

**361 West 34th St. Corp. v Kumar**

2013 NY Slip Op 32489(U)

October 7, 2013

Supreme Court, New York County

Docket Number: 653129/2012

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joav A. M. ddw Justice

PART 11

Index Number : 653129/2012
361 WEST 34TH ST. CORP.
VS.
KUMAR, ARUN
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 7-31-13
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 attached Memorandum Decision & Order

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

Dated: October 7, 2013

[Signature] 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  
361 WEST 34<sup>TH</sup> ST. CORP.,

Index No. 653129/2012

Plaintiff,

-against-

ARUN KUMAR, a/k/a Walter Kumar and  
KARAN BAKERY, INC.

Defendant.

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

Plaintiff 361 West 34<sup>th</sup> St. Corp (hereinafter 361 West or plaintiff), moves for an order (1) awarding summary judgment on its cause of action against defendant Arun Kumar, a/k/a Walter Kumar (Kumar) for breach of a personal guaranty in the amount of \$152,124.03, and (2) awarding summary judgment on its cause of action against defendant Karan Bakery, Inc. (Karan) for breach of its lease with plaintiff in the amount of \$134,374.03, and (3) dismissing the affirmative defense in defendants' answer.

Defendants oppose the motion.

Background

Plaintiff is the owner of the building located at 371 West 34<sup>th</sup> Street in New York, NY ("Building") . On June 1, 2009, plaintiff entered into a lease ("Lease") with Karan for the commercial premises ("the Premises") on the ground floor of the Building. The Lease was for a term of to run for 10 years and four months commencing on June 1, 2009 and expiring on September 30, 2019.

Section 41.1 of the Lease provides:

Provided that this Lease does not terminate prior to the Expiration date as the result of the Tenant's (i.e. Karan's) default, Landlord

(i.e. 361 West) agrees to abate all Fixed Rent hereunder (the "Abatement Period") beginning with the commencement date until September 30, 2009. In the event this Lease is terminated, or the Tenant dispossessed, prior to the Expiration Date as a result of Tenant's default, then the unauthorized portion (based on the schedule of amortization of the term of this Lease) of the rent that had been abated and of the broker's fee payable under paragraph 48, plus interest at the Interest Rate (as defined below) from the dates and such abatement and payment to the date paid by Tenant shall immediately be paid by Tenant, and shall be deemed for all purposes as having been due and payable during the Abatement Period as rent hereunder.

Paragraph 48 provides, inter alia, that the 317 West is solely responsible for the payment of the commission to the broker who negotiated the Lease.

At the time the Lease was executed, Kumar executed a guaranty entitled the "Good Guy Guaranty," unconditionally guaranteeing the payment of "all rent to be paid by the Tenant under the Lease" and additional obligations and rent items to plaintiff (hereinafter "the Guaranty").

In July 2012, Karan failed to pay the rent due and owing under the Lease. Plaintiff sent a demand letter for all rent and additional rent owed, and subsequently commenced a non-payment proceeding. On August 8, 2012, Karan executed a notarized Notice and Certification of Vacature and Surrender of the Premises. On August 13, 2012, Kagan Bakery vacated the Premises and delivered the keys to the plaintiff. On December 15, 2012, plaintiff re-rented the Premises.

Plaintiff commenced the instant action by filing a summons and complaint on September 6, 2012, in which it asserts causes of action against Kagan for breach of the Lease and against Kumar for breach of the Guaranty and against both defendants for attorneys' fees.

Defendants answered the complaint and asserted an affirmative defense alleging that any moneys due and owe are less than pleaded and/or the amount allegedly due was incorrectly calculated, plaintiff's claims should be reduced, and that defendants are entitled to a set off.

Plaintiff now moves for summary judgment on the complaint and in support of its motion submits a copy of the Lease, the Guaranty, the Notice and Certification to Landlord of Vacature and Surrender of Premises, and an affidavit from its President, Jack Lewis. Plaintiff argues that based on this evidence it is entitled to recover \$152,124.03 from Kumar for breach of the Guaranty, which includes \$102,374.03 for rent and additional rent, and \$32,000 for the broker's commission. This amount includes \$17,750.00 for rent and additional rent for the period of December 16, 2012 to February 2013, which is the period after the Premises was re-rented. However, at oral argument, plaintiff withdrew its request for rent during this period.

Plaintiff also seeks to recover \$134,374.03 from Karan for breach of the Lease, which includes \$77,724.03 for rent and additional rent accrued through and including August 31, 2012, \$32,000 for the broker's commission, and \$24,650 for rent and additional rent for the period of September 2012 through December 15, 2012 when plaintiff re-entered the Premises.

Additionally, plaintiff seeks to recover from defendants \$10,814.73 in attorneys' fees allegedly incurred as a result of defendants' breach of the Lease and Guaranty, and in support of this request it submits invoices issued by its attorneys for their services.

In opposition, defendants submit Kumar's affidavit in which he states that upon receiving the demand letter from plaintiff, he entered into an agreement with plaintiff to settle any claims against him for \$50,000 (although he admits that a payment schedule was not worked out) and that he never received a petition in the non-payment proceeding. Defendants argue that under the settlement agreement, defendants were induced to surrender and vacate the Premises and therefore the obligations under the Lease and Guaranty terminated. Defendants also argue that

plaintiff has not provided sufficient evidence as to the amount of broker's fees and asserts that the legal fees sought are unreasonable.

In reply, plaintiff submits an Mr. Lewis' affidavit in which he denies that plaintiff agreed to settle the claims against defendants for the sum of \$50,000, and asserts that, in any event, the provisions of the Lease and Guaranty could only be modified in writing. Plaintiff also contend that defendants do not deny liability under the Lease and Guaranty, and therefore, at the very least, summary judgment should be granted as to liability and that the amounts due and owing should be determined at a hearing.

### 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 Dept 2006); Kensington House Co. v. Oram, 293 A.D.2d 304 (1st Dept 2006) At the same time, 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).

The Guaranty provides that:

Notwithstanding anything to the contrary set forth below, this guaranty shall apply only to the rent (the "Good Guy Rent," which shall include the rent set forth in section 41.1 [of the Lease] but shall not include any future rent that may be accelerated as a result of the Tenant's [i.e. Karan's] default under paragraph 18) and those other obligations ("the Good Guy Obligations") accruing under the Lease until the date that all of the following have occurred: (A) Tenant vacates and surrenders to Landlord the demised premises, delivers to landlord the keys to all doors and locks and removes all of its signs, equipment and other personalty from the demised premises, with the demised premises in the condition required under the Lease, (B) six (6) months have elapsed since Tenant shall have given Landlord notice that it has taken or intends to take the actions set forth in clause "(A)" above and (C) Tenant furnishes owner with its written certification that it has taken the action set forth in clause "(A)" above and that neither Tenant nor any person or entity acting on behalf of or through tenant has any rights in or to the demised premises or any area appurtenant thereto...."

The Guaranty further states that Kumar, "unconditionally guarantees to [317 West] [...] that, (i) all Good Guy Rent (as defined above) to be paid by the Tenant ("Tenant") under the Lease will be promptly paid when due in accordance with the provisions thereof [...] and (ii) that all of the other Good Guy Obligations (as defined above) of Tenant under the Lease will be performed when and as required under the Lease. The obligations of the undersigned hereunder shall be unconditional..."

Plaintiff has submitted documentary proof, including copies of the Lease, the Guaranty, the Notice and Certification to the Landlord of Vacature and Surrender of Premises, as well as an affidavit from Plaintiff's president supporting its claims that Karan has breached the Lease by failing to pay rent due and owing since July 2012 and that Kumar has not paid these amounts and thus breached the Guaranty.

Based on this evidence, plaintiff has made a prima facie showing of entitlement to summary judgment on its claim against Karan for breach of the Lease agreement in connection with its failure to pay rent and additional rent.

Plaintiff has also made a prima facie showing that under the terms of the Guaranty, Kumar is liable for the amount of rent due and owing from Karan, including as provided under section 41.1 of the Lease. Furthermore, plaintiff is entitled to recover from Kumar for the period from July, 2012 through December 15, 2012, since under the Guaranty Kumar remained responsible for rent due and owing unless six months elapsed from the plaintiff receiving notice of the surrender of the Lease. Here, it is undisputed that Karan did not give notice before surrendering the Premises in August 2012, and plaintiff here is seeking rent for less than six months thereafter.

As for the brokers' fees, under paragraph 41.1 of the Lease, which is incorporated into the Guaranty, defendants are liable to pay the brokers fee paid by plaintiff in connection with the negotiation of the Lease. In addition, the Lease and Guaranty each provide that Karan and Kumur are respectively liable for the payment of costs, fees, and commissions and attorneys' fees incurred in connection with enforcing plaintiff's rights under the Lease and Guaranty. See Lease, ¶'s 18, 19; Guaranty, ¶6 (j).

Moreover, Kumar's statement that Karan settled for \$50,000 resulting in a termination of the Lease and the Guaranty is insufficient to raise a triable issue of fact as to defendants' liability. Under CPLR 2104, an out-of-court settlement agreement must be in writing and subscribed by the parties or their attorneys.<sup>1</sup> See Tocker v. the City of New York, 22 A.D.3d

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<sup>1</sup>Although there is an exception to this rule, when there is no dispute of the existence of an oral settlement and there is evidence that a party has been misled or deceived to her detriment in relying on such an agreement (Lowe v. Steinman, 284 A.D.2d 506 (2d Dept 2001)), such exception does not apply here.

311 (1<sup>st</sup> Dept 2005)(plaintiffs' acceptance of offer of settlement communicated by their counsel to defendants' counsel over the telephone was not enforceable); Maldonado v. Novartis Pharmaceuticals Corp., 40 A.D.3d 940 (2d Dept 2007)(holding that alleged oral stipulation negotiated by the parties in the presence of a court-appointed mediator did not constitute an enforceable agreement under CPLR 2104, since the terms of the purported settlement were not made on the record in open court). Here, as the alleged settlement described by Kumar was not in writing or made in open court, it is not enforceable and does not provide a basis for denying plaintiff summary judgment.

At the same time, however, on this record, plaintiff has not established that it is entitled to summary judgment as to the amounts it alleges are due and owing for rent and additional rent under the Lease and based on the Guaranty. Plaintiff has also provides insufficient evidence as to the amount of brokers' fees incurred, and a hearing is required regarding the reasonable value of legal services rendered. Matter of First National Bank of East Islip v. Brower, 42 N.Y.2d 471 (1977); Community Natl. Bank & Trust Co. v. I.M.F. Trading, Inc., 167 A.D.2d 193 (1<sup>st</sup> Dept. 1990).

Accordingly, it is

ORDERED that the motion for summary judgment by plaintiff is granted as to liability of defendants for (i) unpaid rent and additional rent for the period between July 2012 to December 15, 2012 due and owing under the Lease and based on the Guaranty, (2) brokerage fees, and (3) attorneys' fees and costs and expenses as provided for under the Lease and Guaranty; and it is further

ORDERED that the issue of the amount of unpaid rent and additional rent for the period between July 2012 to December 15, 2012, as well as brokerage fees and reasonable attorneys'

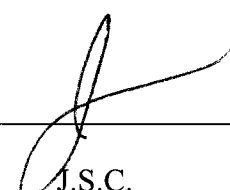
fees and costs and expenses is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that when the parties appear at the hearing before the Special Referee, counsel for the Landlord shall provide copies of its specific billing and time records, together with a summary and breakdown of the categories of legal services provided, and the hours attributed to each category of services, and counsel shall arrange for the requisition of the Court files so that they are available at the hearing for the Referee's inspection and evaluation of written work performed; and it is further

ORDERED that the Referee's report and recommendations shall include specific findings identifying counsel's hourly rate and a breakdown of the nature and category of the legal services performed, and the hours attributed to each category; and it is further

ORDERED that counsel for the plaintiff shall, on or before October <sup>31</sup> 2013, serve a copy of this order with notice of entry, together with a completed Information Sheet<sup>2</sup> upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date.

DATED: ~~September 11, 2013~~ *October 7, 2013*

  
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J.S.C.

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<sup>2</sup>Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.