NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PARTY 7

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625 W. 55 LLC,

Plaintiff,

-against-

GARY B. FLOM and VENJAMIN NILVA,

Defendants.

Index No. 652202/2017
DECISION/ORDER
Motion Seq. No. 002

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for summary judgment.

Papers	**NYCSEF Documents**
Summons and Complaint	1
Notice of Withdrawal of Motion	16
Answer	19
Notice of Motion (# 002)	23
Affidavit in Support of Motion – Robert Fisher	24 (25-29)
Affirmation in Support of Motion – Mark Krassner	30 (31-32)
Affidavit in Opposition to Motion	34 (35-39)
Affirmation in Reply	42 (43)

Goldstein & Altschuler, New York (Mark Krassner of counsel), for plaintiff
Borsen Law LLC, New York (Andrew Borsen), for defendants.

Gerald Lebovits, J.

Plaintiff, 625 W. 55 LLC, moves under CPLR 2112 for summary judgment against defendants Gary B. Flom and Venjamin Nilva. Upon the foregoing papers, it is ordered that plaintiff's motion is granted in part and denied in part.

Background

Non-party Bicom NY, LLC is tenant-in-possession of 625-35 West 55th's ground floor under a standard form store lease dated January 20, 2015 (Compl. at ¶ 6.) Bay Ridge Automotive, LLC signed a written promise to perform Bicom's contractual obligations under the lease if Bicom fails to meet its obligations. Flom and Nilva signed an additional limited guaranty promising to fulfill Bicom and Bay Ridge's contractual obligations. (Compl. at ¶ 13.) Plaintiff,

owner of 625-35 West 55th Street, commenced this action on April 25, 2017, against the guarantors Bay Ridge, Flom, and Nilva to recover money owed under the lease following Bicom's default. (Aff. in Support, at ¶ 13.)

On July 10, 2017, Bicom and Bay Ridge filed for chapter 11 bankruptcy. Plaintiff withdrew this motion as to Bay Ridge. The motion proceeds as to Flom and Nilva as the individual guarantors. (Notice of Withdrawal of Motion.) Plaintiff alleges that as of October 1, 2017, defendants owe plaintiff $430,040.26 in fixed rent and additional rent, $112,100 in brokerage commission, and $34,333 in rent concession. (Aff. in Support, at ¶ 14, 17.) Bicom vacated the premises in July 2017 and the Bankruptcy Court issued an order "rejecting the underlying lease *nuns pro tunc* to August 4, 2017." (Aff. in Opp., at ¶ 11.)

Plaintiff moves for summary judgment to (1) recover from defendants, jointly and severally, $576,473.25 plus interest; (2) dismiss the defendants' affirmative defenses; and (3) recover attorney fees and costs. (Aff. in Support, at ¶ 2.)

Discussion

Plaintiff argues that defendants' lease obligations are ongoing, as personal guarantors, because tenant Bicom failed to provide plaintiff with the required notice and payments at the time it vacated the premises. (Aff. in Support, at ¶ 7.) The limited guaranty states:

"1. FOR VALUE RECEIVED, in consideration for, and as an inducement to (the "Lease") with **BICOM NY, LLC** . . . the undersigned . . . being the [partners, members, officers or the shareholders] of Tenant hereby jointly and severally absolutely, unconditionally and irrevocably guarantee to Landlord all Fixed Rent and Additional Rent and other charges payable by Tenant under the Lease . . . up to and including the Surrender Date. **The 'Surrender Date' means the date that Tenant shall have performed all of the following**: (a) vacated and surrendered the Demised Premises to Landlord free of all subleases, licensees, tenancies, or claims of right therein and in broom clean condition, and Tenant has so notified Landlord or such agents in writing not less than one hundred twenty (120) days prior thereto, (b) delivered the keys . . . and (c) made payment in full to Landlord of (i) all Accrued Rent due to the date which is the latest to occur of the performance by Tenant of (a) or (b) above, (ii) the unamortized portion of the brokerage commissions attributable to the Lease, and (iii) the unamortized portion of the rent concession, in each case corresponding to the month in which falls the latest to occur of the performance by Tenant of (a) or (b) above.

"8. Guarantor further agrees that if Tenant becomes insolvent or shall be adjudicated as bankrupt or shall file for reorganization or similar relief or if such petition is filed by creditors of Tenant, under any present or future Federal or State law, **Guarantor's obligations hereunder may nevertheless be enforced against the Guarantor.** The termination of the Lease pursuant to the exercise of any rights of a trustee or receiver in any of the foregoing proceedings, **shall not affect Guarantor's obligation hereunder** . . . ." (Aff. in Support, Exhibit A, Limited Guaranty, at ¶ 1, 8) (emphasis added.)

A discharge of debt does not affect the liability of any other entity for that debt. (11 USC § 524 [e].) Nothing in the Bankruptcy Code prohibits a landlord from proceeding against a guarantor for the full amount of actual damages, so long as the guarantor is not a debtor in bankruptcy. (*Kopolow v P.M. Holding Corp.*, 900 F2d 1184, 1191 (8th Cir. 1990.) A guaranty contract should be interpreted to reflect the parties' intentions. (*Cit Group/Credit Finance, Inc. v Weinstein*, 261 AD2d 203, 204 [1st Dept 1999].) When the parties' intent can be ascertained from the agreement's face, interpretation is a matter of law, and "the case is ripe for summary judgment." (*Am. Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990].) The limited guaranty clearly outlines how to "surrender" under the lease and that the guarantor's obligations are not terminated by a tenant's filing of bankruptcy. (Plaintiff's Aff. in Support, Exhibit A, Limited Guaranty, at ¶ 1, 8.) When Bicom vacated the premises, there were numerous outstanding payments for accrued rent. Neither the brokerage commissions nor the rent concession were paid to plaintiff.

Defendants argue that on June 23, 2017, the parties agreed to a settlement stipulation, in which defendants consented to a "Final Judgment of Possession of $282,732.71." Defendants allege that this represents all rent and additional rent owed through June 30, 2017, plus legal fees. (Aff. in Opp., at ¶ 6.) This alleged settlement is invalid. First, neither plaintiffs nor plaintiffs' counsel signed the stipulation. Second, the only judgment filed with New York County Civil Court was a landlord and tenant judgment warranting eviction of Bicom from the premises. (Aff. in Reply, Exhibit A, Landlord and Tenant Judgment.) Third, the email on which defendants rely is insufficient to prove that plaintiff accepted the stipulation. Defendants argue that the settlement was ratified by plaintiff's requesting an initial payment, but the email message provided to this court is vague and ambiguous.[1] Nothing in the email's contents or subject line refers to the instant action. Also, the email's author is associated with Wilk Auslander LLP, not Goldstein & Altschuler, attorneys for plaintiff. (Aff. in Opp., Exhibit B.)

Defendants argue that, under the Bankruptcy Court's order terminating the lease as of August 15, 2017, plaintiff cannot request payment through the current date. (Defendant's Aff. in Opp., at ¶ 11.) But even though the order states that the lease is terminated, termination does not mean that the tenant properly "surrendered" under the lease's terms. The limited guaranty defendants signed explicitly provides that the "undersigned . . . unconditionally and irrevocably guarantee to Landlord all Fixed Rent and Additional Rent and other charges payable by Tenant under the Lease . . . up to and including the Surrender Date. The 'Surrender Date' means the date that Tenant shall have performed all of the following . . . ." (Aff. in Support, Exhibit A, Limited Guarantee, at ¶ 1.) The language is clear and unambiguous. Defendants do not dispute that they are the non-debtor personal guarantors under the lease; Bicom and Bay Ridge's bankruptcy filing did not relieve them of their obligations. Defendants must pay the $430,040.26, plus interest, in accrued rent and additional charges provided by the Customer Open Balance. (Aff. in Support, Exhibit C, Customer Open Balance). This represents the rent and additional charges owed from December 31, 2016, to October 1, 2017. (*Id.)* Plaintiff may recover additional monies owed up to the lease expiration, surrender of the lease, or date of re-rental, whichever first occurs. (Plaintiff Aff. in Reply, at ¶ 10.)

[1] The email reads "Thank you. No payments were made pursuant to the stipulation?" (Aff. in Opp., Exhibit B.)

During oral arguments in this court, plaintiff amended its request for $112,100 in brokerage commission to $89,666.69, the amount in the commission invoice. (Aff. in Support, Exhibit D, Commission Invoice.) This court accepts that amendment. Defendants argument that section 55[2] of the lease applies is irrelevant. The limited guaranty specifies that to effectuate surrender of the lease, paying the "unamortized portion of the brokerage commissions" is required. (Aff. in Support, Exhibit A, Limited Guaranty, at ¶ 1.) If defendants wish to surrender the lease, they must pay the brokerage commission.

The limited guaranty also provides, in that same section, that the "unamortized portion of the rent concession" must be paid to surrender all obligations under the lease. (Aff. in Support, Exhibit A., Limited Guaranty, at ¶ 1.) The rent concession refers to the amount payable to the owner upon termination of the lease. Plaintiff claims that it is entitled to $34,333. But this court is unable to verify the requested amount. Plaintiff does not state in its moving papers how it calculated this number. Considering plaintiff's prior error in calculating the brokerage commission, this court cannot grant plaintiff the requested amount without substantiation.

Defendants argue that the letter of credit issued to Bicom, amounting to $166,667, should be credited to plaintiff's calculation of damages. (Aff. in Opp., at ¶ 14.) Yet ¶ 2 of the limited guaranty provides that "any security deposit under the Lease shall not be credited against amounts payable by Tenant, or by Guarantor under the terms of this guarantee." (Aff. in Support, Exhibit B, at ¶ 2.) Paragraph 4 provides, in part, that "[t]his Guarantee may be enforced without the necessity of resorting to or exhausting any other security or remedy." The lease rider provides that "in lieu of a cash deposit, Tenant is . . . delivering the security deposit required pursuant to Article 32 . . . to Owner in the form of a clean, irrevocable, non-documentary and unconditional letter of credit . . ." (Aff. in Support, Exhibit A, at ¶ 66.) Because the letter of credit is used as a substitute to a cash security deposit, it is not necessary to credit it to the amount defendants owe.

Defendant's affirmative defenses are unsubstantiated and conclusory allegations. They are insufficient to defeat plaintiff's summary judgment motion.

Regarding attorney fees, Section 9 of the limited guaranty unambiguously provides that the guarantor will pay attorney fees, court costs, and other expenses landlord incurred in enforcing or attempting to enforce this guaranty.

Settle Order.

Dated: July 16, 2018

HON. GERALD LEBOVITS
J.S.C.

J.S.C.

[2] Section 55 states "owner shall pay the Broker a commission in connection with this Lease pursuant to a separate agreement." (Aff. in Support, Exhibit A, Rider to Lease, at ¶ 55.)