Ten Day Rent Demand dated June 24, 2008. Neither of the Defendants made any rent payments to Plaintiff after receiving the Ten Day Rent Demand. TMM remained in possession of the subject premises until September 2008, as demonstrated by the stipulation entered into on September 25, 2008 in which Plaintiff discontinued the summary proceeding it had commenced without prejudice "[b]ased on the Respondent's surrender of possession of the premises back to Petitioner" and reserved "its right to commence a plenary action for any and all sums that may be due and owing

under the lease.” In this action, Plaintiff seeks rent and additional rent for the entire lease term against TMM, under the Lease, and Grunitzky, under the Guaranty.

Plaintiff has established a prima facie case on liability against TMM under the terms of the Lease. As referenced above, under the terms of the Lease, “The total rent for the whole term hereby demised is payable at the time of the making of the lease” and “the whole of the rent reserved for the whole of the period then remaining unpaid shall at the option of the Landlord at once become due and payable without any notice or demand.” It is undisputed that TMM vacated and surrendered the subject premises as of September 25, 2008. Based on the terms of the Lease, upon vacatur, TMM was obligated to pay the rent and additional rent due through the balance of the Lease, and TMM has failed to do so. As proof of the amount due, annexed to Plaintiff’s Complaint and Feinberg’s supporting affidavit is a ledger that reflects rent owed, late charges, a bounce check fee, administrative fee, as well as legal fees in plaintiff’s landlord and tenant matter in the amount of \$1,240 and total legal fees in this action as \$211,000. The total rent due is \$1,050,154.41, the ledger also states \$1350 is due based on late charges, a bounce check, and administrative fees. TMM has not raised any triable issues.

As for Grunitzky, however, the terms of the Guaranty that he signed, varied from the language contained in the Lease. The Guaranty expressly limited his obligations under the Lease to “the payment of such **fixed annual rent, ADDITIONAL RENT** (as set forth in *paragraph 3, supra*) and other charges as accrue up to that date [the surrender date].” Therefore, Grunitzky is obligated under the Guaranty only for the annual rent and additional rent that accrued at the time of TMM surrendered and vacated the subject premises. As defined in paragraph 48 of the Lease Rider, Year One and Year Two of the Lease Term accrued and were payable upon TMM’s surrender in September 2008. The sum of Year One and Year Two rents is \$185,237.50, and Defendants, as attested to in the Feinberg Affidavit, made payments totaling \$57,440.81, leaving an accrued and payable balance of \$127,796.69 when TMM surrendered and vacated the subject premises in September 2008. Thus, Plaintiff has made a prima face showing only that Grunitzky is liable for the sum of \$127,796.69, plus interest from June 1, 2008. Grunitzky has failed to raise any triable issues concerning this obligation.

Wherefore it is hereby

ORDERED that defendants’ motion for summary judgment is denied; and it

is further

ORDERED that plaintiff's motion for summary judgment as against defendants TMM Group, Inc., and Claude Grunitzky is granted to the extent provided herein; and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff Martin Operating Corp. as against TMM Group, Inc., in the amount of \$1,051,504.41, together with interest as prayed for allowable by law until the date of entry of judgment (at the rate of 9% per annum from June 1, 2008), 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 Clerk enter judgment in favor of plaintiff Martin Operating Corp. as against Claude Grunitzky, in the amount of \$127,796.69, together with interest as prayed for allowable by law until the date of entry of judgment (at the rate of 9% per annum from June 1, 2008), 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 Clerk is directed to enter judgment accordingly; and it is further

ORDERED that an assessment of damages is directed as to reasonable attorneys' fees; and it is further

ORDERED that said assessment shall take place on Tuesday, July 9, 2013, at 2 pm at 80 Centre Street, Room 327.

**FILED**

This constitutes the decision and order of the court. All other relief requested is denied.

MAY 20 2013

NEW YORK  
COUNTY CLERK

Dated:

5/17/13

EILEEN A. RAKOWER, J.S.C.