SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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FORTY SECOND RESIDENTIAL, LLC,

Plaintiff,

-against-

NA KONG a/k/a VICKY KONG,

Defendant.

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Index No. 152632/2017
Motion Seq: 001

DECISION & ORDER

HON. ARLENE P. BLUTH

The motion by plaintiff to amend the complaint to include all monies due, striking defendant's defenses and granting plaintiff summary judgment is granted. The cross-motion by defendant to consolidate and transfer this case to Queens is denied.

Background

This dispute arises out of a lease that commenced in August 2016 between plaintiff and Rainbow Bridge Health Inc. ("Rainbow") for premises located on the second floor at 20 East 42nd Street. As part of the lease, defendant entered into a guaranty with plaintiff on August 29, 2016, in which defendant "hereby absolutely, unconditionally, and irrevocably guarantees to Landlord . . . [i] the full and prompt payment of all Fixed Rent, Additional Rent . . . and all other charges and sums (including, without limitation, Landlord's attorneys' fees and disbursements) payable by Tenant through the date that the Premises shall have been surrendered to Landlord . . . [and] [ii] any sum due by Tenant for use and occupancy of the Premises for the period from and after the date of the termination of the Lease" (NYSCEF Doc. No. 17, ¶ 1). The guaranty also provided that 'This Guaranty is an absolute and unconditional guaranty of payment and

performance" and that the "Guarantor absolutely, irrevocably and unconditionally waives any and all rights it may have to assert any claim, defense, set-off, counterclaim whatsoever with respect to the obligations of any other party, including Tenant" (*id.* ¶¶ 2, 8).

Plaintiff terminated the lease on December 2, 2016 and commenced a holdover proceeding against Rainbow– plaintiff terminated the lease after finding out that defendant had commenced alterations at the premises without showing plaintiff the plans or permits. On January 5, 2018, after a five day bench trial, Justice Cannataro found that Rainbow "violated a substantial obligation under the lease by engaging in unauthorized renovations of the premises and that respondent's tenancy was properly terminated by a notice of termination on or about December 2, 2016" (NYSCEF Doc. No. 29). The premises were surrendered on August 28, 2017, prior to Justice Cannataro's decision.

Plaintiff moves to amend the complaint to include rent that accrued after the filing of the complaint. Plaintiff also moves for summary judgment pursuant to the guaranty for the rent due, commissions, as well as attorneys' fees.

Defendant cross-moves to *inter alia* transfer and consolidate this matter with a case in Queens County and to deny plaintiff's summary judgment motion on the ground that the "underlying lease was a sham and the alleged guaranty was built upon a sham relationship." Defendant also moves to restrain plaintiff's counsel "Stephen Sperber, Esq. from the kind of 'behind the scenes' manipulation, steering racism and influence peddling that impaired the fairness and proper guarantees of due process in the original landlord-tenant Civil Court litigation" (NYSCEF Doc. No. 39 at 3-4).

Leave To Amend

Under CPLR 3025(b), leave to amend "shall be freely given upon such terms as may be just including the granting of costs and continuances." Here, plaintiff moves to amend to include rent arrears that became due after the complaint was filed– this branch of plaintiff's motion is granted.

Summary Judgment

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96

[2003]).

"A guaranty is a promise to fulfill the obligations of another party, and is subject to the ordinary principles of contract construction" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492, 15 NYS3d 277 [2015]). "Absolute and unconditional guarantees have in fact been found to preclude guarantors from asserting a broad range of defenses. This Court has acknowledged the application of these absolute guaranties even to claims of fraudulent inducement in the execution of the guaranty" (*id.* at 493 [internal quotations and citations omitted]).

Here, plaintiff moves for summary judgment based on the guaranty signed by defendant (*see* NYSCEF Doc. No. 17). Plaintiff seeks use and occupancy for December 2016 through November 2017, late fees for failure to pay rent and water charges. Plaintiff also seeks recovery for rent concessions, brokerage fees and attorneys' fees (this total includes invoices for the five day trial in Civil Court) (*see* NYSCEF Doc. Nos. 31 [breakdown of amount due], 32 [water bills] and 33[attorneys' invoices]).

In opposition, defendant does not deny signing the guaranty. Instead, defendant makes numerous arguments about why the underlying lease might be invalid. Defendant argues that plaintiff "was without authority to enter into any lease with Rainbow Bridge Health, Inc." (NYSCEF Doc. No. 40 at 7). Defendant even speculates that plaintiff's counsel "was able to steer the case to favored judges" (*id.* at 8-9). Defendant also points to the surrender agreement in which the parties agreed that "there shall be no prospective or future use & occupancy due, if any, as a result of the transfer herein, Respondent and Guarantor having relinquished possession" (NYSCEF Doc. No. 67 ¶ 4).

In reply, although plaintiff claims it never intended to waive prospective sums due under the lease in the surrender agreement, it admits signing the document and now only seeks $169,639.83 (NYSCEF Doc. No. 63 at 4). Plaintiff provides an updated breakdown of the amount due reflecting the fact that it no longer seeks use and occupancy after the surrender date and including an additional invoice for attorneys' fees (*see* NYSCEF Doc. No. 75).

Setting aside defendant's conspiracy theories, her affidavit in opposition does not create an issue of fact with respect to the guaranty. To the extent that defendant is dissatisfied with Justice Cannataro's decision, defendant can, of course appeal that decision. But Justice Cannataro found that the lease was properly terminated– this of course means that there was a valid lease. This Court cannot act as an appellate court for a Civil Court decision.

This Court is only concerned with whether there was a valid guaranty that required defendant to pay a tenant's liabilities. Plaintiff submitted a signed copy of the unconditional guaranty (NYSCEF Doc. No. 17) and defendant does not deny that she signed it. Therefore, defendant is liable pursuant to the guaranty.

The Court also denies defendant's cross-motion to consolidate this matter with a pending Queens case (brought by Rainbow and defendant) and transfer this case to Queens because it is moot. Justice Butler dismissed that complaint in a decision dated May 3, 2018 (*see* Index No. 712325-2017, NYSCEF Doc. No. 82).

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion to amend the complaint is granted; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment is granted and the

Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $169,639.83, together with interest at the rate of nine percent per annum from the date of August 28, 2017 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 upon presentation of proper papers therefor; and it is further

ORDERED that defendant's cross-motion is denied.

This is the Decision and Order of the Court.

Dated: June 4 **, 2018**
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH