Windsor Plaza LLC v Optimum Interactive (USA) Ltd.
2014 NY Slip Op 31949(U)
July 22, 2014
Sup Ct, New York County
Docket Number: 152215/12
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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WINDSOR PLAZA LLC,

Plaintiff,

-against-

OPTIMUM INTERACTIVE (USA) LTD. and ANTHONY G. ROTH, as guarantor

Defendants.

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Index No.: 152215/12

Motion Seq. No. 005

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for breach of contract, plaintiff Windsor Plaza LLC ("plaintiff") moves pursuant to CPLR 3212 for summary judgment as to liability against defendant *pro se* Anthony G. Roth ("Roth").

Factual Background

Plaintiff alleges that on or about April 8, 2010, it and defendant Optimum Interactive (USA) Ltd. ("Optimum") entered into a lease agreement (the "Lease") for the premises located at 952 Fifth Avenue, 7D, in Manhattan (the "Premises"). The Lease's term was from May 1, 2010 to April 30, 2011; the monthly rent was $5,400. After the Lease expired, Optimum continued to pay, and plaintiff accepted, monthly rent.

Also on April 14, 2010, a guaranty agreement (the "Guaranty") was purportedly executed by Roth, the then-CEO of Optimum. The signature on the Guaranty was acknowledged by Lisa Tully ("Tully"), a notary public. The Guaranty provides that Roth agreed to unconditionally guarantee all of Optimum's obligations, including the payment of rent, additional rent, and attorneys' fees due under the Lease.

During its tenancy, Optimum fell behind in its payment of rent and additional rent. Pursuant to the Lease, Optimum allegedly owes plaintiff $52,687; likewise, pursuant to the Guaranty, Roth allegedly owes plaintiff the same.[1] Additionally, plaintiff alleges that Roth owes plaintiff costs, disbursements, and reasonable attorneys' fees associated with the prosecution of the action based on the Guaranty's terms.

In the instant motion, plaintiff moves for summary judgment against Roth; dismissal of Roth's answer (including all affirmative defenses); an order awarding plaintiff a monetary judgment of $52,687 pursuant to its fourth cause of action; and costs, disbursements, and attorneys' fees pursuant to its third cause of action.

Arguments

Plaintiff contends that it is undisputed that Optimum breached the Lease. As to Roth, plaintiff argues that Roth's sole defense in his answer (that he did not sign the Guaranty) fails as it is conclusory, self-serving, and contradicted by the documentary evidence and Roth's own deposition testimony.

Roth testified that in connection with the Lease and Guaranty, he authorized (by letter on Optimum's letterhead) plaintiff to conduct a credit search on him for purposes of determining whether he had the necessary credit to guarantee the Lease when he was Optimum's CEO. Also, in the letter authorizing the credit check, Roth specifically requested that plaintiff "find this letter to further acknowledge [Roth] as the Guarantor for [the Lease]."[2]

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[1] This figure is based on a tenant profile provided by plaintiff, which indicates that Optimum allegedly owes rent and related fees from April 2011 through April 2012.

[2] Harvey Clarke, a member of plaintiff, submits an affidavit in support of such claims.

In furtherance of the credit check, Roth admitted that he had submitted the guarantor rental application pursuant to his agreement to guarantee the Lease on behalf of Optimum. He also admitted that he completed a portion of the rental application and signed the document. More important, Roth testified that he recognized the facsimile stamp at the top of the rental application and admitted that he more than likely sent the application to plaintiff from an establishment he frequents when he is in Massachusetts.

And, although at his deposition, Roth maintained that the signature on the Guaranty was not his own, case law holds that a conclusory allegation of forgery is insufficient. Further, he testified that he agreed to guarantee the Lease for "the first year" of the lease.

Additionally, when a notary public's acknowledgment is attached to a signature, the signature is presumed to have a higher level of authenticity than a signature that is not notarized. Roth failed to rebut the presumption of authenticity with any clear and convincing evidence. In any event, because Roth admitted at his deposition that he agreed to guarantee the Lease for the first year, at the very least, he consented to having his signature affixed to the Guaranty.

Also, even assuming that Roth only agreed to guarantee the Lease for one year, this fails to establish a defense to the action. After the Lease expired after one year on April 30, 2011, Optimum continued to pay the monthly rent pursuant to the Lease. Such rent was accepted by plaintiff, which created a month-to-month tenancy. And, case law provides that such a tenancy continues on the same terms as the prior lease. As such, even assuming Roth did not sign the Guaranty, but nonetheless agreed to guarantee the Lease, Roth would remain liable because Optimum's monthly tenancy continued on the same terms and conditions as the Lease, under which Roth would remain liable as the guarantor.

Also, plaintiff is entitled to its reasonable attorneys' fees incurred in prosecuting the action. The Lease provides that if it is cancelled, or plaintiff takes back the Premises, any rent received by plaintiff for re-renting shall be used to pay plaintiff's expenses, which include reasonable attorneys' fees. Moreover, the Guaranty provides that Roth agreed not only to perform all of Optimum's requirements under the Lease in the event of default, but also to pay plaintiff's expenses in enforcing the Guaranty, including attorneys' fees. Such clauses are enforceable pursuant to controlling case law.

As to the purported fees incurred, plaintiff's counsel avers that it billed $31,460.31, exclusive of the costs to finalize the instant motion, review of opposition, and drafting of reply papers. Alternatively, should the court not grant the requested sum, plaintiff demands a hearing to determine the reasonable attorneys' fees incurred in the action.

In opposition, Roth (proceeding *pro se*) contends that, although at one point he was willing to consider a guaranty on behalf of Optimum for a one-year lease, he never signed or authorized his signature to execute any guaranty with plaintiff. He also did not sign the Lease. In fact, Roth was not made aware of the purported Guaranty until this action was filed. On this note, he resigned his post as an interim officer of Optimum during the first year of the Lease. Moreover, Roth never occupied the premises or stayed there for any extended period of time during the approximate 18 months that Optimum paid rent to plaintiff.

Clarke's affidavit should be disregarded, as there was no material interaction between him and Roth, and Clarke did not witness a purported Guaranty execution; thus, his claimed knowledge of same is insufficient to support the motion.

Roth's permission to submit a credit application and intent to help Optimum by

considering a guaranty do not constitute an executed guaranty. And, he never would have agreed to the terms of the Guaranty, as they were too onerous.

In sum, no valid guaranty exists. Roth informed plaintiff of his dire financial condition repeatedly throughout this action, and offered a credit check authorization and affidavit of his financial status in support. On multiple occasions, Roth informed plaintiff's counsel that Optimum was represented by a receiver in Illinois. The receiver's counsel's information was provided with plaintiff, as well as information regarding the fact that the receiver was making collections and settlements on behalf of Optimum. To Roth's knowledge, plaintiff has not made an attempt to collect any monies owed from Optimum.

Lastly, Roth requests $500 in costs, in addition to denial of the motion.

In reply, plaintiff reiterates that it is undisputed that Optimum breached the Lease. As to Roth, plaintiff argues that his opposition should be deemed a nullity, as it was not sworn or affirmed before a notary public; thus, it cannot be used to raise a triable issue of fact in opposition. Furthermore, Roth fails to submit any other documentary evidence in admissible form to create an issue of fact.

Even assuming that Roth's papers contain a sworn statement, they would still be insufficient to defeat the motion. Roth's claims that he "entertained an intent to help" Optimum but never "authorized his signature at any time" for the Guaranty are contradicted by his sworn deposition testimony. When questioned about the Guaranty, Roth testified that he allowed Optimum to use him as a guarantor for the first year of the Lease. Later in the deposition, Roth admitted that he was well aware that he had guaranteed the Lease for Optimum. Thus, Roth cannot now backtrack on his own testimony to avoid summary judgment.

Moreover, even if Roth made such denials during his deposition, his opposition would still be insufficient to defeat the motion, as it is well-settled that a bald assertion of forgery cannot create an issue of fact contesting the authenticity of a signature.

The other defenses proffered by Roth (of his poor financial condition and plaintiff's failure to collect monies owed from Optimum) are not legally cognizable defenses to plaintiff's claim for unpaid rent, additional rent, and attorneys' fees against Roth as guarantor. More important, Roth does not dispute the amount of rent, additional rent, and attorneys' fees claimed.

In sum, Roth, an interested party, failed to submit a sworn affidavit, rebut the presumption established by the notary public's acknowledgment, submit the affidavit of a handwriting expert or non-interested witness, and submit any documentation which evidences Roth's handwriting or signature.

Discussion

As to motions for summary judgment, it is well established that the "proponent of a summary judgment motion 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" (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). However, the moving party must demonstrate entitlement to judgment as a matter of law (*see Zuckerman, supra*), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (see *Johnson v. CAC Business Ventures, Inc.*, 52 A.D.3d 327, 859 N.Y.S.2d 646 [1st Dept 2008]; *Murray v. City of New York*, 74 A.D.3d 550, 903

N.Y.S.2d 34 [1st Dept 2010]).

On a motion for summary judgment to enforce a written guaranty, the creditor must prove the existence of an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (*see City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69, 71 [1st Dept 1998]). Here, paragraph 1 of the Guaranty provides that the "Guarantor guarantees, unconditionally and absolutely, the full and faithful performance and observance of all the covenants, terms, and conditions of the Lease provided to be performed and observed by [Optimum], including the payment of rent, when due, under the Lease." Moreover, it is undisputed that Optimum has failed to make payments under the Lease, and Roth has likewise not made such payments on behalf of Optimum. However, at issue is whether the Guaranty was executed by Roth.

At the outset, the presumption of due execution does not apply to the Guaranty.

Case law holds that a certificate of acknowledgment attached to a signature creates a *prima facie* presumption of due execution (*see* CPLR 4538; *Beshara v. Beshara*, 51 A.D.3d 837, 858 N.Y.S.2d 351 [2d Dept 2008]; *Paciello v. Graffeo*, 32 A.D.3d 461, 819 N.Y.S.2d 480 [2d Dept 2006]; *Son Fong Lum v. Antonelli*, 102 A.D.2d 258, 476 N.Y.S.2d 921 [2d Dept 1984], *aff'd* 64 N.Y.2d 1158 [1958]). Such a certificate "should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty" (*Albany Cty. Sav. Bank v. McCarty*, 149 N.Y. 71, 80 [1896]).

At the outset, the Tully's notary stamp indicates that her commission expired on February 27, 2010, nearly two months before the Guaranty was executed and notarized. Thus, the

purported notarization is facially invalid (*see 1180 President Funding, LLC v. 2201 7th Ave. Realty LLC*, 2013 WL 6832930 [Sup Ct New York Cty 2013]),

Further, Tully, is purportedly licensed in California. In this regard, and as pertaining to certificate of acknowledgments to which presumptions of due execution apply, Cal. Civ. Code 1189 provides that:

> (a)(1) Any certificate of acknowledgment taken within this state shall be in the following form:
>
> State of California)
> County of _____)
> On_____
> _____
> before me, (here insert name and title of the officer), personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.
>
> I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.
>
> WITNESS my hand and official seal.
>
> Signature _____(Seal)

No such language appears on the Guaranty or on any document related thereto.

Further, New York requires the acknowledgment to contain a statement to the following effect: "On the [insert date] before me, the undersigned, personally appeared [insert name of signer], personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their

signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument" (*see Galetta v. Galetta*, 21 N.Y.3d 186 [2013]).

New York courts have long held that an acknowledgment that fails to include a certification to this effect is defective (*see Fryer v Rockefeller*, 63 N.Y. 268 [1875] [applying predecessor to Real Property Law § 303, held that acknowledgment of deed that did not establish signer's identity and relationship to document was invalid]; *Gross v Rowley*, 147 A.D. 529 [2d Dept 1911], *appeal denied* 148 A.D. 922 [1912] [acknowledgment deficient because it failed to certify that signer was person described in the instrument]; *see generally People ex rel. Sayville Co. v Kempner*, 49 A.D. 121 [1st Dept 1900] [same]).

Therefore, plaintiff may not avail itself of the presumption.

Notwithstanding, Roth testified at his deposition that he was "aware" he was a guarantor of the Lease for only its first year and "allowed" same, but did not execute the Guaranty. At his deposition, Roth was shown various exhibits and confirmed that they contained his handwriting and signature. Such exhibits included two affidavits in support of his motion to vacate a default judgment previously obtained against him -- copies of which were submitted by plaintiff in support of the instant motion. Also, at his deposition, Roth attempted to explain how his signatures on the exhibits differed from the signature on the Guaranty. As to the signature on the Guaranty, Roth testified that it looked like that of his brother, as the signature (though not Roth's) looked "familiar" to him.

Thus, contrary to plaintiff's contentions, Roth's denial at his deposition contains factual assertions that constitute more than a "bald assertion of forgery" (*see Banco Popular North America v. Victory Taxi Mgmt, Inc.*, 1 N.Y.3d 381 [2004]) and therefore creates an issue of fact

regarding the signature on the Guaranty (*Cicale v. Wachovia Bank N.A.*, 56 A.D.3d 392, 869 N.Y.S.2d 24 [1st Dept 2008] (summary judgment denied when party submitted documents containing her signature for purposes of comparing it with her alleged signature on the documents at issue); *see also 627 Acquisition Co., LLC v. 627 Greenwich, LLC*, 86 A.D.3d 645, 927 N.Y.S.2d 23 [1st Dept 2011]; *Alvidrez v. Roberto Coin, Inc.*, 6 Misc. 3d 742, 791 N.Y.S.2d 344 [Sup Ct New York Cty 2005]).

Moreover, plaintiff did not submit an expert opinion to establish that the signature on the Guaranty matched the signatures confirmed by Roth to be his (*see Alvidrez*, *supra*). And, an expert's opinion is not required to establish a triable issue of fact regarding a forgery allegation (*see Banco Popular*, *supra*); thus, Roth was under no obligation to produce such evidence in opposition to the motion.

Additionally, an oral agreement to answer for the debt or default of another is barred by the Statute of Frauds (*see* Gen. Oblig. Law § 5-701(a)(2); *Lou Atkin Castings, Inc. v. M. Fabrikant & Sons, Inc.*, 216 A.D.2d 111, 628 N.Y.S.2d 98 [1st Dept 1995]). Even assuming Roth agreed to guarantee the Lease for one year, plaintiff provides no relevant documentation related to this alleged agreement.[3] Thus, assuming the agreement was oral, it cannot be the basis for granting the motion. And, plaintiff's claim that "at the very least, Roth consented to having [his] signature affixed to the Guaranty" is unsupported by any evidence or legal authority.

Therefore, plaintiff has failed to establish its *prima facie* entitlement to summary judgment, as its own submissions raise an issue of fact as to the authenticity of the signature on

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[3] Plaintiff's submission of Optimum's lease application, and Roth's letter of authorization dated April 1, 2010 (in which he authorizes a credit search and acknowledges himself as "Guarantor for such lease application" do not go to support plaintiff's motion, as the lease application pertains to Apartment 8D -- as noted in the factual background, *infra*, Optimum rented Apartment 7D.

the Guaranty. Thus, the court need not reach the issue of whether it should consider Roth's opposition.

As such, plaintiff's request for attorneys' fees is also denied. Also, the court declines to grant Roth's request for costs, as such claim was made in opposition to plaintiff's motion, and cannot be the basis for affirmative relief (*see Helfand v. Massachusetts Bonding & Insurance Co.*, 197 A.D.759, 189 N.Y.S. 246 [1st Dept 1921]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant's request for $500 in costs is denied; and it is further

ORDERED that Roth shall serve on plaintiff a copy of this decision and order with notice of entry within 30 days of entry.

This constitutes the decision and order of the Court.

Dated: July 22, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD