

Stephen LLC v Zazula
2018 NY Slip Op 30697(U)
April 19, 2018
Supreme Court, New York County
Docket Number: 153553/16
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A Goetz JSC
Justice

PART 47

Stephen LLC

-v-

Zazula, Anthony M.

INDEX NO. 153553/16

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) 1

Answering Affidavits - Exhibits No(s) 2

Replying Affidavits No(s) 3+4

Upon the foregoing papers, it is ordered that this motion is

In this action, plaintiff Stephen LLC seeks to hold defendant Anthony M. Zazula liable under the terms of the parties' guaranty. Defendant Zazula moves for summary judgment arguing that he cannot be held liable for these obligations under the terms of the guaranty. Plaintiff filed its opposition to defendant's motion one day before the original return date, in contravention of the court's briefing schedule and the notice of motion. As a result, the return date was adjourned so that defendant could submit his reply to the opposition, which he did on November 20, 2017. Although plaintiff does not provide any excuse for its late submission, in the interest of resolving this case on the merits, the court will consider plaintiff's opposition as well as its request for summary judgment.

The relevant facts are undisputed. On November 28, 2012, the tenant signed a one year lease with the plaintiff for the term January 1, 2013 to December 31, 2013. At the same time, defendant signed the guaranty, which guaranteed all of the tenant's obligations under this lease. After the lease expired, the tenant remained in the apartment as a holdover tenant and continued to pay the same rent. On January 1, 2015, the tenant entered into a "Lease Extension Agreement" with the landlord which extended the prior lease under the same terms except that the rent was increased from \$2,200 to \$2,300 per month. The tenant continued paying rent until August 2015, when he defaulted. As a result, the plaintiff commenced a summary nonpayment proceeding against the tenant in Housing Court and recovered possession of the apartment on March 1, 2016. Plaintiff now seeks to hold defendant liable under the terms of the parties' guaranty for the tenant's unpaid rental obligations for the months of August-December 2015, January-March 2016, and for the costs and expenses, including reasonable attorneys' fees, incurred in its nonpayment proceeding against the tenant and in this action to enforce the guaranty.

Dated: 4/19/18

Hon. Paul A Goetz JSC

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

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NOT ON/ONLINE *REFERENCED TO JUSTICE FOR THE FOLLOWING NO *2530N\$*

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____ Hon. P. J. A. Costello, J.S.C.
Justice

PART 47

Stephen LLC

-v-

Zabala, Anthony M.

INDEX NO. 153553/16

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Defendant argues that the terms of the guaranty limited his obligations to the 2013 lease, which expired on December 31, 2013; and the tenant’s unpaid rental obligations arose after the expiration of this lease, he cannot be held liable under the terms of the guaranty, which according to defendant lapsed when the lease expired. However, the guaranty that defendant signed is broad and explicitly states it remains in effect “if the lease is subsequently changed, amended, modified, or renewed” or if the tenant “hold[s] over after expiration or termination of the term.” Thus, contrary to defendant’s contention, the guaranty did not lapse when the lease expired on December 31, 2013 but continued during the holdover period in 2014. *24 St. Marks Owners, LLC v. Sunstar Global Food, Inc.*, 2008 N.Y.Misc. Lexis 9479, at *1011, 2008 NY Slip. Op. 31683(U) (Sup. Ct. N.Y. Cty. June 18, 2008). Under its terms, the guaranty continued to remain in effect after the plaintiff and tenant entered into the “Lease Extension Agreement”, which effectively renewed the 2013 lease and for the holdover period following the expiration this lease on December 31, 2015.

Defendant’s reliance on *Lo-Ho LLC v. Batista*, 62 A.D.3d 558 (1st Dep’t 2009) is misplaced as this case is factually distinguishable. First, unlike the holdover provision in *Lo-Ho*, which explicitly provided that “holding over shall not be deemed to extend or renew the Lease”, the holdover provision in the 2013 lease merely provided for an increased rent for any holdover period and thus the tenancy created during the holdover period was a month to month tenancy subject to the same covenants as those contained in the expired lease. *City of New York v. Pennsylvania Railroad Co.*, 37 N.Y.2d 298, 300 (1975). More importantly however, unlike the guaranty in *Lo-Ho*, which unquestionably lapsed during the holdover period, the guaranty in this case explicitly stated that it would remain in effect during any such period and thus did not lapse when the lease expired. Finally, unlike the second lease in *Lo-Ho*, which explicitly stated that the prior lease had expired, the “Lease Extension Agreement” clearly intended to continue all terms in the 2013 lease and thus should not be considered a new lease.

Dated: 4/19/18

see page 1, J.S.C.

OUTLINE PAGE IS BEING OPENED REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____ Hon. Pt. A. Coth. JSC
Justice

PART 47

Stephen LLC
-v-
Zezula, Anthony M.

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Defendant’s argument that the guaranty cannot apply to the Lease Extension Agreement because it increased the tenant’s rent is unavailing. Defendant explicitly agreed that the guaranty would apply even if the lease was subsequently changed without any notice to the guarantor. Moreover, the defendant’s risk under the Lease Extension Agreement was substantially reduced, at least during the 2015 lease term, because the tenant was no longer a holdover tenant. As a result, plaintiff could no longer charge the tenant, and by extension defendant, double the monthly rent, which it was permitted to do under paragraph 24 of the lease. Finally, with respect to the collateral estoppel/res judicata argument, defendant did not submit any evidence regarding the Housing Court proceeding and thus has failed to show that the Housing Court even considered the issue of the tenant’s non-payment, much less whether plaintiff had a “full and fair opportunity” to litigate this issue. *See generally Buechel v. Bain*, 97 N.Y.2d 295 (2001). In any event, the process server’s affidavit from the Housing Court proceeding, which was submitted by plaintiff, indicates that the tenant was served by conspicuous service after only two attempts were made to personally serve tenant at the premises, and is sufficient to raise an issue of fact regarding whether the process server exercised the due diligence required for the Housing Court to obtain personal jurisdiction over the tenant. *Borg v. Feeley*, 56 Misc.3d 128(A) (App. Term 1st Dep’t, 2017); *Cornhill LLC v. Sposato*, 56 Misc.3d 364 (N.Y. City Ct. 2017).

MOTION/ORDER TO SHOW CAUSE REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

Dated: 4/19/18

see page 1, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Hon. P. J. A. Scola, J.S.C.

PRESENT: _____
Justice

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Stephen LLC

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Zazula, Anthony M.

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In its opposition papers, plaintiff requests that the court search the record and award it summary judgment on the four causes of action in the complaint. With respect to the first and second causes of action based on nonpayment, plaintiff has demonstrated the tenant's default on its rental obligations by submitting the affidavit of the landlord in which he states that tenant failed to pay rent from August 1, 2015 to March 1, 2016, when landlord regained possession of the apartment. Further, under paragraph 24 of the lease, plaintiff is entitled to double the rent for the holdover period from January-March 2016. Defendant has not submitted any evidence to rebut the landlord's affidavit and thus fails to raise a triable issue of fact concerning the tenant's default. With respect to the third and fourth causes of action for costs and attorneys fees, plaintiff claims that the lease requires the tenant to indemnify the landlord for all costs and expenses, including attorneys' fees in connection with tenant's default. However, plaintiff does not cite to the specific provision of the lease which states this and the court, upon searching the record, could not find any such provision in the lease or the guaranty. Accordingly, it is

ORDERED that defendant's motion is denied with respect to the first and second causes of action and granted with respect to the third and fourth causes of action, which are hereby dismissed; and it is further

ORDERED that plaintiff is awarded summary judgment on its first and second causes of action and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the sum of \$ 25,300, with interest at the rate of 9% per annum from September 1, 2015, until entry of judgment, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk.

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See page 1, J.S.C.

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NOTION/AGE IS *SPEOT/ALU REFERED TO JUSTICE FOR THE FOLLOWING *REASON(S):