

Circle Assoc., LLC v Sapper
2019 NY Slip Op 30029(U)
January 7, 2019
Supreme Court, New York County
Docket Number: 159353/2017
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

-----X INDEX NO. 159353/2017

TIMES CIRCLE ASSOCIATES, LLC, MOTION SEQ. NO. 001

Plaintiff,

- v -

WAYNE SAPPER, DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this breach of contract action, plaintiff Times Circle Associates, LLC (“TCA”) moves, pursuant to CPLR 3212, for summary judgment against defendant Wayne Sapper (“Sapper”) on its first and third causes of action, which seek to hold Sapper liable on a written guaranty for unpaid rent and for the attorneys’ fees plaintiff incurred as a result of this litigation. After a review of the papers and the relevant statutes and case law, it is ordered that the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

On October 16, 2008, TCA entered into a lease with Kings Display, Inc. (“Kings Display”) for the “store and basement space” of the building TCA owned at 333 West 52nd Street in Manhattan (“the premises”). (Docs. 11; 13 at 4.) The term of the lease commenced on November 1, 2008, and expired on October 31, 2018. (Doc. 11 at 4.) Although the term “store” is not defined

by the lease, Kings Display occupies the basement and part of the first floor of the premises. (Doc. 13 at 4–5.) To induce TCA to lease the premises, defendant Sapper, Kings Display’s president and chief operating officer (Doc. 7 at 3), executed a written guaranty, whereby he agreed to be personally liable for the payment of Kings Display’s rent (Doc. 12).

Kings Display failed to pay rent to TCA for August and September of 2017 (Doc. 13 at 5), which resulted in TCA commencing a nonpayment proceeding styled *Times Circle Associates, LLC v Kings Display, Inc.*, Civil Court, New York County Index Number LT-74945-17/NY (“the nonpayment proceeding”). On January 24, 2018, the Civil Court (Cannataro, J.) granted TCA summary judgment against Kings Display, and determined that Kings Display was liable for any unpaid rent through October of 2017. (Docs. 6 at 2; 13 at 7.) The decision ordered that a money judgment be entered in favor of TCA in the amount of \$102,279.24. (Doc. 13 at 7.) This judgment has not been satisfied, and Kings Display has not paid the accruing rent since the issuance of the Civil Court judgment. (Doc. 6 at 2.) The Civil Court also scheduled a hearing to determine the amount of attorneys’ fees to be awarded to TCA. (Doc. 13 at 7.) However, Kings Display filed for bankruptcy, thereby staying the Civil Court proceedings. (Doc. 7 at 7.)

TCA then commenced the instant action against defendant Sapper by filing a summons and complaint on October 19, 2017. (Doc. 9.) In its complaint, TCA alleged three causes of action: (1) that Sapper is liable for outstanding rent in the amount of \$98,903.01 based on his guaranty (*id.* at 6–8); (2) that this Court should pierce the corporate veil and declare Sapper liable for the outstanding rent (*id.* at 8–10); and (3) that Sapper is liable for TCA’s attorneys’ fees in this litigation pursuant to a provision in the lease (*id.* at 10–11). In his answer, Sapper asserted four affirmative defenses: (1) that the complaint fails to state a cause of action (Doc. 10 at 2); (2) that

the rent has been paid (*id.*); (3) that TCA failed to serve notices required by the lease and guaranty (*id.*); and (4) that this action is barred by the nonpayment Civil Court proceeding (*id.* at 3).

TCA now moves, pursuant to CPLR 3212, for summary judgment against Sapper on its first and third causes of action. (Doc. 5.) Its papers in support of the motion seek to amend the first cause of action to claim an amount of \$243,310.56 for rent accrued through March of 2018 (Doc. 7 at 1, 6) and to strike all of Sapper's affirmative defenses (Doc. 8 at 9–11). The motion is unopposed.

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) Where, as here, summary judgment is being sought to enforce a written guaranty, “all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998].)

TCA is entitled to summary judgment on its first cause of action seeking payment of outstanding rent and other monetary obligations owed by Kings Display. The Civil Court found Kings Display liable to TCA for unpaid rent pursuant to the lease. (Doc. 13.) The lease was executed between TCA and Sapper, who was acting in his corporate capacity as the president of Kings Display. (Doc. 11 at 24.) Importantly, Sapper executed the guaranty in writing, (*Paribas Properties, Inc. v Benson*, 146 AD2d 522, 525 [1st Dept 1989]) (“To be enforceable, a special promise to answer for the debt or default of another must be in writing and subscribed to by the

party against whom enforcement is sought.”)), and the guaranty references the lease (Doc. 12). Furthermore, the guaranty uses clear language obligating Sapper to ensure satisfaction of Kings Display’s responsibilities under the lease, and no condition limiting his liability appears in the guaranty. In pertinent part, the guaranty states that “[Sapper] guarantees to [TCA] . . . the full performance and observance of all the covenants, conditions and agreements, therein provided to be performed and observed by [Kings Display]” (*Id.* at 2.) “[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement.” (*Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446–47 [1st Dept 2012].)

TCA is also entitled to summary judgment on its third cause of action seeking attorneys’ fees. Paragraph 19 of the lease provides:

If [TCA] . . . in connection with any default by [Kings Display] in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys’ fees . . . then [Kings Display] will reimburse [TCA] for such sums so paid or obligations incurred with interest and costs.

(Doc. 11 at 6.)

Therefore, pursuant to the lease, Kings Display is liable for TCA’s attorneys’ fees that have been incurred as a result of the nonpayment of rent. (*See Berns v Halberstam*, 46 AD3d 808, 809 [1st Dept 2007] (where parties have agreed to provisions governing the award of attorneys’ fees, the agreement’s provisions control).) As explained in the above discussion, Sapper is obligated to fulfill Kings Display’s responsibilities, which include the repayment of reasonable attorneys’ fees, under the guaranty that he executed.

Sapper did not oppose the motion and therefore did not raise any triable issues of fact to defeat TCA's motion. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006] (if the movant makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact).)

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff Times Circle Associates, LLC's motion for summary judgment on its first cause of action for \$243,310.56 and on its third cause of action for attorneys' fees is granted; and it is further

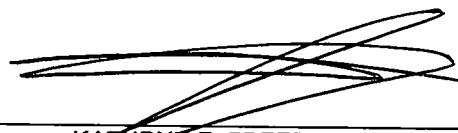
ORDERED that plaintiff's counsel is to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within 30 days after the entry of this order onto NYSCEF; and it is further

ORDERED that the Clerk of the General Clerk's Office is to enter judgment accordingly; and it is further

ORDERED that within 30 days of the entry of this order on the NYSCEF system, plaintiff shall serve a copy of this order on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date for a hearing to calculate the amount of attorneys' fees, and shall notify all parties of the hearing date; and it is further

ORDERED that this constitutes the decision and order of this Court.

1/7/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE