SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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766 TENTH LLC,

Index No.
651905/2014

Plaintiff,

DECISION and ORDER

- v -

Mot. Seq. 001

CONVERSION CONSULTING LLC a/k/a FLIP SERVICES d/b/a BOUNCE AND FLIP, and ED MATTHEWS,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff 766 Tenth LLC ("766 Tenth") brings this commercial nonpayment action against defendants Conversion Consulting LLC a/k/a Flip Services d/b/a Bounce and Flip ("Consulting") and Edward Matthews ("Matthews" and collectively, "defendants"). In the verified complaint, plaintiff alleges that Consulting is in default under the terms of a commercial lease agreement, and that Matthews, as guarantor of the Lease, is liable for both a money judgment entered against Consulting in the Civil Court of the County of New York on August 19, 2013, and "all rent due and owing accruing thereafter under the Lease through and including the expiration of the Lease term."

On July 16, 2012, Consulting became a commercial tenant in a building owned by 766 Tenth pursuant to the terms of a least agreement (the "Lease"). On the same day, Matthews executed a "Good Guy Guaranty" (the "Guaranty") for the Lease. The term of the Lease is ten (10) years expiring on December 31, 2022.

On May 28, 2013, plaintiff commenced a summary nonpayment proceeding as a result of Consulting defaulting in the payment of the rent and additional rent. By decision and order dated August 19, 2013, Justice Nancy M. Bannon awarded plaintiff possession of the premises and a money judgment in favor of plaintiff as against Consulting in the sum of $192,903.23. Consulting was evicted from the demised premises pursuant to a warrant and notice of eviction and plaintiff obtained legal possession of the demised premises on January 13, 2015.

Consulting filed a voluntary bankruptcy petition in the United States Bankruptcy Court, Southern District of New York (No. 14-10665) on March 17, 2014. Matthews is not named as a debtor in the bankruptcy petition. Plaintiff commenced the instant action by the filing of a Summons and Verified Complaint on June 20, 2014.

On August 5, 2014, Matthews, appearing *pro se*, interposed a notice of appearance and a verified answer, in which he asserted the following affirmative defense: "Plaintiff has violated a federal stay, granted with defendant filing a voluntary bankruptcy petition, by seeking to collect/recover the rent that arose before the commencement of the bankruptcy case no. 14-10665 dated march 17, 2014." Matthews asserted no other defenses or counterclaims and denied all of the allegations in the complaint.

Plaintiff now moves for an order, granting summary judgment to plaintiff against defendant Matthews on its first, second, and third Causes of Action (Breach of Contract, Rent Due on Unexpired Term of Lease, and Reimbursement of Attorneys' Fees); dismissing the affirmative defense of Matthews; and awarding a money judgment in the amount of $3,578,550.66 in favor of plaintiff and against Matthews; and/or in the alternative, awarding attorney fees, expenses, costs and disbursements, and granting leave to file a note of issue and scheduling this matter for an inquest on the issue of plaintiff's damages as against Matthews.

Plaintiff submits the affirmation of Andreas Vasilatos, Esq., the affidavit of Annabelle Santiago, property manager of 766 Tenth, the affidavit of Travis Morrison, bookkeeper for 766 Tenth, and the following annexed exhibits: (a) the Lease; (b) the Guaranty; (c) the August 19, 2013 Decision and Order, awarding plaintiff a money judgment in the amount of $192,903.23 as against Consulting; (d) the voluntary bankruptcy petition, dated March 17, 2014, filed by Consulting in the United States Bankruptcy Court, Southern District of New York; (e) a copy of the warrant of eviction; and (f) the rent ledger for the premises leased by Consulting.

In opposition, defendant Matthews submits an affidavit annexing (a) an asbestos assessment report for the premises, dated October 19, 2013; (b) an email scheduling the asbestos abatement for January 12, 2013; (c) an estimate totaling $37,650 for roof resurfacing; (d) an architectural drawing of the premises; (e) an ECB Violation, dated April 24, 2012, for "failure to maintain building, noted at north façade bulging parapet/wall approx. 3–4 inches causing stucco to detach from inner brick face, façade shows multiple cracks throughout, w/washing out mortar joints," imposing a penalty of $1,000; (f) an email dated May 17, 2012 from

plaintiff's brokerage firm, Robert K. Futterman & Associates, LLC ("RKF"), to Matthews, containing a second counter proposal to lease the retail space at 766 Tenth; and (g) a NYC Department of Buildings permit, approved on May 24, 2011, for "renovation of existing commercial space, new storefront, minor plumbing work."

Matthews argues that plaintiff made four misrepresentations to fraudulently induce defendants into executing the Lease and Guaranty, rendering the Guaranty invalid. Specifically, Matthews alleges that plaintiff represented that there was no asbestos in the building (the "first misrepresentation"), that the building was in satisfactory condition (the "second misrepresentation"), and that defendants would receive five months of rent concessions (the "third misrepresentation"). Matthews further alleges that plaintiff verbally requested to do work during the first two months after lease execution and represented that, if the work was not complete within two months, plaintiff would provide the amount of months in rent concessions to the defendants equal to the number of months that plaintiff remained on the premises completing its work (the "fourth misrepresentation").

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 from the case. *Santiago v. Filstein*, 35 A.D.3d 184, 185–86 (1st Dept. 2006). The burden then shifts to the opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metropolitan Museum New York*, 49 N.Y.2d 557, 562 (1980). Mere conclusions, expression of hope or unsubstantiated allegations or assertions are insufficient for this purpose. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

"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." *4 USS LLC v. DSW MS LLC*, 120 A.D.3d 1049, 1051 (1st Dept. 2014); *City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69, 71 (1st Dept. 1998).

The Guaranty executed by Matthews on July 16, 2012 provides:

> [T]he undersigned (sometimes hereinafter called "Guarantor) does hereby ... unconditionally guarantee to Landlord . . . the full and timely payment, performance and observance of, and compliance with all of Tenant's obligations under the Lease, including, without limitation, the full and prompt payment of all Base Rent, additional

> rent, an amount equal to the prorated remaining value of the real estate commission paid initially by the Landlord, an amount equal to the prorated remaining value of the initial build out time, an amount equal to the full security . . . and all other reasonable charges and sums due and payable by Tenant under the Lease (including, without limitation, Landlord's reasonable attorney's fees and disbursements) (collectively, the "Obligations") through and including the date that Tenant ... shall have completely performed all of the following: (i) provide written notice to Landlord (pursuant to the notice requirements in the Lease) of Tenant's intention to vacate and surrender the Demised Premises to Landlord ... ; (ii) vacated and surrendered the Demised Premises to the Landlord pursuant to the terms of the Lease; (iii) delivered the keys to the Demised Premises to Landlord; and (iv) paid to Landlord all Obligations through and including the date of the surrender of the Demised Premises.

Further, the Guaranty provides:

> This Guaranty is an absolute and unconditional guaranty of payment and performance. The undersigned hereby covenants and agrees to and with Landlord and its successors and assigns, that the undersigned may be joined in any action or proceeding against Tenant in connection with the Obligations, and that recovery may be had against the undersigned in such action or proceeding or in any independent action or proceeding against the undersigned without Landlord ... first pursuing or exhausting any remedy or claim against Tenant[.]

Here, the terms of the Guaranty are unambiguous and unconditional, and plaintiff has otherwise met its prima facie burden by submitting proof of the underlying debt and the guarantor's failure to perform under the Guaranty. In opposition, defendant Matthews fails to raise a triable issue of fact. The sole affirmative defense Matthews raises in his Answer fails as a matter of law. It is well settled that "[d]efendants, as guarantors of the debt of a corporation against which a proceeding has been commenced under the Bankruptcy Code, are not relieved from liability, nor is plaintiff prevented from proceeding against the non-bankrupt individual defendant guarantors by the bankruptcy stay." *Milliken & Co. v. Stewart*, 182 A.D.2d 385, 386 (1st Dept. 1992) (citing *Marine Bank v. Woodworth*, 158 A.D.2d 953, 954 (4th Dept. 1990); *Credit All. Corp. v. Williams*, 851 F.2d 119 (4th Cir. 1988); *In re Larmar Estates, Inc.*, 5 B.R. 328 (Bankr. E.D.N.Y. 1980)). Where, as here, a guarantee states that it is "absolute" and "unconditional," binding the guarantor to pay immediately upon the default of the

debtor, "it is considered to be a guarantee of payment, and upon default the creditor may proceed directly against the guarantor in the first instance." *Milliken*, 182 A.D.2d at 386–87 (internal citations omitted); *see also APF 286 Mad LLC v. Chittur & Associates P.C.*, 132 A.D.3d 610 (1st Dept. 2015) (holding that the landlord was entitled to proceed directly against the guarantor because the guarantee "plainly states that it is an unconditional guarantee of payment").

In his answer, Matthews does not interpose any affirmative defense or counter claim relating to fraudulent inducement or rescission, and has not requested leave to file and serve and amended answer pursuant to CPLR 3025. As Matthews raises allegations of fraudulent inducement for the first time in his affidavit in opposition to the motion for summary judgment, such allegations are untimely and improper. *See Hassan v. Bellmarc Prop. Mgmt. Servs.*, 12 A.D.3d 197 (1st Dept. 2004) (in opposing summary judgment, tenant could not rely on theory of liability based on alleged negligent hiring and supervision that was never advanced in pleadings); *Carminati v. Roman Catholic Diocese of Rockville Ctr.*, 6 A.D.3d 481, 482 (2d Dept. 2004) (plaintiff's allegation that defendants were negligent was improperly raised for the first time in opposition to the motion, and therefore, plaintiff could not rely on this new theory of liability to defeat the motion).

In any event, Matthews' affidavit in opposition fails to adequately allege scienter or fraudulent intent with respect to the four alleged misrepresentations. *See* CPLR 3016(b); *Dembeck v. 220 Cent. Park S., LLC*, 33 A.D.3d 491, 492 (1st Dept. 2006) (elements of fraud include misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance, and resulting injury).

Moreover, express language in the Lease and Guaranty precludes a defense based upon the alleged second, third, and fourth misrepresentation. Paragraph 20 of the Lease provides: "Tenant has inspected the building and the demised premises and is thoroughly acquainted with their condition, and agrees to take the same 'as is'[.]" Similarly, Paragraph 60 of the rider to the Lease provides:

> Tenant acknowledges that it has made a full and complete inspection of the demised premises and is thoroughly familiar with the condition thereof, and Tenant agrees to accept possession of the demised premises on the Commencement Date in their then 'as-is' condition.

The second alleged misrepresentation relating to the condition of the building is therefore untenable as a defense. The alleged third and fourth misrepresentations, concerning the terms of a verbal rent concession and alleged verbal modification of

the Lease, are barred by the parol evidence rule and the express terms of the Lease. Paragraph 68 provides:

> Tenant agrees and acknowledges that neither Landlord nor Landlord's agents, employees, representatives nor any other party has made any representations, warranties or promises, either express or implied, except as expressly set forth in this Lease and Tenant does not rely on any representations, warranties or promises except as specifically set forth in this Lease.

Because the contract is unambiguous, parol evidence of any alleged verbal agreements is precluded. *See Centaur Properties, LLC v. Farahdian*, 29 A.D.3d 468, 469 (1st Dept. 2006) (rejecting defendant's argument that the alleged oral modifications may be proven by parol evidence); *Polygram Holding, Inc. v. Cafaro*, 42 A.D.3d 339, 340 (1st Dept. 2007) ("Absent fraud or mutual mistake, the parol evidence rule precludes a party from offering evidence to contradict or modify an unambiguous contract."); *Rosenblum v. Glogoff*, 96 A.D.3d 514, 514–15 (1st Dept. 2012) (holding that the alleged misrepresentations by sellers' agent regarding the existence of "thru-wall" air conditioning did not excuse purchasers' default).

With respect to damages, plaintiff contends that Matthews, by virtue of the Guaranty, is liable to plaintiff for the money judgment, dated August 19, 2013, against Consulting, in the amount of $192,903.23. In addition, plaintiff contends that Matthews is liable for Consulting's default of payment of rent and additional rent for the period of time from August 19, 2013 through and including January 13, 2015, the date on which Consulting was evicted and plaintiff obtained legal possession of the demised premises. Finally, plaintiff contends that Matthews is liable for liquidated damages, pursuant to the Guaranty and Paragraph 45 of the Rider to the Lease.

Paragraph 45(a) defines "additional rent" as

> [a]ll sums of money, other than the base rent reserved in this lease, that shall become due from and payable from Tenant to Landlord hereunder shall constitute additional rent, for default in the payment of which Landlord shall have the same remedies as for a default in the payment of base rent.

Paragraph 45(d) sets forth the liquidated damages clause:

> [I]n the event of the termination of this lease ... [the] Landlord may, at Landlord's option, forthwith be entitled to recover from Tenant as and for liquidated damages with respect to any such lease termination, an amount equal to the rent provided hereunder for the unexpired portion of the term demised. Upon the computation of such damages, all rent payable hereunder after the date of termination, shall be discounted from the date of termination at the rate of four (4%) percent per annum.

Paragraph 45(d) further provides that the landlord has no "obligation ... to relet the premises demised hereunder in the event of any termination[.]"

Generally, parties are free to agree to a liquidated damages clause "provided that the clause is neither unconscionable nor contrary to public policy." *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc.*, 24 N.Y.3d 528, 536 (2014); *City of Rye v. Pub. Serv. Mut. Ins. Co.*, 34 N.Y.2d 470, 473 (1974). "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation." *Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 425 (1977) (internal citations omitted). On the other hand, a provision which requires damages "grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable." *Id.* at 424.

Summary judgment on the amount of damages plaintiff is entitled to recover cannot be determined on the record before the court. There is no evidence as to whether, at the time the Lease was executed, the liquidated damages clause provided a reasonable estimate of the losses plaintiff would suffer, or whether the damages were incapable of precise estimation. While a landlord may be entitled to seek from the guarantor the liquidated damages for which the tenant was liable, plaintiff has failed to establish its entitlement to such damages here. *See H.L. Realty, LLC v. Edwards*, 131 A.D.3d 573, 575, 15 N.Y.S.3d 413, 415 (2d Dept. 2015) (where guarantor guaranteed "the full and prompt payment by Tenant of *all amounts due under [the] lease*" landlord was entitled to seek from guarantor the liquidated damages for which the tenant was liable under the lease even after the termination of the landlord-tenant relationship); *Holy Properties Ltd., L.P. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130, 134 (1995) ("Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please."); *but see 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc.*, 24 N.Y.3d 528, 535 (2014) (tenant was

entitled to a hearing on the issue of whether the collection of undiscounted accelerated rent was an unenforceable penalty).

Wherefore, it is hereby

ORDERED that plaintiff 766 Tenth LLC's motion for summary judgment is granted solely to the extent of granting judgment on the issue of liability against defendant Edward Matthews on plaintiff's first and third causes of action (breach of contract and reimbursement of attorneys' fees); and it is further

ORDERED that the second cause of action (rent due on unexpired term of lease) is hereby severed and the remainder of the action shall continue as a separate action; and it is further

ORDERED that plaintiff 766 Tenth LLC's motion to dismiss the affirmative defense raised in defendant Edward Matthews' answer is granted and said affirmative defense is hereby dismissed; and it is further

ORDERED that the issues of (1) whether the liquidated damages clause in Paragraph 45 of the Rider to the Lease is enforceable; (2) if said clause is not enforceable, the amount of damages recoverable; and (3) the amount of reasonable attorneys' fees and costs incurred is referred to a Special Referee to hear and report with recommendations, unless the parties consent to a determination by the Special Referee, in which case the Special Referee may hear and determine said issues; and it is further

ORDERED that plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry 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 plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on defendant Edward Matthews.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: AUGUST 29, 2016

AUG 29 2016

EILEEN A. RAKOWER, J.S.C.