

**75 Broad, LLC v Ramgopal**

2018 NY Slip Op 32820(U)

November 7, 2018

Supreme Court, New York County

Docket Number: 150260/2013

Judge: Shlomo S. Hagler

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liability under the Guaranty to unpaid rent, and otherwise dismissing the complaint. 75 Broad opposes defendants' motion.

In Motion Sequence Number 010, 75 Broad seeks partial summary judgment, pursuant to CPLR 3212, holding Ramgopal liable on its first cause of action for breach of guaranty. 75 Broad also seeks to sever its remaining causes of action, as well as an assessment of damages, and its reasonable attorneys' fees, for separate trial under CPLR 3212 (e). Defendants oppose plaintiff's motion.

### **Background**

75 Broad is the owner and landlord of the building located at 75 Broad Street, in the County, City and State of New York (see Amended Complaint, dated July 8, 2015 ["Complaint"], ¶ 1).

Nonparty Marco Polo Network, Inc. ("Marco Polo" or "Tenant") entered a long-term office lease with 75 Broad, dated as of December 20, 2006 ("Lease" [Ramgopal Affidavit, Exhibit "1"]), under which Marco Polo occupied part of 75 Broad Street's 15th floor (the "Premises") (Complaint ¶ 12).

Under the Lease, Marco Polo agreed, among other things, to pay 75 Broad fixed rent, additional rent, and, upon default, an amount 75 Broad characterizes in its pleading as "liquidated damages" (*id.* ¶ 13). The Lease also required Marco Polo to deliver to 75 Broad a letter of credit in the amount of \$469,920.00, as security for its performance (*id.* ¶ 14).

It is undisputed that in March 2012, Marco Polo ran into financial difficulties which caused it to fall behind on its lease payments. In exchange for 75 Broad's forbearance, Marco Polo and 75 Broad entered the first of several lease modifications (*id.* ¶ 15). Pursuant to the First Lease Modification, 75 Broad agreed to (i) draw down on Marco Polo's letter of credit, given as security and which had been reduced to \$391,600, in order to pay a past due rent and (ii) pre-pay rent due in upcoming months of March, April and May 2012 (*id.* ¶ 16; First Lease Modification Agreement, **SECOND** ["First Lease Modification"]) [Ramgopal Affidavit, Exhibit "2"]. 75 Broad also required Ramgopal, as Marco Polo's "Principal", to execute a personal guaranty, securing Marco Polo's payment and security obligations under the Lease (Complaint ¶ 30; First Lease Modification, **THIRD**).

Under the terms of the guaranty, dated March 7, 2012; ("Guaranty"), Ramgopal, as "Principal" and "Guarantor," "guarantee[d]" to 75 Broad "the payment and performance of Tenant's obligations under and in accordance with the Lease, including, without limitation, the payment of fixed and additional rent and the Replacement Guarantee Sum" (Complaint ¶ 31, quoting Guaranty ¶ C [1] [Ramgopal Affidavit, Exhibit "3"]).

That same paragraph of the Guaranty also provides that Ramgopal, as "Principal hereby acknowledges and agrees that the

Replacement Guarantee Sum shall be deemed to have accrued prior to Tenant vacating and surrendering the Demised Premises to Landlord" (Guaranty ¶ C [1]). The Guaranty further provides that "[t]his is a guaranty of payment and not only of collection." The Guaranty states that "[a]ny security deposit under the Lease shall not be credited against amounts payable by Tenant or by Principal [Ramgopal] under this Guaranty" (*id.*).

The Guaranty also provides that Ramgopal's obligations "are unconditional, are not subject to any set-off or defense based on any claim [guarantor] may have against Landlord, and will remain in full force and effect without regard to any circumstance or condition. . ." (Complaint ¶ 32, quoting Guaranty ¶ C [2]).

Pursuant to the Guaranty, Ramgopal promised to reimburse "all costs and expenses incurred by Landlord in connection with the enforcement of th[e] Guaranty, including, without limitation, reasonable attorneys' fees" (Guaranty ¶ C [4]).

The Guaranty provides that it, and all of Ramgopal's obligations thereunder, "shall terminate immediately upon the timely (*i.e.*, by May 1, 2012, time being of the essence) delivery to Landlord, by either Tenant or [Ramgopal], of the Replacement Guarantee in the amount of the Replacement Guarantee Sum" (*id.* ¶ C [1]).

The First Lease Modification enabled Marco Polo to draw against its original security deposit to pay down amounts past due (Complaint ¶ 16). It also required Ramgopal to execute the Guaranty, as Marco Polo's "Principal," and for Marco Polo to

"deliver to Landlord, on or prior to May 1, 2012, time being of the essence, a replacement Guarantee ('Replacement Guarantee') in the amount of \$391,600 less the amount of the Additional Security Deposit, if any, remaining as of the date such Replacement Guarantee is delivered to Landlord (the 'Replacement Guarantee Sum') . . . , which shall serve as the Guarantee under the Lease."

(First Lease Modification, ¶ **THIRD**.)

Marco Polo's continuing financial difficulties resulted in its failure to deliver the Replacement Security Sum due under the First Lease Modification by May 1, 2012. The parties entered into a Second Lease Modification Agreement ("Second Lease Modification") wherein Marco Polo promised to pay \$160,000 of the unpaid \$360,000 by May 4, 2012 and the remainder by July 31, 2012, time being of the essence (Complaint ¶¶ 18-20; [Ramgopal Affidavit, Exhibit "4"]).

Marco Polo delivered \$160,000 in partial payment of the Replacement Security Sum on May 11, 2012 but failed to pay rent or deliver the remainder of the Replacement Security Sum (*id.* at 21; Jerome Affidavit in support of 75 Broad's motion, sworn to on July 31, 2017 [Jerome July 2017 Affidavit] ¶ 24).

On or about July 13, 2012, the parties entered into a Third Lease Modification Agreement ("Third Lease Modification") [Ramgopal Affidavit, Exhibit "6"]. Pursuant to the Third Lease Modification, \$57,691.30 of the \$160,000 Replacement Guaranty Sum previously paid by Marco Polo pursuant to the Second Lease Modification, was applied towards the payment of rent for June and July 2012 and Marco Polo was required to pay the remainder of the unpaid \$391,600 Replacement Guarantee Sum (\$289,291.30) to 75 Broad by September 30, 2012, time being of the essence (Third Lease Modification, **SECOND**).

75 Broad alleges that Marco Polo failed to pay the remaining Replacement Security Sum (\$289,291.30) by September 30, 2012. Marco Polo made no further payments, for any purpose, after May 2012. Eventually, Marco Polo's failure to pay past-due rent, additional rent and other charges resulted in the depletion of Marco Polo's security, in its entirety, in satisfaction of past due rent and additional rent through September 2012. As such, "all Tenant's obligations that accrued on or after October 1, 2012 were never satisfied" (Jerome Affidavit, in support of 75 Broad's motion, sworn to on July 31, 2017 [Jerome July 2017 Affidavit] ¶ 28).

On or about December 6, 2012, 75 Broad sent a notice of default to Marco Polo and Marco Polo failed to respond (*id.* ¶¶

29-30). It is undisputed that on December 18, 2012, Marco Polo vacated the Premises (*id.* ¶ 31; Ramgopal Affidavit ¶ 19).

In Plaintiff's first cause of action asserted against Ramgopal for breach of a "personal guaranty, 75 Broad alleges that Marco Polo defaulted on its obligations, by failing to pay "the fixed rent, additional rent, or liquidated damages" due under the terms of the Lease, and failed to pay "the Replacement Security Sum" (Complaint ¶ 49). 75 Broad alleges that Ramgopal guaranteed Marco Polo's payment of these obligations but, despite due demand, breached the Guaranty (*id.* ¶¶ 51-54).

75 Broad seeks damages in excess of \$500,000, plus interest and its costs and expenses, including reasonable attorneys' fees, incurred in its enforcement of the Guaranty (*id.* ¶¶ 51-55).

75 Broad asserts four other causes of action against Ramgopal and defendant McCallion, alleging that they violated Sections 273, 275, 276, and 276-a of New York's Debtor and Creditor Law, by transferring Ramgopal's "interests in two very valuable real estate assets" to Ms. McCallion "for no consideration whatsoever and with the intent of evading Ramgopal's liability to 75 Broad as a result of this action" (*id.* ¶¶ 34-47, 56-75).

In their Second Amended Verified Answer, dated August 11, 2015, defendants deny 75 Broad's allegations, present 23 "affirmative defenses," and assert one counterclaim, alleging that 75 Broad overcharged Marco Polo for fixed rent and thus must refund its overcharges under the terms of the Lease (Sartorius Affirmation in Support of Motion Sequence 010, Exhibit "B").

In Motion Sequence 009, defendants move for partial summary judgment pursuant to CPLR 3212, seeking to limit Ramgopal's liability under the Guaranty to \$56,441.64 in unpaid rent, and otherwise dismissing 75 Broad's Complaint.<sup>1</sup> That sum is the amount that defendants assert was outstanding on October 29, 2012, when Hurricane Sandy hit Manhattan. Defendants allege that the storm rendered the Premises unusable and relieved Marco Polo of its obligation to pay any further rent, under the Lease's casualty event provisions.

In Motion Sequence 010, 75 Broad seeks partial summary judgment pursuant to CPLR 3212, against Ramgopal pursuant to its first cause of action for breach of the Guaranty in an amount not less than \$557,311.02 plus interest and reasonable attorneys' fees, as provided for in the Guaranty. 75 Broad also

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<sup>1</sup> Defendants allege that they, rather than nonparty Marco Polo, be awarded damages for these alleged overcharges. Defendants do not address the counterclaim in their motion for partial summary judgment.

seeks severance of its remaining causes of action and an Order directing an inquest to determine assessment of reasonable attorneys' fees and costs.

### Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) [internal citations omitted]).

To prevail at summary judgment, the movant must produce evidentiary proof in admissible form sufficient to warrant granting summary judgment in its favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once the movant makes its showing, the burden shifts to the opposing party, to submit proof in admissible form sufficient to show a question of fact exists, requiring trial (*Kosson v Algaze*, 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmovant (*Prine v Santee*, 21 NY3d 923, 925 [2013]). Party affidavits and other proof must be examined carefully "because summary judgment is a drastic remedy and should not be granted where there is any

doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]). Still, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment" (*id.*).

The resolution of the parties' summary judgment motions turns on the scope of Ramgopal's liability, as Marco Polo's Guarantor under the Lease. "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., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015] [citations and internal quotation marks omitted]). "Under those principles, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.* at 493 [citation and internal quotation marks omitted]).

"Guaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guaranties that are 'absolute and unconditional,' have been consistently upheld by New York courts" (*id.* [citations omitted]).

75 Broad argues that there is no issue of material fact to be resolved, given that the Guaranty is unconditional and

remained in effect notwithstanding any defense to or limitation on the liability of Marco Polo, as Tenant.

75 Broad further contends that Hurricane Sandy did not relieve Ramgopal of his obligations under the Guaranty. It argues that Ramgopal is liable because the Premises had not been "Totally Damaged or Rendered Wholly Unusable," under the terms of Section 9 of the Lease. In addition, 75 Broad maintains that the casualty provisions of Section 9 were not triggered because Marco Polo did not give requisite notice.

Finally, 75 Broad argues that Ramgopal owes the "Replacement Guaranty Sum" of \$391,600, because he agreed to pay that amount on Marco Polo's default, regardless of whether the Premises were surrendered before payment. The Guaranty by its terms provides that "the Replacement Guarantee Sum shall be deemed to have accrued prior to Tenant vacating and surrendering [the] Premises to Landlord" (Guaranty, ¶ C [1]).

Defendants argue against Ramgopal's liability by asserting claims and defenses belonging to Marco Polo. For example, defendants argue that Ramgopal's liability as Guarantor should be limited to the \$56,441.64 in rent that Marco Polo allegedly left unpaid through October 29, 2012, when Hurricane Sandy hit and rendered the Premises unusable.

Defendants also contend that Ramgopal should not be held liable for any rent charges after that date because 75 Broad

failed to give Marco Polo proper notice under the Lease that it had restored the Premises for Marco Polo's occupancy. In the alternative, defendants assert Ramgopal should not be held liable for unpaid rent accruing after December 18, 2012, when 75 Broad allegedly accepted Marco Polo's surrender of the Premises.

Finally, defendants argue that Ramgopal is not obligated to replenish Marco Polo's "security deposit" under the Guaranty. Defendants maintain that after Marco Polo vacated the Premises, the Lease was terminated and Marco Polo's obligation to replenish the security deposit terminated with the Lease. As such, defendants argue that 75 Broad would not be entitled to replenishment of the security deposit which would serve no purpose in the absence of a continued tenancy.

Defendants' arguments are unavailing, as they are all premised on rights belonging to tenant Marco Polo. Ramgopal cannot avoid liability under the Guaranty by asserting Marco Polo's defenses (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A.*, 25 NY3d at 493, citing *Walcutt v Clevite Corp.*, 13 NY2d 48, 55 [1963] ["guarantor may not raise as counterclaims or defenses those claims belonging to the principal obligor"]).

Here, the Guaranty provides that Ramgopal's obligations are 'unconditional' and shall remain in effect notwithstanding "any defense to or limitation on the liability or obligations of [75

Broad] under the Lease (Guaranty ¶ C [1]). Ramgopal's payment obligations under the Guaranty are not subject to any defense of limitation on liability that 75 Broad, as tenant, could raise, such as the effect of Super Storm Sandy. Only Marco Polo can raise such defenses.

With respect to Ramgopal's liability to pay the Replacement Guaranty Sum, the Guaranty by its terms provides that Ramgopal, as Guarantor, expressly "acknowledges and agrees that the Replacement Guarantee Sum shall be deemed to have accrued prior to Tenant vacating and surrendering the Demised Premises to Landlord" (Guaranty ¶ C [1]; see Tr. Of Oral Argument ("Tr.") 10:11-14). Moreover, that section of the Guaranty also provides that the obligations under the Guaranty "shall terminate immediately upon the timely, []delivery to Landlord, by either Tenant or [Ramgopal], of the Replacement Guarantee in the amount of the Replacement Guarantee Sum" (Guaranty, ¶ C[1]). Therefore, the obligation to pay the security deposit terminates only when the monies are paid by either the Tenant or the Guarantor (Tr. 31:12-16).

Ramgopal cites the decision of Hon. Judith J. Gische, J.S.C. in *413 West 14 Assoc. v Santorelli* (2011 NY Slip Op 32105 [U] [Sup Ct, NY County, July 29, 2011]), as the basis for his contention that, by vacating the Premises and thereby avoiding accrual of additional unpaid rental and other charges, Marco

Polo made it unnecessary for it, or Ramgopal, to replenish the "security deposit" (see Tr. at 9:5-10:7).

The Guaranty differs from the relevant provision of the guaranty in *Santorelli*, which stated that,

"[I]n the event this guaranty must be enforced, a credit against any monies due Tenant shall be granted. Any such credit will be comprised of the amount of any security deposit remaining and held by the Owner after application to cover premises damage and any additional rent due. A credit shall be granted as well as for any advance rent received, by the Owner for a period beyond the vacatur date."

(*413 West 14 Assoc. v Santorelli, supra*, 2011 NY Slip Op 32105 (U), at \*3 [italics in original]).

Here, in contrast there is unequivocal language in the Guaranty, that the Replacement Guarantee Sum accrues prior to the Tenant vacating the Premises, and any security deposit under the Lease shall not be credited against amounts payable by Ramgopal.

Accordingly, 75 Broad's motion for partial summary judgment is granted and defendants' motion for partial summary judgment is denied. Ramgopal is liable to 75 Broad for the Replacement Guaranty Sum (see Tr. at 30:26-31:13, 31:26-32:13, 17-22), the amount of which shall be determined at a later damages hearing.

Defendants have admitted that Ramgopal, as Guarantor, is liable to 75 Broad for some unpaid rent, but assert that his liability can be no more than \$56,441.64, which they maintain is

the amount due and owing as of October 29, 2012, when Hurricane Sandy struck New York City (see Tr. at 20:4-21).

75 Broad disputes this contention, claiming that it is entitled to recover unpaid rent for the months of October, November and December 2012, in the amount of \$142,594.08 (Tr. at 21:3-4). 75 Broad, however, notes that it is "not seeking to recover those damages on this motion" (Tr. at 24:17-21), and leaves calculation of damages for a later damages trial.

75 Broad also claims that it is entitled to recover \$16,721.14 for electricity bills incurred during Marco Polo's tenancy (Tr. at 21:5-6). Defendants concede that Ramgopal would be liable for bills incurred on and before December 18, 2012, but assert that he cannot be held responsible for any later charges (Tr. at 33:24-26). 75 Broad also contends that it is entitled to recover its reasonable attorneys' fees and costs, under the terms of the Guaranty. These issues shall also be determined at a later damages trial.

#### CONCLUSION

On the basis of the foregoing, it is hereby

ORDERED that the motion of defendants Vinode Ramgopal and Heather McCallion for partial summary judgment, pursuant to CPLR 3212 [Motion Sequence Number 009], is denied; and it is further

ORDERED that plaintiff 75 Broad LLC's motion for partial summary judgment on liability, pursuant to CPLR 3212, to hold

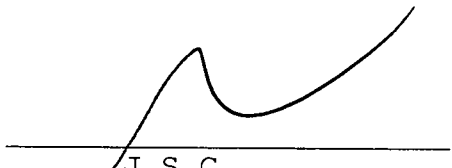
defendant Vinode Ramgopal liable to 75 Broad LLC on the first cause of action for breach of guaranty [Motion Sequence Number 010], is granted, and it is further

ORDERED, that a copy of this order with notice of entry shall be served by 75 Broad upon the Clerk of the Trial Support Office (Room 158), who is directed, upon filing of a note of issue and statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for an assessment of damages; and it is further

ORDERED that the action shall continue as to plaintiff's second through fifth causes of action, and as to defendants' counterclaim.

Dated: *November 7, 2018*

ENTER

  
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J.S.C.

**SHLOMO HAGLER**  
**J.S.C.**