

**24 Fifth Owners, Inc. v Glazier**

2015 NY Slip Op 30078(U)

January 16, 2015

Supreme Court, New York County

Docket Number: 650686/2013

Judge: Saliann Scarpulla

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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 39**

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24 FIFTH OWNERS, INC.,

Plaintiff,

**DECISION and ORDER**

- against -

Index No. 650686/2013  
Motion Seq. No. 002

PETER GLAZIER,

Defendant.

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**SALIANN SCARPULLA, J.:**

In this action on a guaranty, plaintiff 24 Fifth Owners, Inc. moves for: (a) summary judgment on its complaint against defendant Peter Glazier; and (b) for a hearing to determine the amount of attorney’s fees, costs, and disbursements to be awarded plaintiff.

Plaintiff is the owner and landlord of the building located at 24 Fifth Avenue, New York, New York. Plaintiff leased a portion of the ground floor and basement space of the building to Fifth Avenue Ballroom, LLC d/b/a Fifth Avenue Ballroom (“the Tenant”) pursuant to a commercial lease (“the lease”). Glazier is the Tenant’s manager.

The lease commenced on January 1, 2002. Under the initial lease, the Tenant agreed to pay a fixed monthly rent of \$29,167.00 from January 1, 2007 through December 31, 2011; and \$33,334.00 from January 1, 2012 through December 31, 2016. The lease further provided for Tenant to pay additional rent consisting of any other amounts that Tenant agreed to pay, including the cost of water and sewage service. In February 2009,

Plaintiff and Tenant entered into a First Amendment of Lease, whereby Tenant agreed to pay a fixed monthly rent of \$25,667.00 for the period from January 1, 2009 to December 31, 2009.

Glazier executed a guaranty dated December 13, 2001 under which he agreed to guarantee “all of the obligations and covenants of Tenant of fifty (50%) percent (‘the Guaranteed Amount’) of the Annual Rent and Additional Rent (as defined in the Lease) until the date on which Tenant shall surrender possession of the Demised Premises to Owner . . .” Glazier further acknowledged that the guaranty “is an absolute and unconditional guarantee of payment and performance, and not of collection in respect to Tenant’s obligation to Owner for Annual Rent and Additional Rent until the date on which Tenant surrenders possession. . .”

Article Third of the Guaranty states that “[n]otwithstanding anything to the contrary contained herein, Guarantor [Glazier] shall have the option to terminate this Guaranty and it shall be considered null and void, if, upon ten (10) days prior written notice to Owner, and within ten (10) days thereof, delivering to Owner the sum of Fifty Thousand Dollars (\$50,000) . . . to be held by Owner as additional security pursuant to Article 68 of the Lease.”

Plaintiff alleges that Tenant defaulted on the lease by failing to pay the fixed monthly rent and additional rent for the period, January 1, 2009 to March 31, 2010.

Plaintiff thereafter commenced a nonpayment proceeding against Tenant in New York City Civil Court, New York County, which was later settled.

Under the settlement agreement, the Tenant acknowledged that it owed \$208,184.21 for rent and additional rent for the period, January 1, 2009 to June 30, 2010. Plaintiff agreed to defer a portion of the fixed rent in the amount of \$6,000 per month between July 1, 2010 and June 30, 2011, during which the Tenant was then be obligated to pay a reduced rent of \$23,167.00 per month, plus additional rent. The Tenant agreed to repay the deferred balance in twenty-four monthly installments of \$3,000 beginning on July 1, 2011.

According to the complaint, the Tenant failed to comply with the lease and the settlement agreement. In September 2012, Plaintiff served a default notice upon the Tenant that demanded payment of \$224,692.19, which represented fixed rent, additional rent, and attorney's fees for the period, May 1, 2012 to September 30, 2012, and \$12,000 in deferred installment payments due for June through September 2012.

On November 13, 2012, Glazier sent a letter advising Plaintiff that the Tenant had vacated and surrendered possession of the premises.

Plaintiff thereafter restored the nonpayment proceeding as a result of the Tenant's breach of the lease and settlement agreement. On January 15, 2013, Judge Nervo so-ordered the stipulation of settlement between Plaintiff and Tenant, and thereby granted a final judgment of possession of the premises to Plaintiff. On February 22, 2013, Judge

Samuels granted Plaintiff's motion for a money judgment against the Tenant on default, in the amount of \$477,009.07 representing rent and additional rent due under the Lease through January 31, 2013, plus attorney's fees of \$8,739.50.

Shortly before this action was commenced, Glazier sent a letter to Plaintiff dated February 20, 2013. In the letter, Glazier advised Plaintiff that he was exercising his option to terminate the guaranty pursuant to the termination provision. Glazier enclosed a \$50,000 bank check, which he identified as "additional security pursuant to Article 68 of the Lease."

In its motion for summary judgment, Plaintiff argues that Glazier is obligated under the guaranty to pay one half of the fixed rent and additional rent prior to the tenant's surrender of the premises. Plaintiff alleges that Glazier owes a total of \$188,136.36, which represents fifty percent of the total arrears of \$376,272.72.

Plaintiff argues that Glazier's attempt to invoke the termination provision of the guaranty is invalid because the guaranty may not be terminated after the Tenant vacates the premises. Lastly, Plaintiff seeks a hearing to determine the amount of attorney's fees, costs, and disbursements that it is entitled to under the guaranty.

In opposition, Glazier argues that summary judgment should be denied because material issues of fact exist as to the meaning of the guaranty's termination provision. Glazier argues that he may terminate the guaranty even after the Tenant vacated the premises, and regardless of whether outstanding amounts remain due under the lease.

## Discussion

Where “a creditor seeks summary judgment upon a written guaranty, the creditor need prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guarantee.” *Kensington House Co. v. Oram*, 293 A.D.2d 304, 305 (1st Dep’t 2002). “To sustain its burden on damages, plaintiff must come forward with supporting documentary evidence or an explanation as to how the total amount of the debt was calculated; conclusory allegations as to the amount due are insufficient.” *Sterling Nat. Bank v. Biaggi*, 2006 WL 7068783 (N.Y. Sup. 2006); *City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69, 71 (1st Dep’t 1998).

Plaintiff demonstrates that Glazier executed an absolute and unconditional guaranty under which he agreed to guarantee 50% of the annual rent and additional rent due under the lease. Although Plaintiff submits evidence that Glazier failed to make any payment under the guaranty, Plaintiff fails to adequately support its claim that \$188,136.35 is the amount due. The affidavit of Joanne Soto, Plaintiff’s assistant secretary, merely asserts that \$188,136.35 is due based on total arrears of \$376,272.72. Her affidavit does not include a detailed calculation of the debt, and the exhibit she references shows that the total arrears improperly included legal fees. Accordingly, I grant Plaintiff’s motion for summary judgment on its breach of guaranty claim as to liability only.

Glazier's argument that he properly terminated the guaranty is without merit. The termination provision granted Glazier the option to terminate the guaranty upon written notice and by delivering \$50,000 "to be held by Owner as additional security pursuant to Article 68 of the Lease." Glazier contends that he could terminate the guaranty at any time, and that his \$50,000 payment could then be applied to Tenant's outstanding arrears. However, it is clear that the termination provision could only be exercised while the Tenant was still in possession of the premises.<sup>1</sup> If the guaranty could be terminated after the Tenant surrendered possession, Glazier's contractual obligation to deliver a \$50,000 payment "as additional security pursuant to Article 68 of the Lease" upon termination would be rendered meaningless.

Plaintiff further moves for attorney's fees. A prevailing party may only collect attorney's fees if "an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491 (1989); *Atlantic Dev. Group, LLC v. 296 East 149th Street, LLC*, 70 A.D.3d 528, 529 (1st Dep't 2010).

Pursuant to the guaranty, Glazier expressly covenanted to "reimburse Owner for the reasonable costs and expenses paid by Owner to enforce its rights under this Guaranty . . . ." Plaintiff is therefore entitled to reasonable attorney's fees, costs, and disbursements that it incurred in enforcing its rights under the guaranty. *Kensington House Co.*, 293 A.D.2d at

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<sup>1</sup> The Court further notes that Justice Barbara Kapnick similarly interpreted the termination provision upon denying Glazier's motion to dismiss the complaint.

305. I therefore direct a hearing to determine the amount of reasonable attorney's fees to be awarded to Plaintiff.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff 24 Fifth Owners, Inc.'s motion for summary judgment on its complaint against defendant Peter Glazier pursuant to CPLR § 3212 is granted on the issue of liability only; and it is further

ORDERED that a hearing shall be conducted before a Special Referee on the issue of damages and attorney's fees. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

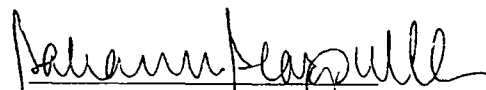
ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report, a final judgment shall be entered in accordance with the results of the Special Referee's report and this decision.

This constitutes the decision and order of this Court.

Date: New York, New York  
January 16, 2015

ENTER:

  
Saliann Scarpulla, J.S.C.