

<b>SLG Graybar Mesne Lease LLC v Capital Programs, Inc.</b>
2018 NY Slip Op 30602(U)
April 3, 2018
Supreme Court, New York County
Docket Number: 155357/2015
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

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SLG GRAYBAR MESNE LEASE LLC,

Plaintiff,

Index No.: 155357/2015

-against-

Mot. Seq. No. 002

CAPITAL PROGRAMS, INC., and SABI M. KANAAN,

Defendants.

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**MELISSA A. CRANE, J.S.C.:**

Plaintiff SLG Graybar Mesne Lease LLC (“Graybar”) moves, pursuant to CPLR 3212, for summary judgment against defendant Sabi M. Kanaan (“Kanaan”) on the third, fourth, and fifth causes of action of the complaint, and to dismiss Kanaan’s affirmative defenses. Graybar also moves, pursuant to CPLR 3215, for a default judgment on the first, second, and fifth causes of action against defendant Capital Programs, Inc. (“Capital”).

Kanaan cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third, fourth, and fifth causes of action of the complaint.

**Background**

On July 19, 2005, Capital entered into a lease with Graybar for Room 310 at 420 Lexington Avenue, New York, New York (Padmore Aff dated 12/15/16, Exhibit A, Lease dated 7/19/05 [lease], ¶ 1.01). The term of the lease was three years, running from August 5, 2005 to June 30, 2008 (*id.*, ¶ 2.01). In conjunction with the lease, Kanaan executed an unconditional personal guarantee of the lease while Capital occupied the premises (the “Good Guy” period) (Padmore Aff, Exhibit B, Guarantee dated 7/19/05 [guarantee], ¶ 1). Absent ninety-days’ notice of Capital vacating the premises, Kanaan was additionally liable under the guarantee for 90 days beyond Capital’s vacatur of the premises (*id.*). The guarantee covered “rent, additional rent and

any charges accruing under the lease” (*id.*). As part of the guarantee, Kanaan consented to “any modification, supplement, extension or amendment of the [l]ease” (*id.*, ¶ 2).

On June 23, 2008, Capital and Graybar entered into a Lease Modification Agreement (the modification) (Padmore Aff, Exhibit C, modification dated 6/23/2008). The modification extended the term of the lease, effective July 1, 2008 to July 31, 2013, and changed the leased premises from Room 310 to Room 631 (*id.* at 1). Kanaan consented to and ratified the modification, and, making reference to his original guarantee, agreed that his obligations thereunder would “remain in full force and effect . . . under the [l]ease as modified by [the modification]” (*id.* at 9). Kanaan also executed an additional guarantee (the corporate guarantee) in his capacity as managing partner of nonparty CPI Enterprises (Padmore Aff, Exhibit D, corporate guarantee dated 6/24/08).

On March 31, 2010, Capital and Graybar entered into a Second Lease Modification Agreement (the second modification) (Padmore Aff, Exhibit E, second modification dated 3/31/10). Capital represented that it was currently in rent arrears of \$18,337.15 (*id.* at 1). Such arrears had resulted in a judgment of possession and warrant of eviction issued to Graybar by the New York County Civil Court (*id.*, ¶ 3). As part of the modification, Graybar agreed to vacate that judgment once Capital made partial payment on the arrears (*id.*). As with the modification, Kanaan consented to and ratified the second modification, and, making reference to both his initial guarantee and to the corporate guarantee, warranted that his obligations thereunder would “remain in full force and effect and are hereby ratified and confirmed in all respects with respect to the [l]ease as modified hereby” (*id.* at 12).

On May 31, 2012, Graybar obtained a judgment of possession against Capital, and recovered possession of the premises on June 23, 2012 (Kanaan Aff dated 1/30/17, ¶ 40; Exhibit

F, decision and judgment dated 5/31/12). Kanaan avers that he was not aware of the eviction proceeding and was unable to enter the premises when he returned from business travels in August 2012 (Kanaan Aff, ¶ 41). Ken Padmore, Graybar's vice president, avers that Capital owes \$64,729.88 in rent and additional rent, including electric charges, legal fees related to the eviction proceeding, miscellaneous work order charges, late charges, and real estate taxes as provided under the lease (*id.*, ¶¶ 12, 15; Exhibit F, arrears report). This amount includes rent and additional rent of \$5,707.60 for the period between September 2012 and the date when Graybar was able to relet the premises on January 1, 2013, for a total of \$22,830.40 (Padmore Aff, ¶ 13). Padmore also avers that Capital owes \$40,437.50 in costs to relet the premises (*id.*, ¶¶ 18-20; Lopes aff dated 12/15/16, ¶¶ 2-3).

On May 28, 2015, Graybar served the complaint in this action on Capital and Kanaan (Padmore Aff, Exhibit A, complaint dated 5/28/15). The complaint asserts five causes of action: breach of the lease against Capital, for rent and additional rent (first cause of action); breach of the lease against Capital, for reletting costs (second cause of action); breach of the guarantee against Kanaan, for rent and additional rent (third cause of action); breach of the guarantee against Kanaan, for reletting costs (fourth cause of action); and, for attorneys' fees, costs, and expenses (fifth cause of action).

On July 18, 2015, Kanaan answered the complaint (Padmore Aff, Exhibit B, answer dated 7/18/15). Kanaan raises seven affirmative defenses: failure to state a claim (first affirmative defense); set-off (second affirmative defense); documentary evidence (third affirmative defense); payment or partial payment (fourth affirmative defense); Graybar's failure to comply with its obligations under the lease, modification, and second modification (fifth affirmative defense); failure to satisfy a condition precedent (sixth affirmative defense); and, the

statute of frauds (seventh affirmative defense).<sup>1</sup>

### Discussion

As an initial matter, Capital fails to oppose the motion for a default judgment against it on the first, second, and fifth causes of action. The records of Capital's accrued debts, submitted in conjunction with this motion, reflects that Capital owes Graybar the amounts of rent, additional rent, and reletting expenses set forth in Graybar's complaint, pursuant to the lease, modification, and second modification. Accordingly, the court grants that branch of Graybar's motion for a default judgment pursuant to CPLR 3215, and awards Graybar \$105,167.38 on its first and second causes of action. The court will hold a hearing to determine the appropriate amount of attorneys' fees and costs that Graybar is entitled to on its fifth cause of action against Capital.

As to Graybar's motion for summary judgment against Kanaan, summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Graybar argues that the guarantee, that Kanaan ratified twice after initially signing, makes Kanaan liable for unpaid rent on the third cause of action, for reletting expenses on the

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<sup>1</sup> Kanaan reserves the right to identify other defenses during litigation, and denotes this as his eighth affirmative defense. A reservation of rights, however, is not a separate affirmative defense, and, therefore, the court dismisses Kanaan's eighth affirmative defense.

fourth cause of action, and for attorneys' fees and costs on the fifth cause of action. Graybar points out the lease mentions all of these expenses, and that Kanaan agreed to pay any charges accruing under the lease.

In opposition, Kanaan argues that the modification operated as an entirely new lease and, therefore, his original guarantee did not carry over to the modification. He claims that the corporate guarantee, signed in his capacity as a corporate officer, is the only active guarantee related to the lease, and, thus, he may not be held personally liable. Further, he asserts that the ratification paragraphs in the modification and second modification violate the statute of frauds, because it does not show an actual intent to bind Kanaan personally. Alternatively, Kanaan states that, if the guarantee still binds him, his obligation is limited to charges that accrued during the Good Guy period prior to Capital surrendering the premises.

Breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "Where, as here, a creditor seeks summary judgment upon a written guaranty, the creditor need prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guarantee" (*Kensington House Co. v Oram*, 293 AD2d 304, 304-05 [1st Dept 2002]).

As an initial matter, other than his seventh affirmative defense of the statute of frauds, Kanaan does not raise any of his affirmative defenses in opposition to Graybar's motion. When the defendant fails to raise a previously pleaded affirmative defense in opposition to a motion for summary judgment, or fails to oppose dismissal of the defense, the court should dismiss the defense (*Town of N. Elba v Grimditch*, 131 AD3d 150, 159 n 4 [3d Dept 2015]) ["To the extent that defendants have not briefed any issues with respect to their remaining affirmative defenses

and counterclaims, we deem any arguments related thereto to be abandoned”]; *Starkman v City of Long Beach*, 106 AD3d 1076, 1078 [2d Dept 2013] [“Further, the first, second, and fourth affirmative defenses must be dismissed on the ground that the defendants did not oppose the dismissal of those affirmative defenses”]). Accordingly, the court grants that branch of Graybar’s motion to dismiss Kanaan’s first through sixth affirmative defenses.

Kanaan does not dispute that he explicitly agreed to guarantee the initial lease pursuant to the guarantee, in his personal capacity. Moreover, in ratifying the modification, he explicitly stated that his “guarantee of payment and performance by Tenant under the [l]ease [would] remain in full force and effect with its terms and [would] encompass all of [Capital’s] obligations under the [l]ease as modified” (guarantee at 9). This language contemplates that the guarantee would carry over to the modification and Capital’s move from room 310 to room 631.

Kanaan’s reliance on *Lo-Ho LLC v Batista* (62 AD3d 558 [1st Dept 2009]), to argue that the modification served as a new lease that extinguished his liability under the guarantee, is unavailing. In *Lo-Ho LLC*, the defendant had guaranteed a lease that expired on March 31, 2005 (*id.* at 558). A month later, the landlord and tenant entered into a new lease, that increased tenant’s rent and real estate tax payments (*id.* at 558-59). The guarantor of the original lease did not ratify his guarantee or sign a new guarantee with respect to the new lease (*id.* at 559). The Appellate Division, First Department, granted the guarantor summary judgment dismissing the complaint on the grounds that the April 2005 lease was a new lease, and the guarantee was explicitly connected to the expired lease (*id.* at 560). Moreover, the court held that the terms of the new lease would have “impermissibly increased defendant’s risk without his consent” (*id.* at 561).

Here, by contrast, the modification took effect at the time that the lease’s original term

expired (modification at 1), without any break in between. Kanaan explicitly consented to the modification and agreed that his obligation to guarantee the lease would continue (modification at 9). Moreover, Kanaan ratified the guarantee a second time as a part of the second modification (second modification at 12). Kanaan's ratification explicitly refers to both the guarantee and the corporate guarantee. This explicit reference would have been unnecessary had the guarantee expired prior to the modification taking effect. It is not, as Kanaan argues, merely that the word guarantor appears in both ratifications, but, rather, that Kanaan agreed that his obligations under his undisputed personal guarantee would remain in full force and effect. Kanaan's reliance on *Savoy Record Co. v Cardinal Export Corp.* (15 NY2d 1 [1964]) is unavailing, as there, the guarantor signed the contract in his representative capacity.

Finally, the original personal guarantee is sufficient to satisfy the statute of frauds, and extends to both the modification and second modification. As relevant to this action, the statute of frauds provides that a contract that "[b]y its terms is not to be performed within one year from the making thereof" (General Obligations Law § 5-701 [a] [1]) or "[i]s a special promise to answer for the debt, default or miscarriage of another person" (*id.*, § 5-701 [a] [2]), must be in writing "and subscribed by the person to be charged therewith" (*id.*, § 5-701 [a]). Contrary to Kanaan's argument, the guarantee is explicit, and does not purport to bind Kanaan solely in his capacity as a corporate officer. Thus, Kanaan's reliance on *Salzman Sign Co. v Beck* (10 NY2d 63 [1961]) is unavailing, because there the signatory signed only in his corporate capacity, and did not intend to bind himself personally. Moreover, as set forth above, Kanaan referenced the guarantee in his ratification of both the modification and second modification, and agreed that his obligations under the guarantee would continue in full force and effect. These actions satisfy the requirement under the statute of frauds of: (1) a written guarantee; and (2) the charging party

subscribe the guarantee. Thus, the statute of frauds does not apply to bar enforcement of the guarantee.

Accordingly, Graybar is entitled to summary judgment as to liability on the third through fifth causes of action. The court denies Kanaan's cross motion for summary judgment dismissing those claims. The court dismisses Kanaan's seventh affirmative defense of the statute of frauds. However, Kanaan is correct that the guarantee only applies to expenses accrued during the Good Guy period (guarantee, ¶ 1). As the landlord evicted Capital from the premises, and thus vacated and surrendered possession without giving ninety-days' notice, Kanaan is only liable for amounts that accrued up to 90 days after Capital left the premises on June 23, 2012, or until September 21, 2012 (*id.*). While the statement Graybar provided shows the outstanding balance as of August 1, 2012, there remains an issue of fact as to what other portion of Capital's claimed arrears and Graybar's reletting expenses accrued during the Good Guy period. Further, the guarantee provides that Kanaan is liable to Graybar for any attorneys' fees and costs incurred in seeking to enforce the guarantee (*id.*, ¶ 1). Accordingly, a trial should resolve the issues of damages on the third through fifth causes of action. The court has examined the remaining contentions of the parties and finds them to be without merit.

Accordingly, it is hereby

**ORDERED** that the branch of the motion of plaintiff SLG Graybar Mesne Lease LLC, pursuant to CPLR 3215, for a default judgment on its first, second, and fifth causes of action against defendant Capital Programs, Inc., is granted without opposition, as follows:

1. Graybar is granted judgment on the first cause of action in the amount of \$64,729.88, and on the second cause of action in the amount of \$40,437.50, together with interest at the rate

of 9% per annum from the date of May 28, 2015, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the first and second causes of action are severed, and the Clerk is directed to enter judgment accordingly;

2. Capital is found liable to Graybar on the fifth cause of action and the issue of the amount of a judgment to be entered thereon shall be determined at trial; and it is further

**ORDERED** that, it appearing to the court that Graybar is entitled to summary judgment as to liability against Kanaan on the third through fifth causes of action, and that the only triable issues of fact arising on Graybar's motion for summary judgment relate to the amount of damages to which Graybar is entitled, that branch of Graybar's motion, pursuant to CPLR 3212, for summary judgment on the third through fifth causes of action against Kanaan is granted with regard to liability, and the issue of the amount of a judgment to be entered thereon shall be determined at trial; and it is further

**ORDERED** that the action shall continue as to the third through fifth causes of action; and it is further

**ORDERED** that counsel are directed to appear for a status conference in Room 304, 71 Thomas Street, on June 19, 2018, at 11:00AM.

Dated: 4/3/2018

ENTER:

  
HON. MELISSA A. CRANE, J.S.C.  
**HON. MELISSA A. CRANE**  
J.S.C.