

**Ganzevoort 69 Realty LLC v Laba**

2014 NY Slip Op 30466(U)

February 25, 2014

Supreme Court, New York County

Docket Number: 651010/2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

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GANZEVOORT 69 REALTY LLC,

Plaintiff,

Index No.  
651010/2013

- against -

Mot. Seq. No.: 001

DECISION/ORDER

REMI LABA  
VINCENT LUGONNARD-ROCHE,

Defendants.

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HON. EILEEN A. RAKOWER

Plaintiff Ganzevoort 69 Realty LLC (“Plaintiff”) commenced this action on or about March 19, 2013 seeking to enter judgment against defendants Remi Laba (“Laba”) and Vincent Lugonnard-Roche, as guarantors of Gans Wine, for outstanding rent and additional rent owed by Gans Wine Concept LLC (“Gans Wine”).<sup>1</sup> Plaintiff’s first cause of action is for the outstanding rent and additional rent owed. The second cause of action is for attorneys’ fees.

Defendant Laba interposed an answer with affirmative defenses. The first affirmative defense asserts that Laba had brought a potential buyer of the Property to Plaintiff and the parties entered into an agreement that if the buyer purchased the Property from Plaintiff, Laba would be released from liability. The second affirmative defense alleges that Plaintiff sold the Property and transferred its rights to the buyer. The third affirmative defense alleges that Plaintiff fails to state a cause of action. The fourth affirmative defense alleges unclean hands and

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<sup>1</sup>Plaintiff discontinued the action as to defendant Vincent Lugonnard-Roche.

the fifth asserts the action is barred by the Statute of Frauds, General Obligation Law 5-701. The sixth affirmative defense alleges that Plaintiff failed to mitigate damages.

Plaintiff now moves for an Order striking Laba's affirmative defenses pursuant to CPLR § 3211(b), awarding summary judgment in favor of Plaintiff on its first cause of action in the amount of \$181,278,89, and awarding summary judgment on its second cause of action as to liability and setting the matter down for a hearing as to damages.

Plaintiff submits the attorney affirmation of James C. Manta and the affidavit of Joanne Lucas, a member of Plaintiff.

As set forth in Lucas' affidavit, Plaintiff is the owner of a building located at 69 Gansevoort Restaurant Inc, that Plaintiff leased the building to 69 Gansevoort Restaurant Inc. pursuant to a written lease dated March 6, 2009, and that contained and incorporated as part of that lease was a guaranty entered by Laba to guaranty 69 Ganzevoort Restaurant's performance under the lease for the payment of rent and/or additional rent. The Lease provides for reasonable attorneys' fees upon default under the Lease and that any such fees to be deemed "additional rent" owed. See paragraphs 19 and 59 of the Lease.

Thereafter, Lucas states that on or about December 2010, Plaintiff, 69 Ganzevoort Restaurant, and Gans Wine Concept LLC entered into a modification and consent agreement whereby the tenant under the March 6, 2000 Lease was changed from 69 Ganzevoort Restaurant to Gans Wine. All other terms and conditions of the Lease and rider remained in full effect unless specifically modified by the Lease Modification and Consent.

Annexed to Lucas' affidavit is a copy of records from New York City Department of Finance showing Plaintiff as the fee owner of the Building, a copy of the March 6, 2009 Lease containing the Guaranty signed by Laba, and the December 2010 Modification and Consent Agreement.

The Guaranty states in relevant part:

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This Guaranty shall be a continuing guaranty, and, except for actual payment and performance by Guarantor or payment or performance by Tenant, in each case to the extent the same would result in commensurate reductions of liability under this Guaranty and the liability of Guarantor hereunder shall in no way be affected, modified or diminished by reason of (a) any assignment, renewal, modification, amendment or extension of the Lease, or (b) any modification or waiver or change in any of the terms, covenants and conditions of the Lease by Owner and Tenant, or (c) any extension of time that may be granted by Owner to Tenant; (d) any consent, release or indulgence under or in respect of the Lease, or (e) any dealings or transactions or matter of thing occurring between Owner and Tenant, or (f) any bankruptcy, insolvency, reorganization, liquidation, arrangement, assignment for the benefit of creditors, receiverships, trusteeship or similar proceeding affecting Tenant, whether or not notice thereof is given to Guarantors.

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No waiver or modification of any provision of this Guaranty or any termination of this Guaranty shall be effective unless in writing, signed by Owner; nor shall any such waiver be applicable except in the specific instance for which given.

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Guarantor agrees that this Guaranty shall inure to the benefit of and may be enforced by Owner, its mortgagees and their respective transferees, successors and assigns. This Guaranty shall not be assigned in whole or in part by any Guarantor.

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Notwithstanding the foregoing it is intended that this Guaranty shall be limited the full performance and observance of all of the terms, covenants and agreements provided to be performed and observed by Tenant in the

Lease including, without limitation the prompt payment of the Minimum Annual Rental and Additional Rent and all other amounts provided in the Lease to be paid by Tenant through the date the Premises shall be surrendered to Owner vacant and broom clean ("the Surrender Date"). Guarantor shall not be liable for any Minimum Annual Rental, Additional Rent or other charges accruing under the Lease from and after the Surrender Date.

Lucas further avers that on or about December 2012, Gans Wine began to fall behind on its rent and additional rent due to Plaintiff.

Thereafter, Plaintiff commenced a summary non-payment proceeding against Gans Wine in the Civil Court of the City of New York, County of New York, under index number 63489/2013, in April 2013. In June 2013, the Court granted Plaintiff's application for the entry of default judgment based on Gans Wine's default and entered an Order granting Plaintiff a judgment for possession and money in the amount of \$181,278.79 through June 2013. A copy of the Order is annexed to Lucas' affidavit. Gans Wine was dispossessed of the premises in August 2013.

Plaintiff commenced this action on or about March 2013 seeking to enter judgment against Defendants as guarantors of Gans Wine for the rent and additional rent owed by Gans Wine.

Laba cross moves for an Order for summary judgment dismissing the Complaint for sanctions pursuant to 20 NYCRR 130-1.1.

Laba submits an affidavit, in which she avers that Lucas, on behalf of Plaintiff, on or about October 15, 2012 orally agreed to release Laba from her liabilities or claims upon Plaintiff's sale of the subject Building to 69 Realty LLC, a buyer that was introduced to Plaintiff by Laba. Laba alleges that on October 22, 2012, Plaintiff entered into a Contract of Sale with 69 Realty LLC, and a closing on the contract occurred on August 20, 2013.

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]).

“On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” (*City of New York v. Clarose Cinema Corp.*, 256 AD2d 69, 71 [1<sup>st</sup> Dept., 1998]).

Here, Plaintiff has made a prima facie showing of entitlement to summary judgment as a matter of law against Laba. Plaintiff has submitted evidence of an absolute and unconditional guaranty entered by Laba with respect to Gans Wine’s obligations under the Lease, the underlying debt, and Laba’s failure to perform under the Guaranty.

In opposition, Laba alleges that she was released of her obligations when she presented a buyer to Plaintiff based on an alleged oral agreement; however, this is contradicted by the terms of the Guaranty, which provides, “No waiver or modification of any provision of this Guaranty or any termination of this Guaranty shall be effective unless in writing, signed by Owner; nor shall any such waiver be applicable except in the specific instance for which given.”

Wherefore it is hereby

ORDERED that Plaintiff’s motion to strike the affirmative defenses and for summary judgment is granted; and it is further

ORDERED that defendant Remi Laba’s cross motion is denied; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff and against Defendant Remi Laba amount of \$181,278.89, together with interest prayed as

allowable by law (at the rate of 9% per annum) until the date of entry of judgment, 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 amount of reasonable attorneys' fees and costs owed is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendant, of the date of the hearing.

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

DATED: FEBRUARY 25, 2014



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EILEEN A. RAKOWER, J.S.C.