

2374 Concourse Assoc., LLC v MAS Music, Inc.

2017 NY Slip Op 30085(U)

January 12, 2017

Supreme Court, New York County

Docket Number: 153341/2014

Judge: Kathryn E. Freed

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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: IAS PART 2

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2374 CONCOURSE ASSOCIATES, LLC,

Plaintiff,

Index No. 153341/2014

- against-

MAS MUSIC, INC. d/b/a/ RINCON MUSICAL
and AMALIO SANTOS,

DECISION AND ORDER

Mot. Seq. 001

Defendants.

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KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (A), OF THE PAPERS
CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
Notice of Motion and Affidavit annexed	19-37 (Exs. A-Q)
Memorandum of Law in Support	38
Affidavit in Opposition Lawrence Garvey	42-45 (Exs. A-C)
Affidavit in Opposition Amalio Santos	48
Reply Affirmation Charles E. Boulbol	53

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER IS AS
FOLLOWS:

Plaintiff-landlord 2374 Concourse Associates moves for
summary judgment, pursuant to CPLR 3212, seeking a money judgment
in the amount of \$258,453.94, plus interest and attorneys' fees,
against defendant-tenant, MAS Music, Inc., d/b/a Rincon Musical
("MAS"), and Amalio Santos, for unpaid rent, plus additional
rent, under a January 18, 2008 commercial lease ("the lease",
Exhibit A to Cohen Aff.), which was for a term of 10 "[l]ease
[y]ears," as that term was defined in the agreement. The lease
was amended by a May 1, 2011 partial surrender agreement. *Id.*

Plaintiff alleges that defendants stopped paying rent in December 2010.

Pursuant to paragraph 83 of the rider to the lease, Santos unconditionally guaranteed payment ("the guaranty") of all base and additional rent, with the limitation that the guaranty would end upon the completion of all of the following four stated conditions, specifically that MAS:

"(i) [v]acated and surrendered the Demised Premises to [plaintiff] pursuant to the terms of the [l]ease (except with respect to the stated expiration date in this lease); (ii) Delivered the keys to the Demised premises to [plaintiff]; (iii) paid to [plaintiff] all accrued rent to and including the date which is the later of (a) the actual receipt by [plaintiff] of said Accrued Rent, (b) the surrender of the Premises, or (c) receipt by [plaintiff] of the keys to the Demised Premises; and (iv) the date which is one-hundred eighty (180) days after the date [MAS] advises landlord, in writing, that [MAS] is vacating the Demised Premises"

(*Id.*).

Plaintiff obtained a January 27, 2012 judgment of possession, upon default, against MAS in the Civil Court of the City of New York, Bronx County. Exhibit F to Cohen Aff.

Plaintiff commenced a non-payment proceeding against Santos, individually, on the guaranty, in Supreme Court, New York County, resulting in an April 12, 2012 default judgment in the amount of \$149,864.84, including interest, costs, and disbursements. Exhibit I to Cohen Aff. Plaintiff alleges in the complaint that MAS was evicted on April 30, 2012. Although defendants deny that they were evicted and maintain that they surrendered the premises

by delivering the keys, it is immaterial to the issue of rent due under the terms of the lease.

The amended complaint in this action, which was commenced on April 8, 2014 (Exhibit A to Cohen Aff.), seeks \$401,323.58, representing the amount of the default judgment against Santos, plus unpaid additional rent through December 2013, as well as interest and attorneys' fees. In February 2015, defendants made a payment in the amount of \$142,869.64, leaving a balance of \$258,453.94. This sum is established by the affidavit of Jack Cohen, a member of plaintiff, who submits plaintiff's open item statement as Exhibit O to said affidavit.

In opposition to plaintiff's motion, defendants submit the attorney affirmation of Lawrence A. Garvey, Esq. Garvey asserts, inter alia, that plaintiff failed to submit any evidence that defendants failed to satisfy the conditions to the guaranty cited above, and that Santos guaranteed the lease solely in his capacity as president of MAS.

Santos submits his own affidavit, first asserting that he is not personally liable under the lease because he did not sign the guaranty in his individual capacity. This argument fails. Not only did Santos sign an unconditional guaranty at paragraph 83 of the rider, without any limitation as to the capacity in which he executed the same, but the issue is precluded by the default judgment against him, awarding damages in the amount of

\$149,864.84 on the lease against Santos individually, inasmuch as the Supreme Court action, in which Santos defaulted, "afforded [him] a full and fair opportunity to contest the [issue of the guarantee] [citations omitted]." *Silverman v Leucadia, Inc.*, 156 AD2d 442, 443 (2d Dept 1989). It is well settled that "a judgment by default which has not been vacated is conclusive for res judicata purposes." *83-17 Broadway Corp. v Debcon Fin. Servs., Inc.*, 39 AD3d 583, 585 (2d Dept 2007).

Even if the issue were not precluded, Santos has not demonstrated the existence of a factual issue regarding whether he signed the guaranty only in his capacity as a representative of MAS. Nor is there any question of fact as to whether tenants met all of the conditions quoted above to be relieved from the guaranty. Santos has not even alleged that he had paid all accrued rent as required by (iii) of the conditions. In addition, MAS has not contested its liability to pay rent pursuant to the lease.

Finally, plaintiff has demonstrated its entitlement to attorneys' fees under the terms of the Lease. *Rep A8 LLC v Aventura Tech., Inc.*, 68 AD3d 1087, 1090 (2d Dept 2009).

Accordingly, it is:

ORDERED that the motion of plaintiff 2374 Concourse Associates LLC for summary judgment on its amended complaint is granted, to the extent of awarding it judgment in the amount of \$248,125.36, plus interest from the date of commencement of this action, April 8, 2014, plus attorneys' fees; and it is further,

ORDERED that plaintiff 2374 Concourse Associates LLC, having an address c/o Comjem Associates, Ltd., 1430 Broadway, Suite 1505, New York, New York, 10018, shall have judgment against defendants MAS Music, Inc. d/b/a Rincon Musical, and Amalio Santos, both having an address at 14 Garfield Place, Roslyn Heights, New York, 11577, jointly and severally, in the amount of \$248,125.36, plus interest from December 2013, and costs and disbursements, as taxed by the Clerk of the Court upon presentment of an appropriate bill of costs; and it is further,

ORDERED that the issue of the amount of plaintiff's reasonable attorneys' fees is severed and is referred to a Special Referee to hear and report with recommendations, 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 issues; and it is further,

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or the receipt of the report of the Special Referee or the designated referee; and it is further,

ORDERED that this motion for attorneys' fees is held in abeyance, along with the claim for damages, pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further,

ORDERED that counsel for the party seeking the reference, or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further,

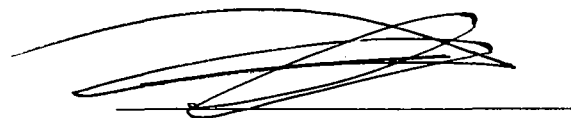
¹ Copies are available in Rm. 119 at 60 Centre Street and on the Court's website.

ORDERED that the Clerk shall enter judgment accordingly; and
it is further,

ORDERED that this constitutes the decision and order of the
court.

Dated: January 12, 2017

ENTER:

A handwritten signature in black ink, consisting of several overlapping, fluid strokes that form a cursive name. The signature is positioned above a horizontal line.

KATHRYN E. FREED, J.S.C.