

**Arthur at the Westchester, Inc. v Westchester Mall,  
LLC**

2015 NY Slip Op 32112(U)

April 29, 2015

Supreme Court, New York County

Docket Number: 600293/2010

Judge: Geoffrey D. Wright

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This opinion is uncorrected and not selected for official publication.

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5/14/15  
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Geoffrey Wright  
Justice

PART 47

Index Number : 600293/2010  
ARTHUR AT THE WESTCHESTER, INC

INDEX NO. \_\_\_\_\_

vs  
WESTCHESTER MALL, LLC

MOTION DATE \_\_\_\_\_

Sequence Number : 007

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

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 decision and order.*

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

RECEIVED  
MAY 04 2015  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

FILED  
MAY 04 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

*G*  
GEOFFREY D. WRIGHT  
AJSC

Dated: 4/29/15

\_\_\_\_\_, 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

-----x

ARTHUR AT THE WESTCHESTER, INC. d/b/a  
ARTHUR and EVGENY FREIDMAN,

Plaintiffs,

Index # 600293/10

-against-

DECISION

WESTCHESTER MALL, LLC,

Defendant.

Present:

Hon. Geoffrey D. Wright

-----x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR § 2219 (A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_ 1 _
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____
Replying Affidavits.....	_ 3, 4 _
Exhibits.....	_____
Memoranda.....	_____
Cross-Motion .....	_ 2 _

**FILED**  
MAY 04 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

This case is a landlord/tenant dispute between Plaintiffs Arthur At the Westchester, Inc., the tenant, (hereinafter, "Arthur") and Evgeny Friedman (collectively, "Plaintiffs"), and Defendant Westchester Mall, LLC, the landlord, (hereinafter, "Defendant"). Plaintiffs and Defendant executed a ten year commercial lease dated November 4, 2008 for the rental of certain commercial store space located at the Westchester Mall in White Plains, New York. Plaintiff Evgeny Friedman, Arthur's President, executed a guaranty dated October 8, 2008. The lease by its terms began on October 1, 2008. Pursuant to the lease, Arthur was required to pay a sum certain as rent plus ancillary charges each month in advance on the first day of the month. Under the lease, minimum annual rent is designated as being due subject to applicable increases during each year of the lease term. Additional charges were also required to be paid

monthly, including operating costs, taxes, trash removal, media funding and promotion, water and utilities. Plaintiff Arthur defaulted on the lease due to failure to pay rent and other monthly charges on July 1, 2009 and continuing thereafter. Defendant took steps to evict Plaintiff Arthur from its premises. Initially the parties litigated their case in the White Plains City Court which ultimately resulted in the dismissal of three non-payment proceedings commenced by Defendant against Plaintiffs. Plaintiffs voluntarily surrendered the premises to Defendant following these proceedings.

On or about February 4, 2010, Plaintiffs commenced this action by filing a Verified Complaint against Defendant in Supreme Court, New York County, alleging, among other things, wrongful eviction and defamation. Defendant filed an Answer, Affirmative Defenses, and Counterclaims resulting from Plaintiff Arthur's breach of the lease. The Defendant's counterclaims against Plaintiffs were for back rent and attorney's fees, and for future rents due and owing.

On or about April 11, 2011, Plaintiffs filed a motion to dismiss and for partial summary judgment seeking, amongst other relief, the dismissal of Defendant's counterclaims. Defendant cross-moved for summary judgment. In a decision entered February 21, 2012, the Hon. S. Scarpulla denied the Defendant's cross-motion for summary judgment without prejudice to be resubmitted at the close of discovery and also denied the Plaintiffs' motion to dismiss as it pertained to Defendant's counterclaims against Plaintiff Freidman.

Plaintiffs bring the instant motion for summary judgment on Defendant's counterclaims. Defendant has cross-moved for summary judgment on its counterclaims.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law demonstrating the absence of material issues of fact. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. Zuckerman v. City of New York, 49 NY.2d 557 (1980). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. Winegrad v. City of New York Univ. Med. Ctr., 64 NY2d 851 (1985).

## **1. Plaintiffs' Summary Judgment Motion**

Plaintiffs move for summary judgment on Defendant's counterclaims by asserting that the guaranty Plaintiff entered into is invalid and unenforceable. In their motion papers Plaintiffs state that Plaintiff Freidman is not liable to Defendant as guarantor because the guaranty and the subsequent lease were intended to be two separate transactions and accordingly the guaranty is a nullity because it lacks consideration. Plaintiffs also argue that the guaranty possesses terms that contradict the lease which should be viewed as evidence that the guaranty was part of a separate transaction. The Hon. S. Scarpulla previously ruled that Plaintiff Freidman's lease guaranty was supported

by valid consideration because the guaranty was issued to induce the Defendant to enter into the lease with Plaintiff Arthur. In her ruling, Judge Scarpulla stated that Plaintiff Freidman's guaranty and the subsequent lease between Defendant and Arthur were part of the same transaction. Plaintiff appealed to the First Department, which unanimously affirmed Judge Scarpulla: "The guaranty, which recited that it was made to induce the execution of a lease, was supported by consideration notwithstanding that it was signed before the lease." Arthur At The Westchester, Inc. v. Westchester Mall, LLC, 104 A.D.3d 471, 471 (1<sup>st</sup> Dep't 2013). The law of the case prevents this Court from deciding this motion in a manner contrary to Judge Scarpulla's ruling. As it stands, the lease guaranty, signed by Plaintiff Freidman, is valid and enforceable. Accordingly, Plaintiffs' motion for summary judgment on Defendant's counterclaims is denied.

## **2. Defendant's Motion For Summary Judgment**

Defendant cross-moves for summary judgment on its counterclaims on the grounds that Plaintiff Friedman unconditionally guaranteed the lease agreement between Defendant and Arthur, and that Arthur breached the lease when it ceased paying rent in July 2009. Plaintiffs do not offer sufficient evidence to refute Defendant's counterclaims for the amount owed. Defendant has submitted lease summaries and a Net Present Value calculation which illustrate the amounts that Plaintiffs owe. Plaintiffs have offered no documentary evidence that it paid the rent that Defendant claims it is owed. Defendant states that on the date Plaintiff Arthur vacated the premises it owed Defendant \$146,359.24. Additionally, Defendant's Net Present Value Analysis shows that in accordance with section 18.2 of the lease, Plaintiff Arthur, the tenant, owes \$560,179.80. Defendant may recover these amounts. Pursuant to the guaranty, Plaintiff Freidman has agreed to unconditionally reimburse Defendant for all outstanding rents and other charges under the lease from the period covering July 1, 2009 to June 30, 2011 in the amount of \$335,100.51 plus attorney's fees and costs. As stated above, the guaranty is valid and enforceable, therefore Plaintiff may recover the amount stated under the guaranty. An examination of the lease reveals that the portion of the lease granting attorney's fees to the Defendant, the landlord, was stricken. Therefore, Defendant may only recover attorney's fees for its attorney's efforts to recover under the guaranty. With there being no issue as to a material fact in this case, Defendant's motion for summary judgment on the first and second causes of action of Defendant's counterclaims is granted.

Accordingly, it is hereby

ORDERED, that the motion for summary judgment by Plaintiffs Arthur At The Westchester, Inc. and Evgeny Freidman is denied; and it is further

ORDERED, that the motion for summary judgment by Defendant Westchester Mall, Inc. is granted; and it is further

ORDERED, that the clerk is directed to enter a money judgment in favor of Defendant Westchester Mall, Inc. in the amount of \$706,539.04 against Plaintiff Arthur At The Westchester, Inc. and \$335,100.51, plus attorney's fees against Plaintiff Evgeny Freidman.

  
**GEOFFREY D. WRIGHT**  
**AJSC**

Dated: April 29, 2015

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JUDGE GEOFFREY D. WRIGHT  
Acting Justice of the Supreme Court

**FILED**  
MAY 04 2015  
NEW YORK  
COUNTY CLERKS OFFICE