

Lamb 79 & 2 Corp. v Heiberger
2019 NY Slip Op 30579(U)
March 6, 2019
Supreme Court, New York County
Docket Number: 651837/2018
Judge: Joel M. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

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INDEX NO. 651837/2018

LAMB 79 & 2 CORP.

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

ANDREW HEIBERGER,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents:

Plaintiff Lamb 79 & 2 Corp. commenced this action against Defendant Andrew Heiberger seeking damages for his alleged breach of a Guaranty. With the instant motion Plaintiff seeks summary judgment on its First and Second Causes of Action and also seeks dismissal of Defendant's Affirmative Defenses. For the following reasons, Plaintiff's motion is granted as to liability. The matter will be referred to a Judicial Hearing Officer ("JHO") to determine the amount of damages, inclusive of attorneys' fees.¹

Factual Background

On or about June 24, 2011, Plaintiff, as landlord, and Tenant (*i.e.*, Town 79" Street LLC d/b/a Town Residential) entered into a commercial Lease for certain space ("Premises") in the building known as 1523 Second Avenue, New York, New York.

¹ Oral argument on this motion was scheduled for 9:30 am on March 6, 2019. Plaintiff's counsel appeared (in advance of the scheduled time), but Defendant's counsel did not. Plaintiff may submit an application for costs incurred to prepare for and attend the scheduled hearing.

Tenant operated a real estate services firm at the Premises. The Lease was to expire on May 30, 2029 and was executed by Andrew Heiberger in his capacity as C.E.O. of Tenant. (NYSCEF 11). In connection with the Lease, on or about May 25, 2011, Defendant executed a Personal Guaranty in which he unconditionally and absolutely guaranteed to Plaintiff the full payment of all rent, additional rent, and other charges due under the Lease. (NYSCEF 12).

Under the Guaranty, if the Tenant wished to vacate the property it was required to provide 60 days' notice to Landlord (*Id.*). In relevant part, the Guaranty reads as follows:

“ANDREW HEIBERGER (“Guarantor”) absolutely, unconditionally and irrevocably guarantees to Landlord . . . all obligations of Tenant under the Lease, including, but not limited, to any obligations of Tenant to: . . . pay all Basic Rent, additional rent and any other charges accruing under the Lease (or damages in lieu thereof) and the performance of all other monetary obligations of Tenant under the Lease through the date of the surrender of the Premises by Tenant to Landlord (or the date upon which Landlord obtains possession of the Premises) . . . (the “Surrender Date”): *provided Tenant has given Landlord not less than sixty (60) days prior written notice that Tenant intends to vacate and surrender to Landlord possession of the Premises in the condition required by the Lease and, in the absence of such notice, the Surrender Date shall be extended for an additional sixty (60) days* (emphasis added).

On March 8, 2018 Defendant’s counsel sent a letter to Landlord advising that Tenant intended to vacate and surrender the premises by May 12, 2018. (NYSCEF 14). Notably, in this letter counsel acknowledged that Defendant was indeed the guarantor for the Tenant. Despite the representations made in the March 8, 2018 letter and in contravention of the Guaranty, Tenant vacated the premises on April 13, 2018. (NYSCEF 15). According to Plaintiff, under the terms of the Guaranty, because the Tenant vacated the premises with less than 60 days-notice, the “surrender date” was to be calculated as 60 days after the actual vacatur date or June 12, 2018. The Premises was

re-let through a lease effective June 1, 2018 (NYSCEF 16), though Plaintiff asserts that it did not receive rent for the month of June.

To that end, Plaintiff seeks recovery for all unpaid rent and additional rent incurred through June 12, 2018 as well as attorney's fees amassed in pursuing collection of these monies.

Summary Judgment Standard

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). A failure to make such a showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez*, 68 N.Y.2d at 324; *Zuckerman*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dep't 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d, at 562.

Analysis

In opposition to Plaintiff's motion, Defendant challenges the validity of the Guaranty and its relation to the subject Lease. Defendant notes the Guaranty is undated and does not reference the date of the Lease. (NYSCEF 12). Defendant does not seriously deny guaranteeing Tenant's lease, and could not do so credibly given the acknowledgment in his counsel's March 8 letter. Nevertheless, he asserts – without legal or evidentiary support – that the Guaranty is “unenforceable” and that it “does not guaranty the lease in submitted by Plaintiff for the premises [sic]”. (NYSCEF 23 at ¶4).

Although the first page of the signed Guaranty agreement does not bear the date of either the Guaranty or the lease it supports, it is clear from the context that it is in fact a guarantee of the Lease, and that the Guaranty is dated and signed May 25, 2011. Paragraph 67 of the Lease specifically references the Guaranty, which is attached as Exhibit C to the Lease. (NYSCEF 11, ¶67). The first page of the Guaranty signed by the Defendant confirms that it is Exhibit C. According to Plaintiff's managing agent, Karen Dee, and unrebutted by any evidence provided by Defendant, the Lease, as submitted as NYSCEF 11, is how it appears in Plaintiff's file, with Exhibit C to the Lease being the signed Guaranty. (NYSCEF 8 at 3).

Defendant does not deny that the Guaranty was incorporated by reference into the Lease nor does he deny having signed the Guaranty. Defendant does not deny that that his signature is on the Guaranty is genuine nor does he address or rebut the clear language in the Guaranty which specifically states the Guaranty is being entered into as “an inducement for the execution of the captioned Lease”. (NYSCEF 12 at 1). Where “a guaranty is indorsed upon or attached to the instrument creating the principal obligation,

the language of the guaranty will be interpreted as referable to the terms of the principal obligation”. 63 N.Y. Jur. 2d Guaranty and Suretyship § 96.3.

In *Gettinger Assoc. v One Move Upward, Inc.*, 19 Misc 3d 1118(A) (Sup Ct N.Y. Cty. 2008), Justice Kornreich was faced with a similar question. There, in opposition to Plaintiff landlord’s motion for summary judgment, Defendant guarantor could not recall signing the Guaranty in connection with the subject lease but neither denied that it is the applicable Guaranty nor that he guaranteed the Tenant's obligations under the Lease. Also, like the case at bar, the guarantor in *Gettinger* did not deny that the Guaranty bore his signature. The Guarantor, like here, failed to come forward with a copy of any other Guaranty which may allegedly relate to the Lease or one that may contain different terms. Accordingly, Justice Kornreich found Defendant failed to submit any proof that sufficiently opposed Landlord's evidence that the Guaranty presented is the one applicable to Tenant's obligations under the Lease. This Court reaches the same conclusion.

As a final argument, Defendant argues that Plaintiff’s motion is premature as discovery has not been completed. Yet, Defendant does not identify what specifically discovery will reveal or what specific issue needs to be explored. A motion for summary judgment should not be denied for lack of discovery alone; there must be a showing that, because of lack of disclosure, material facts not presented are unavailable to the party opposing the motion. *Id* at * 3. CPLR §3212(f) provides that “should it appear from affidavits ... that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion....” The party opposing the motion must demonstrate that the facts are exclusively within the control of the moving party in order to rely on CPLR

§3212(f). *Stevens v. Hilmy*, 185 A.D.2d 840 (2nd Dep't 1992). A motion for summary judgment should not be denied for lack of disclosure unless the party opposing the motion identifies the needed disclosure. *Auerback v. Bennett*, 47 N.Y.2d 619, 636 (1979) (“To speculate that something might be caught on a fishing expedition provides no basis to postpone decision on summary judgment....”). This argument, therefore, is unavailing.

As for Plaintiff's Second Cause of action, Plaintiff has shown its entitlement to reasonable attorney's fees incurred in connection with Tenant's Lease defaults and Defendant's breach of his Guaranty by virtue of the language contained in the first paragraph of the Guaranty (i.e. “Guarantor shall remain liable for the reasonable costs and expenses (including counsel fees) of Landlord with respect to the removal of all Liens and enforcing this Guaranty”). (NYSCEF 12 at 1). Therefore, Plaintiff is entitled to legal fees incurred in connection with this action to enforce the Guaranty as well as legal fees incurred in connection with the action between the Landlord and the Tenant, provided the Tenant has not already paid such fees.

Defendant does raise issues of fact as to the amount of damages to which Plaintiff is entitled. Specifically, Defendant highlights that Plaintiff's rent ledger calculates outstanding rent and charges through August 2018 totaling \$162,410.04 (seemingly including attorney's fees), yet the Complaint seeks damages in the amount of \$125,333.04, which includes \$5,000 in attorney's fees. Just over half a year after filing the Complaint, Plaintiff now seeks damages in connection with its summary judgment motion totaling \$199,834.04 and an open-ended request for attorney's fees. Because there are genuine questions about the damages to which Plaintiff is entitled and the

reasonableness of the requested attorney's fees, these issues shall be referred to a Judicial Hearing Officer for determination.

Affirmative Defenses

Plaintiff also seeks dismissal of Defendant's Six Affirmative Defenses. Plaintiff argues the Second Affirmative Defense (alleging payment, and a set off for Tenant's security deposit), Third Affirmative Defense (accord and satisfaction) and Fifth Affirmative Defense (waiver, estoppel and laches) are conclusory, unsubstantiated by the facts, and defectively pled. Defendant does not submit arguments in opposition to dismissal of these three defenses and, accordingly, these three affirmative defenses are dismissed. *Robbins v. Growney*, 229 A.D.2d 356, 357 (1st Dep't 1996) citing *Bentivegna v. Meenan Oil Co.*, 126 A.D.2d 506 (2nd Dep't 1987) (bare legal conclusions without supporting factual allegations are insufficient to raise affirmative defenses.). Here, the affirmative defenses are bare legal conclusions or contradicted by the terms of the Lease and Guaranty, warranting dismissal.

As for the First and Sixth Affirmative Defenses, alleging that Plaintiff failed to state a cause of action in its Complaint and that the time to calculate damages does not flow from 60 days after the vacatur but, rather, from 60 days following the March 8, 2018 notice of intent to vacate. The Court's awarding of Summary Judgment in favor of Plaintiff on liability took into consideration, and rejected, these Defenses. The Complaint states a cause of action and the Guaranty plainly states that the 60 days (for the purposes of determining how much rent and additional rent is owed) shall be calculated from 60 days following the vacatur, provided the vacatur took place with less than 60 days' advance notice. Here, it is clear that a March 8, 2018 notice was provided which would

have permitted Tenant to properly vacate 60 days later, on May 12, 2018. Instead, however, Tenant vacated on April 13, 2018, triggering the penalty of adding an additional 60 days from the day of vacatur, extending the effective surrender date to June 12, 2018. Therefore, Plaintiff's request to dismiss these Defenses is granted.

Finally, Defendant's Fourth Affirmative Defense points to Plaintiff's alleged failure to mitigate damages. As a preliminary matter, this defense does not aid Defendant in his opposition to the allegation that he breached the Guaranty. It does not rebut the premature vacatur nor does it address Defendant's failure to pay additional rent due and owing. At best, mitigation goes to damages. Further, Article 18 of the Lease specifically states that "[t]he failure of Owner to re-let the demised premises or any part or parts thereof shall not release or affect Tenant's liability for damages." Article 18 goes on to state that Plaintiff "may grant concessions of free rent." Plaintiff's position is that despite the fact that it re-let the Premises as of June 1, 2018, it did not collect any rent from the new tenants for that month. Therefore, the Guarantor, who essentially stands in the shoes of the Tenant, cannot assert a failure to mitigate, a defense unavailable to the Tenant. See *Country Glen, L.L.C. v Himmelfarb*, 4 Misc 3d 1015(A) * 7 (Sup Ct 2004). As such, the Fourth Affirmative Defense is dismissed.

Conclusion

In sum, Plaintiff has satisfactorily demonstrated its entitlement to summary judgment on liability against Defendant and to dismissal of Defendant's Affirmative Defenses. The Court finds, however, that issues of fact exist as to the amount of damages, inclusive of attorneys' fees, to which Plaintiff is entitled. The issue of damages

and attorneys' fees will be referred for hearing and determination by a Judicial Hearing Officer ("JHO").

Therefore, it is:

ORDERED that Plaintiff's motion for Summary Judgment as to the First and Second Causes of Action is Granted as to liability; it is further

ORDERED that Plaintiff is entitled to damages on the First Cause of Action (breach of contract) and Second Cause of Action (attorney's fees) which are to be calculated and determined by a JHO; it is further

ORDERED that a JHO or Special Referee shall be designated to determine the damages, inclusive of attorneys' fees, owed to Plaintiff; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that Plaintiff's counsel shall serve a copy of this order with notice of entry on defendant within five days and that counsel for plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/ljd/supctmanh/refpart-infosheet-10-09.pdf>) containing


all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the Decision and Order of the Court.

3/6/2019
DATE


JOEL M. COHEN, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE