

ET 46 Main St. LLC v Lord & Guy, LLC
2016 NY Slip Op 31473(U)
July 27, 2016
Supreme Court, New York County
Docket Number: 651077/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 55

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 ET 46 MAIN STREET LLC,

Plaintiff,

DECISION/ORDER
Index No. 651077/2015

-against-

LORD & GUY, LLC and GAVIN ABADI,

Defendants.

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 HON. CYNTHIA KERN, J.:

Plaintiff ET 46 Main Street LLC commenced the instant action seeking⁹ recovery of unpaid rent allegedly due and owing pursuant to a commercial lease agreement with defendant Lord & Guy, LLC (“Lord & Guy”) and the personal guaranty of defendant Gavin Abadi (“Abadi”) and asserting a cause of action for an account stated against defendants. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its causes of action for an account stated against Lord & Guy and for breach of a personal guaranty against Abadi. For the reasons set forth below, plaintiff’s motion for summary judgment is granted in its entirety.

The relevant facts are as follows. On or about January 24, 2014, plaintiff, as landlord, entered into a commercial lease agreement (the “Lease”) with Lord & Guy, as tenant, for premises in a building located at 46 Main Street, East Hampton, New York (the “premises”). Pursuant to Article 3 of the Lease, “Tenant agrees to accept the Demised Premises in its ‘as in’ condition and acknowledges and agrees that Landlord shall not be responsible to perform any work, make any improvements, alterations or other modifications to the Demised Premises to prepare the same for Tenant’s occupancy.” Concurrently with the execution of the Lease, Abadi, a principal of Lord & Guy, entered into a personal guaranty of the Lease (the “Guaranty”). Pursuant to the Guaranty, “[t]he Guarantor [Abadi] hereby irrevocably and unconditionally guarantees, to Landlord and its successors and assigns, the full, faithful and timely payment, performance, and observance

by Tenant [Lord & Guy] of all of the payments, covenants and other obligations of Tenant under or pursuant to the Lease in accordance with the terms herein.”

In or around December 2014, Lord & Guy stopped making rent payments. Plaintiff mailed invoices addressed to Lord & Guy at the attention of Abadi on December 1, 2014, January 1, 2015, February 1, 2015, March 1, 2015 and April 1, 2015. Plaintiff has submitted the affidavit of Elie Tahari (“Tahari”), the managing director of plaintiff’s owner, stating that Lord & Guy failed to pay or object to any of the invoices. In response, defendants have submitted the affidavit of Abadi stating that he spoke with Ran Daniel (“Daniel”), plaintiff’s in-house attorney and accountant, on many occasions beginning in December 2014 to object to “paying the rent” due to alleged misrepresentations made during the lease negotiations. Abadi’s affidavit further states that a Tiffany & Co. store was located across the street from the premises at the time of the negotiations, which was a critical factor in Lord & Guy’s decision to rent the premises, but that the Tiffany & Co. store vacated its space shortly after Lord & Guy’s took possession of the premises. Also, Abadi’s affidavit states that the condition of the premises “was not what was represented,” and that Lord & Guy spent \$80,000.00 in repairs to make the premises usable.

The court first considers the portion of plaintiff’s motion for summary judgment on its cause of action for breach of a personal guaranty against Abadi. 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 Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). 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.*

“On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” *City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69, 71 (1st Dept 1998). *See also 4 USS LLC v. 40 East 14 Realty Associates LLC*, 120 A.D.3d 1049 (1st Dept 2014).

In the present case, plaintiff has made a *prima facie* showing of its entitlement to summary judgment on its cause of action for breach of a personal guaranty against Abadi as it has submitted the Guaranty, which is absolute and unconditional, and the affidavit testimony of Tahari that Lord & Guy failed to pay rent from December 2014 to the present due and owing pursuant to the Lease and that Abadi also failed to pay said rent as required by the Guaranty.

In opposition, defendants have failed to raise a triable issue of fact. Defendants' argument that Abadi should be excused from his obligation to pay rent under the Guaranty due to plaintiff's alleged misrepresentation of the condition of the premises is without merit as it is completely belied by the terms of the Lease. The Lease explicitly states that the tenant accepts the premises "as is" and that landlord "acknowledges and agrees that Landlord shall not be responsible to perform any work, make any improvements, alterations or other modifications to the Demised Premises to prepare the same for Tenant's occupancy."

Defendants' argument that Abadi should be excused from his obligation to pay rent under the Guaranty due to plaintiff's alleged "misrepresentation" regarding the proximity of the Tiffany & Co. store is also without merit as Abadi's affidavit does not allege that plaintiff made any representation whatsoever to defendants that the Tiffany & Co. store would be located near the premises during Lord & Guy's tenancy or that plaintiff knew of the store, its location or any plans to vacate its location.

Further, defendants' argument that plaintiff's damages should be reduced by the amount of the security deposit, which was retained by plaintiff, is without merit as the Guaranty explicitly states that "[t]he Guaranteed Obligations shall in no way be reduced or otherwise affected by any security deposit held by Landlord under the Lease, it being expressly agreed that the Guaranteed Obligations are in addition to the amount of any such security deposit." Thus, defendants have failed to raise a triable issue of fact and the portion of plaintiff's motion for summary judgment on its cause of action for breach of a personal guaranty is granted.

The court next considers the portion of plaintiff's motion for summary judgment on its cause of action for an account stated against Lord & Guy. An account stated "exists where a party to a contract

receives bills or invoices and does not protest within a reasonable time.” *Russo v. Heller*, 80 A.D.3d 530, 532 (1st Dept 2011) (internal quotation omitted). For a plaintiff to recover on a cause of action for an account stated, the invoices that are the foundation of the claim must actually be addressed to the defendant. *See Roth Law Firm, PLLC v. Sands*, 82 A.D.3d 675, 676 (1st Dept 2011).

In the present case, plaintiff has made a *prima facie* showing of its entitlement to summary judgment on its cause of action for an account stated against Lord & Guy as it has submitted invoices addressed to Lord & Guy at the attention of Abadi and dated December 1, 2014, January 1, 2015, February 1, 2015, March 1, 2015 and April 1, 2015 and the affidavit testimony of Tahari that plaintiff mailed the invoices to Lord & Guy at Abadi’s home address and that Lord & Guy never objected to or paid the invoices.

In opposition, defendants have failed to raise a triable issue of fact. Defendants’ argument that Abadi objected to the invoices within a reasonable time is without merit. A defendant cannot raise an issue of fact to an account stated claim by submitting an affidavit consisting of “self-serving, conclusory and unsubstantiated allegations” that the defendant objected to invoices. *See Morrison Cohen Singer & Weinstein, LLP v. Ackerman*, 280 A.D.2d 355, 356 (1st Dept 2011) (“Defendant’s opposition, which consists of self-serving, conclusory and unsubstantiated allegations that she orally objected to the bills are insufficient to defeat plaintiff’s motion”); *Zanani v. Schwimmer*, 50 A.D.3d 445, 446 (1st Dept 2008) (holding that an affidavit that did not state when the defendant objected to the invoices or the “specific substance of the conversations in which the objections were made” did not raise an issue of fact).

In the present case, Abadi’s affidavit testimony that he spoke with Daniel, plaintiff’s in-house attorney and accountant, on many occasions beginning in December 2014 to object to “paying the rent” on the grounds that the Tiffany & Co. store vacated and the premises were not in the condition plaintiff represented does not raise an issue of fact as it is self-serving, conclusory and unsubstantiated. Abadi’s affidavit testimony is conclusory as he merely states that he objected frequently, without stating when he objected. Further, Abadi’s affidavit testimony is self-serving and unsubstantiated as Abadi did not object to and stop paying the invoices on the grounds that the Tiffany & Co. store had moved and the premises were not in the condition plaintiff represented until nearly a year after Lord & Guy first assumed possession of

the premises, even though Abadi alleges that the Tiffany & Co. store moved soon after Lord & Guy opened in the premises and the condition of the premises would have been evident to defendants when Lord & Guy assumed possession of the premises. Moreover, the court finds that the reasons for defendants' objection to the invoices, that the Tiffany & Co. store had moved and the premises were not in the condition plaintiff represented, were not valid. Defendants' objection to the invoices on the basis that the Tiffany & Co. store had moved was not valid as defendants do not allege that plaintiff made any representation whatsoever to defendants that the Tiffany & Co. store would be located near the premises during Lord & Guy's tenancy. Further, defendants' objection to the invoices on the basis that the condition of the premises was not as represented was not valid as the Lease explicitly states that the tenant accepts the premises "as is."

Accordingly, plaintiff's motion for summary judgment on its causes of action for breach of a personal guaranty against Abadi and for an account stated against Lord & Guy is granted in its entirety. It is hereby

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$103,585.08, with interest thereon at the statutory rate from December 5, 2014, together with costs and disbursements; and it is further

ORDERED that the portion of plaintiff's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees plaintiff may recover against defendants is referred to a Special Referee to hear and report unless the parties agree that the Special Referee may hear and determine. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date. This constitutes the decision and order of the court.

DATE :

7/27/16

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KERN, CYNTHIA S., JSC
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