

**Dweck v Copen Sport Inc.**

2016 NY Slip Op 30629(U)

April 12, 2016

Supreme Court, New York County

Docket Number: 152013/14

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
ISAAC RALPH DWECK,

Plaintiff,

Index No. 152013/14

-against-

**DECISION/ORDER**

COPEN SPORT INC., BARRY EMANUEL and  
CARIN TRUNDLE,

Defendants.  
-----X

**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for

\_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Motion and Affidavits Annexed.....	<u>2</u>
Replying Affidavits.....	<u>3,4</u>
Exhibits.....	<u>5</u>

Plaintiff Isaac Ralph Dweck commenced the instant action against defendants Copen Sport Inc. (“Copen Sport”), Barry Emanuel (“Emanuel”) and Carin Trundle (“Trundle”) seeking to recover on his claims for unpaid rent under a lease and guaranty and for attorney’s fees. Plaintiff now moves for an Order pursuant to CPLR § 3211(b) dismissing defendant Trundle’s third, fourth, thirteenth and fifteenth affirmative defenses. Defendant Trundle cross-moves for an Order pursuant to CPLR § 3212 granting her summary judgment dismissing the third, fifth and seventh causes of action asserted in the Amended Verified Complaint. For the reasons set forth below, Trundle’s cross-motion is granted and plaintiff’s motion is denied.

The relevant facts are as follows. On or about December 30, 1997, plaintiff’s predecessor, Dweck 37<sup>th</sup> Street Associates, as landlord (“Landlord”), entered into a ten-year lease for the 10<sup>th</sup> floor of the building located at 1 West 37<sup>th</sup> Street, New York, New York (the “premises”) with

defendant Copen Sport, Inc., as tenant ("Tenant") (the "Lease"). The Lease provided for annual base rent starting at \$73,750 in year one, increasing annually to \$111,136.56 in year ten. On or about December 24, 1997, Trundle, who was at that time an officer of Copen Sport, guaranteed payment of rent and additional rent under the Lease pursuant to a written guaranty (the "Guaranty").

Pursuant to the Guaranty,

[Trundle] guarantees to Landlord, its successors or assigns the prompt payment by Tenant of the rents and additional rents reserved in the Lease and the charges thereunder and the performance by Tenant of all provisions and covenants contained in said Lease. If any default under the Lease shall be made by Tenant, then [Trundle] shall pay and hereby agrees to pay to Landlord, its successors or assigns such sum or sums of money as will be sufficient to make up any such deficiency, and shall satisfy the provisions and covenants to be performed by Tenant under the Lease.

Additionally, pursuant to the Guaranty,

Upon receipt by Landlord of a duly executed and acknowledged Surrender Declaration (the "Surrender Declaration")...together with all keys to the Premises (such date that Landlord actually receives the Surrender Declaration and all keys shall be known as the "Surrender Date"), then [Trundle] shall be released from all liability with respect to any obligations of Tenant under the lease arising or accruing after the Surrender Date, but [Trundle] shall continue to remain liable pursuant to the terms of this Guaranty for (i) all obligations of Tenant which arose or accrued on or prior to the Surrender Date and (ii) any liability of Tenant arising out of breach of any warranty or representation of Tenant under the Surrender Declaration.

The Guaranty also provides that

[Trundle] does further covenant and agree that the Landlord may, from time to time, during the term of the Lease, modify, change or alter any of the terms of the Lease by agreement with Tenant, any subsidiary, affiliate or other corporation to which Tenant may assign Tenant's interest in the Lease, in accordance with the terms thereof, without notice to [Trundle] and that [Trundle] shall not be relieved of its liabilities hereunder as a result of such action, it being expressly agreed and understood that [Trundle] will recognize and be bound by any such modification, change or alteration as though it had been part of the

Lease as originally drawn.

Upon expiration of the Lease, on or about December 31, 2007, Tenant allegedly remained in possession of the premises and never provided to Landlord an executed Surrender Declaration or the keys to the premises. Rather than electing to hold Tenant as a month to month tenant after the Lease expiration, Landlord agreed to extend Tenant's Lease for an additional five years by executing a "modification of the Lease" dated January 1, 2008 that purported to extend the term of the Lease through December 31, 2012 (the "Lease Modification Agreement"). Trundle signed the Lease Modification on the signature line of the second page above which was pre-printed Copen Sport Inc. and under which was pre-printed the word "President."

Thereafter, when Tenant defaulted under the Lease Modification Agreement, plaintiff commenced the instant action asserting causes of action for breach of contract against Copen Sport, breach of contract against Emanuel, breach of contract against Trundle, attorney's fees against Copen Sport and Emanuel, attorney's fees against Copen Sport and Trundle, attorney's fees against Emanuel and attorney's fees against Trundle.

The court first turns to defendant Trundle's cross-motion for an Order pursuant to CPLR § 3212 granting her summary judgment dismissing plaintiff's third, fifth and seventh causes of action. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1<sup>st</sup> Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his

claim.” *Id.*

As an initial matter, Trundle’s motion for summary judgment dismissing the third cause of action for breach of the Guaranty is granted. “It is well established that ‘[a] guaranty is to be interpreted in the strictest manner’ (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]), particularly in favor of a private guarantor (*see 665-75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD2d 270, 271 [1999]), and cannot be altered without the guarantor’s consent (*see White Rose Food v Saleh*, 99 NY2d at 591). In this regard, a ‘guarantor should not be bound beyond the express terms of his guarantee’ (*665-75 Eleventh Ave. Realty Corp.*, 265 AD2d at 271 [internal quotation marks and citation omitted]).” *Lo-Ho LLC v. Batista*, 62 A.D.3d 558, 559-60 (1<sup>st</sup> Dept 2009).

In *Lo-Ho LLC*, the First Department expressly held that a lease entered into after the expiration of the original lease is not a lease modification or extension which would permit a landlord to recover from a guarantor but rather a new lease entirely. In that case, plaintiff landlord and the tenant entered into a commercial lease agreement dated April 2000 for a five-year term, which was guaranteed by the defendant guarantor pursuant to a written guaranty. The guaranty specified that “[t]he undersigned Guarantor guarantees to Owner...the full performance and observance of all the agreements to be performed and observance of all the agreements to be performed and observed by Tenant in the attached Lease...The Guarantor further agrees that this guaranty shall remain and continue in full force and effect as to any renewal, change or extension of the Lease.” *Lo-Ho LLC*, 62 A.D.3d at 558. The lease expired on March 31, 2005 and in or around April 2005, the landlord and the tenant entered into a purported “lease extension” extending the terms of the April 2000 lease for an additional five year term until March 31, 2010. When the tenant defaulted under the purported lease extension, plaintiff brought an action to recover unpaid

rent against both the tenant and the guarantor. After a bench trial was held, the court dismissed the action finding that “what was denominated as an extension was in reality a new lease and that the guaranty did not carry over to the April 2005 lease.” *Id.* The First Department affirmed, finding that the original lease had expired on March 31, 2005 and that thus, the lease signed in April 2005 was not an extension of the lease which would permit the landlord to recover against the guarantor. *See id.* The court explained that the guarantor was not liable under the lease signed in April 2005 as that agreement was entered into after the expiration of the original lease. *See id.* Further, the court found that the lease signed in April 2005 could not have been an extension of the original lease on the grounds that, *inter alia*, there was no option to renew or extend included in the original lease and, most importantly, that “the lease of April 2005 could not be the type of extension of lease contemplated in the guaranty because it did not extend the terms and conditions of the [original lease]. The April 2005 lease contained new terms and conditions including an incrementally higher rent...[which] would have substantially and impermissibly changed the guarantor’s obligations under the original agreement and thus, impermissibly increased [the guarantor’s] risk without his consent. Hence, the second lease did not obligate the guarantor.” *Id.* at 560-61.

In the instant action, Trundle has established her *prima facie* right to summary judgment dismissing the third cause of action for breach of the Guaranty on the ground that the Lease Modification Agreement signed in January 2008 was not an extension of the Lease as would permit plaintiff to recover from Trundle under the Guaranty but rather was a new lease agreement entirely, which was not covered by the Guaranty. Pursuant to the Guaranty, Trundle is liable for any modification, change or alteration of the Lease made “during the term of the Lease.” It is undisputed that the “Lease Modification Agreement” was only entered into after the original Lease expired on December 31, 2007. Additionally, as in *Lo-Ho LLC*, this court finds that the Lease

Modification Agreement was a new lease and not merely an extension of the original Lease because the original Lease did not contain an option to renew or extend and because the Lease Modification Agreement did not extend the terms and conditions of the original Lease. Indeed, pursuant to the Lease Modification Agreement, the base rent was increased from \$111,136.56 in year ten under the original Lease to \$155,000 in year one of the Lease Modification Agreement, increasing annually to the sum of \$172,454 in year five. These new terms and conditions impermissibly changed defendant Trundle's obligations and increased her risk as guarantor without her consent and thus, she may not be held personally liable under the Lease Modification Agreement.

To the extent that plaintiff asserts that Trundle is obligated as an agent of Copen Sport pursuant to Paragraph 4 of the Lease Modification Agreement because she individually signed the agreement, such assertion is without merit. Specifically, Paragraph 4 of the Lease Modification Agreement states as follows:

All of the terms and provisions of the Lease...shall be binding upon the parties hereto, their successors, assigns, guarantors and agents. The Lease and this Lease Modification Agreement shall be binding upon the tenant under the Lease, Copen Sport Inc. as well as Copen Associates Inc.

Plaintiff argues that "[t]his language expresses the intentions of the parties: that tenant remain in occupancy at the stipulated rents, that the rents would be paid by the tenant and guaranteed by Carin Trundle, as guarantor under the December 24, 1997 Guaranty, as agent for Copen Sport Inc. and by tenant's successors and assigns." However, such assertion is without merit based on the fact that Trundle executed the Lease Modification Agreement solely in her capacity as President of Copen Sport and not in her individual capacity. See *Rene Boas & Assoc. v. Vernier*, 22 A.D.2d 561, 563 (1<sup>st</sup> Dept 1965)("The writing, moreover, was executed by defendant solely in his capacity as general manager of the corporation, and not in his individual capacity. Under the rule of *Salzman Sign Co.*

*v. Beck* (10 N Y 2d 63) a person who signs solely as a corporate officer is not personally obligated on the contract, even though the text of the writing states that the officer is to be liable personally. This rule was recently reaffirmed in a case involving one corporation signing solely as agent for another corporation (*Savoy Record Co. v. Cardinal Export Corp.*, 15 N Y 2d 1.)” See also *Yellow Book Sales & Distrib. Co. Inc. v. M & J Commodity Brokerage Corp.*, 49 Misc.3d 144 (App. Term. 1<sup>st</sup> Dept 2015)(“Although the text of the agreement states that the signor is also personally liable as a guarantor, we agree with the trial court that in the particular circumstances at issue, there was no clear and explicit evidence that [the guarantor] intended to superadd his personal liability to that of the corporate defendant. As the Court of Appeals stated more than 50 years ago: ‘[i]n modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for his corporation’s engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice – once as an officer and again as an individual.’ (*Salzman Sign Co. v. Beck*, 10 NY2d 63, 67 [1961]).”) Here, it is clear from the face of the Lease Modification Agreement that Trundle signed the agreement in her capacity as President of Copen Sport and that she only signed once in that capacity. Thus, as there is no “clear and explicit evidence” that Trundle intended to “superadd” her personal liability to that of Copen Sport, she is not personally liable to plaintiff under the Lease Modification Agreement.

As this court has dismissed the third cause of action for a breach of the Guaranty as against defendant Trundle, the fifth and seventh causes of action which seek attorney’s fees against Trundle based on her breach of the Guaranty and the Lease Modification Agreement must be dismissed as well.

Finally, the court turns to plaintiff’s motion for an Order pursuant to CPLR § 3211(b)

