

**KH 48 LLC v Muniak**

2014 NY Slip Op 31183(U)

April 24, 2014

Supreme Court, New York County

Docket Number: 15160/13

Judge: Joan A. Madden

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

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KH 48 LLC,

Index No.: 151606/13

Plaintiff,

-against-

SASHA MUNIAK,

Defendant.  
-----X

**JOAN A. MADDEN, J.:**

In this action seeking to recover based on a guaranty of obligations under a commercial lease, plaintiff KH 48 LLC moves for an order (1) striking defendant's affirmative defenses, (2) granting partial summary judgment on its first cause of action in the amount of \$362, 203.84, plus interest, (3) granting it summary judgment on its second cause of action in the amount of \$4,732,527.58, and (4) granting it summary judgment on its third cause of action in the amount of \$72,000. Defendant Sasha Muniak opposes the motion, which is granted only to the extent of striking certain of Muniak's affirmative defenses.

**Background**

KH is the landlord and owner of 16 East 48<sup>th</sup> Street in Manhattan ("the building"). KH, as landlord, and non-party MA Holding Corp., as tenant, (hereafter "the Tenant"), entered into a commercial lease agreement for the building, which consisted of seven floors and a basement. In conjunction with the lease agreement, KH obtained an easement from the adjacent property for a fee. A restaurant, Services Mangia Inc. d/b/a Mangia, an affiliate of the Tenant, occupied the first four floors and the basement. The

Tenant subleased the fifth, sixth and seventh floors to three commercial subtenants. The ten-year term of the lease commenced on May 1, 2008 and ended on 2018.

Under the lease, the Tenant agreed to pay a monthly based rent of \$57,000, subject to rent escalations. Muniak, who is the President of the Tenant, executed a "Good Guy Guaranty" which guaranteed the performance of the tenant under the lease, and payment of the easement fee. When the Tenant fell behind in its rent payments during the Fall of 2010, KH commenced a non-payment proceeding in Civil Court. Subsequently, on December 15, 2011, the parties entered into a Stipulation calling for certain payments to be made to the Landlord. Tenant made all payments to Landlord under the Stipulation. By the summer of 2012, the rent had risen to \$61,657.20 per month which the Tenant could no longer afford.

In his affidavit submitted in opposition, Muniak states that prior to making the final rent payment, he attempted to renegotiate the lease terms with KH's principal, Kim Hakim, and with KH's agent and manager, Ely Samuels, but they could not reach an agreement. Muniak states that on August 16, 2012, he personally delivered the final check to Mr. Samuels in the amount of \$23,794.90. The check was marked "Final Stipulation Payment from Dec 2011." According to Muniak:

After handing the check to Mr. Samuels in his office, I reminded him that he had promised to discuss the situation after we [made] the final payment. He then asked what I had in mind. I told him if he didn't reduce the rent I had no choice but to leave. I told him I want to work out a deal to leave on good terms with no further obligation under the lease or the good guy guaranty. He asked if I was willing to pay two months required rent under the good guy guaranty (\$123,000). I told him I was unable to do so. He thought for a minute and asked me what I was planning to do with all my restaurant equipment. I told him I was planning on removing it and leaving the space vacant. He then said he was expecting me to leave for some time and was in contact with several prospective

tenants, one of which was a restaurant. He said that if I “get out” by September 15<sup>th</sup> and leave the kitchen equipment behind, he would let me out of the good guy guaranty. I said ‘no problem.’ .... I then repeated to the deal to him if (the restaurant vacates the space by September 15 and leaves all of the kitchen equipment behind, I will owe you nothing further. He said “Yes.” I asked him what he wanted to do about the tenants on the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> floors. He said, “Don’t worry, I’ll take care of them.” He did say, however, that he wanted copies of their leases—which were delivered to his offices by messenger the very next day. I shook his hand and left the office.

Muniak Aff. ¶ 6.

Muniak states that he kept his promise and left behind the kitchen equipment, which he states is worth \$144,220. In addition, Muniak states that KH has renovated the restaurant, re-let the space to a new tenant, and is collecting rent from the former subtenants. *Id.*, at 10-12.

KH now moves for summary judgment on its claims against Muniak for the easement fee, unpaid rent accrued and to accrue during the unexpired portion and the lease and for attorneys’ fees. In this connection, KH argues that as the record shows that the Tenant failed to make payments due and owing under the lease and failed to pay the fee under the easement agreement, and Muniak guaranteed these obligations, there are no triable issues of fact.

Muniak counters that the statement in his affidavit raise material issues of fact as to: (i) whether the conduct of the parties, which was inconsistent with the landlord-tenant relationship, amounted to a surrender by operation of law; (ii) whether there was an oral agreement between the parties which was acted upon to completion so as to modify or release the Muniak’s personal guaranty; and (iii) whether the KH induced the Muniak’s reliance on an oral modification of the guarantee (by promising to release him from the guarantee if the Tenant vacated the building and gave KH equipment valued at over \$144,000). Muniak further argues that as there has been no discovery it is premature to grant summary judgment.

In reply, KH asserts that any oral modification of the lease would be unenforceable and that promissory estoppel does not apply in this case since Muniak did not rely on any representations by KH. It also submits a further affidavit from Mr. Samuels who does not specifically rebut Muniak's description of their alleged conversation, and instead asserts that any oral agreement is barred by no oral modification and no waiver clauses in the lease and easement, and that any reliance on his statements by Muniak was unreasonable.

### **Discussion**

It is well settled that summary judgment is proper where there are no issues of fact for trial (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The burden of proof is on movant for a motion for summary judgment who must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made a prima facie showing, the burden shifts to the motion's opposing party to lay bare its evidentiary proof and present a genuine, triable issue of fact (*Id.*).

Here, even assuming *arguendo* that KH has made a prima facie showing entitling it to summary judgment, Muniak has controverted this showing by raising triable issues of fact, including whether a surrender by operation of law can be "inferred from the conduct of the parties," which is "a determination to be made on the facts" (*Riverside Research Institute v. KMGMA, Inc.*, 68 NY2d 689, 692 [1986]; *see also Deer Hills Hardware, Inc. v. Conklin Realty Corp.*, 292 A.D.2d 565 [2d Dept 2002][surrender occurred by operation of law where the tenant abandoned the premises during the lease term and the landlord's conduct indicated an intent to terminate the lease and use the property for his own benefit]). In particular, evidence that the Tenant left valuable kitchen equipment at the restaurant and that KH re-let the restaurant for its

benefit, and took over the sub-leases of the Tenant's subtenants raise factual issues as to surrender and are sufficient to warrant further discovery as to the issue. In addition, while the lease and easement contain provisions precluding oral modifications, at the very least, there are issues of fact as to whether the provision was waived by KH and/or whether the doctrine of equitable estoppel applies based on Muniak's asserted reliance on the alleged oral agreement (*Rose v. Spa Realty Associates*, 42 NY2d 338, 397 (1977)). Under these circumstances, and as no discovery has been conducted, summary judgment must be denied.

As for KH's motion to strike Muniak's affirmative defenses, it is noted that pursuant to CPLR 3211 (b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." In a pleading, statements, including those supporting an affirmative defense, must be "sufficiently particular to give the court and parties notice of the transactions, occurrences of series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense" (CPLR 3013). An affirmative defense which fails to set forth no factual basis supporting it, must be dismissed (*Robbins v. Growney*, 229 AD2d 356, 358 [1<sup>st</sup> Dept 1996]).

Here, Muniak pleads the following affirmative defenses in a wholly conclusory fashion, and fails to include any supporting facts: first (failure to state a cause of action); second (KH has received payment or other valuable consideration in satisfaction of an alleged debt); third (the alleged guaranty has been discharged by virtue of acts or deeds of KH); fourth (the alleged debt is not evidenced by any writing which was duly subscribed by defendant); fifth (KH's claims are barred by the doctrine of waiver); sixth (KH's claims are barred by the doctrine of estoppel); seventh (KH's claims are barred by the doctrine of release); eighth (KH's claims are barred by the doctrine of fraud and/or unclean hands); and tenth (KH has failed to mitigate its damages).

None of these affirmative defenses, as pleaded, is sufficiently specific to put the KH on notice as to what the defenses actually are. Thus, these affirmative defenses must be stricken (*see Commissioners of State Ins. Fund v. Ramos*, 63 Ad3D 453 [1<sup>st</sup> Dept 2009][affirmative defense was properly stricken where pleading contained bare legal conclusions without supporting facts]; *Robbins v Grownney*, 229 AD2d at 358 [trial court should have dismissed affirmative defense set forth with "no factual basis"]; *Anthoine v Wolff*, 2010 WL 835457, 2010 NY Misc LEXIS 2425 [Sup Ct, NY County 2010] [dismissing defendants' defense pled "in a conclusory fashion"]).

In contrast, the ninth affirmative defense, which states that KH's "claims are barred due to a surrender in fact and/or a surrender by operation of law of the subject premises resulting in a termination of the landlord/tenant relationship and the lease on or about September 6, 2012," is adequately pleaded.

Conclusion

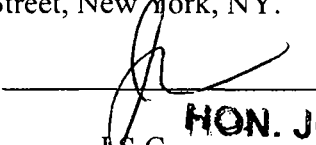
In view of the above, it is

ORDERED that KH's motion for summary judgment is denied; and it is further

ORDERED that KH's motion to strike Muniak's affirmative defenses is granted to the extent of striking his first, second, third, fourth, fifth, sixth, seventh, eighth and tenth affirmative defenses without prejudice to Muniak moving for leave to replead such affirmative defense within 60 days of this decision and order.

ORDERED that the parties shall appear on May 22, 2014, at 9:30 am for a compliance conference in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: April 24, 2014

  
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 J.S.C. HON. JOAN A. MADDEN  
 J.S.C.