

<b>BSD 26 MAEEM LLC v Sacks</b>
2019 NY Slip Op 30580(U)
March 4, 2019
Supreme Court, New York County
Docket Number: 652301/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

INDEX NO. 652301/2017

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BSD 26 MAEEM LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

DUSICA SACKS, AKA DUSICA IVANOVIC SACKS

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 were read on this motion to/for DISMISSAL

In this action to recover from the breach of a license agreement, defendant/guarantor Dusica Sacks a/k/a Dusica Ivanovic Sacks moves in motion sequence 001 to: (1) dismiss plaintiff BSD 26 MAEEM LLC's complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction over defendant, or in the alternative; (2) set this matter down for a traverse hearing to determine whether the defendant was properly served by substitute service; and (3) award defendants costs, disbursements, and expenses for legal services rendered in connection with the instant motion.

Plaintiff strenuously opposes defendant's motion and cross-moves for: (1) summary judgment pursuant to CPLR 3212 on plaintiff's first cause of action regarding unpaid rent against defendant in the amount of \$28,072.31; (2) summary judgment on plaintiff's second cause of action as to defendant's liability for attorneys' fees and subsequently setting this matter down for a hearing to determine the amount to be awarded; (3) to dismiss defendant's affirmative defenses; and (4) to deny defendant's motion to dismiss. The decision and order is as follows:

Facts

Plaintiff BSD 26 MAEEM, as landlord/licensor and owner of 167-177 Lafayette Street, New York, New York 10013, entered into a written license agreement on September 16, 2014, with "Dusica Dusica" -- the name of defendant's store -- as licensee for the premises designated "Retail 100N and Basement 100N" for a term beginning in September 2014 and ending September 30, 2015, with an option to renew the term for an additional year (NYSCEF #3 - License at §§1.01, 1.03, 1.07)¹.

¹ NYSCEF #3, 4, 5, & 6 can also be found attached to plaintiff's cross-motion as NYSCEF #27

Contemporaneously with the execution of the license, defendant signed and delivered a written guaranty to plaintiff which unconditionally guaranteed the full and punctual payment to licensor of all license fees and other sums payable by licensee due under the license (NYSCEF #4 – Guaranty at §1). The premises was delivered to licensee as required under the license. Subsequently, licensee exercised its renewal option under the license. Following the completion of the renewal term, the parties agreed to and executed the First Modification and Extension of License Agreement (the Extension) dated September 28, 2016, that extended the term of the license through September 30, 2017 (NYSCEF #5 – Extension of License). The Extension added a provision to give the licensor the unilateral option to cancel the license (*id.* at §5[a]). Additionally, pursuant to the Extension, defendant ratified the terms of the Guaranty for the extension of the term of the license (*id.* at §9). The Extension was further amended by a Stipulation of Settlement dated January 23, 2017 (NYSCEF #28).

On March 6, 2017, plaintiff exercised its cancellation option pursuant to Extension §5(a), with an effective date of May 8, 2017 (NYSCEF #28 – Cancellation Notice). On March 22, 2017, plaintiff served a five-day notice of default on the licensee; the licensee never cured the default (NYSCEF #26 – Aff of Elliott Aharonoff at ¶10-11). Thus, plaintiff initiated a New York County Landlord/Tenant non-payment petition against the licensee on March 29, 2017 (NYSCEF #6 – Landlord/Tenant Action, Index No. 58921/2017). At the time of the filing of the non-payment petition, the licensee was in arrears in the amount of \$15,419.58 (*id.* at p.6). The licensee defaulted having failed to interpose an answer or appear in the Landlord/Tenant Action (NYSCEF #26 at ¶15). Plaintiff therefore proceeded to file this instant lawsuit on April 28, 2017, against the guarantor, Dusica Sacks, for the amount owed, which \$28,072.31 plus interest at the time the instant cross-motion was filed (NYSCEF #1 – Complaint; NYSCEF # 31 – Final Arrears). The Licensee vacated the premises on May 8, 2017. Defendant answered plaintiff's complaint on June 19, 2017 and filed her motion to dismiss on August 11, 2017.

### Service

Defendant's motion to dismiss is pursuant to CPLR 3211(a)(8), on the basis that this court does not have personal jurisdiction in this matter due to faulty service. Defendant claims Andre Meisel, plaintiff's licensed process server, failed to properly serve defendant on May 12, 2017. According to the Meisel's Affidavit of Service sworn on May 16, 2017, service was effectuated by substituted service upon the defendant's doorman, identified as 'Steven Smith' on May 12, 2017 at 11:27 a.m. (NYSCEF #8 – Aff of Service). The Affidavit of Service indicates that the doorman refused to allow the process server access into the building (*id.*). The process server averred that following the service on the doorman, he mailed a copy of the summons and complaint to defendant at her last known address (*id.*). Defendant, for her part, swears that the process server never attempted personal service upon her, and thus could not resort to substitute service upon the doorman at the premises (NYSCEF # 13 – Aff of Dusica

Sacks at ¶8). Defendant states that the doorman never called her and did not inform her that she had a visitor by the name of “Andre Meisel” (*id.* at ¶10).

CPLR 308 governs personal service upon natural persons. CPLR 308(2) allows for substituted service whereby the summons are delivered within the state “to a person of suitable age and discretion at the actual... dwelling place or usual place of abode of the person to be served and by... mailing the summons to the person to be served at his or her last known residence”. Additionally, an affidavit of service is “prima facie evidence that defendant was properly served with the summons and complaint pursuant to CPLR 308(2)” (*Caba v Rai*, 63 AD3d 578, 582-83 [1st Dept 2009]).

In this case, service upon the doorman of defendant’s apartment building was proper pursuant to CPLR 308(2). As defendant herself acknowledges, courts within the First Department have consistently held that service upon a building’s doorman falls within the contemplation of CPLR 308(2) alternative service (*see Charnin v Cogan*, 250 AD2d 513 [1st Dept 1998]; *F.I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794 [1977]). Defendant argues that service upon the doorman is proper only where the process server “has not been permitted access to the specified apartment or is advised that the intended party is not home” (*Charnin*, 250 AD2d at 516). However, the First Department has found that service is completed and proper when the doorman is the cause of the denial of access and that service upon the doorman in such a circumstance is acceptable (*Bank of America, N.A. v Grufferman*, 117 AD3d 508, 508-509 [1st Dept 2014]). Accordingly, defendant was properly served and this court has personal jurisdiction over the defendant. As such, defendant’s motion to dismiss pursuant to CPLR 3211(a)(8) is denied and there is no need for a traverse hearing.

#### Plaintiff’s Cross-Motion for Summary Judgment

Plaintiff cross-moves for summary judgment. Curiously, defendant has chosen to rest solely on its motion to dismiss and barely offers any response to plaintiff’s cross-motion. Defendant’s one argument against plaintiff’s motion for summary judgment is that summary judgment cannot be granted until the issue is joined (NYSCEF #34 – Def’s Opposition at ¶14-17). Defendant specifically states that as “[d]efendant has previously moved for dismissal prior to filing her answer, it would be wholly inappropriate for this Court to render judgment as a matter of law, prior to determining the Court’s jurisdictional issues” (*id.* at ¶16). However, the facts contradict defendant’s assertions here. Defendant joined this matter on June 19, 2017 by serving its answer in this matter (NYSCEF #9 – Answer). Defendant then filed her motion to dismiss on August 11, 2017 (NYSCEF #11 – Notice of Motion). As such, defendant has joined this matter, her motion to dismiss on jurisdiction grounds has been denied, and this matter is amenable to summary judgment at this time.

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320

[1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's motion for summary judgment on its first cause of action for breach of license and guaranty is granted. "On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (*Davimos v Halle*, 35 Ad3d 270, 272 [1st Dept 2006]). Guaranties are strictly enforced – "[w]here a guaranty is clear and unambiguous on its face and... absolute and unconditional, the signer is conclusively bound by its terms" (*National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470 [1st Dept 1991]).

Defendant's breach here is clear. Plaintiff and Dusica Dusica entered into a license agreement in September 2014, backed up by the guaranty of defendant Dusica Sacks (NYSCEF #26 – Aharonoff at ¶¶5-6). The guaranty stated that defendant would pay to plaintiff all license fees and other sums that accrued under the terms of the license agreement (Guaranty at ¶1). The parties exercised the renewal option in the initial license agreement and then executed an Extension of the license in September 2016. However, Dusica Dusica defaulted on the Extension and failed to remedy the default. As such, guarantor Dusica Sacks became liable for the unpaid license fees, amounting to \$28,072.31 plus interest. The guaranty here is clear, unconditional, and obligates defendant to ensure that any unpaid sums are paid to plaintiff.

Similarly, plaintiff's motion for summary judgment on its second cause of action to enforce the attorneys' fee provision of the guaranty is granted. Both the License Agreement and the Guaranty explicitly authorize the collection of attorneys' fees incurred in connection with collecting rent or enforcing licensor's rights (License Agreement at §10(b); Guaranty at ¶2). Plaintiff is entitled to attorneys' fees and this matter will be set down for a hearing to determine the amount of plaintiff's attorneys' fees, costs and disbursements.

#### Plaintiff's Cross-Motion to Dismiss Defendant's Affirmative Defenses

Plaintiff cross-moves to dismiss defendant's affirmative defenses. CPLR 3211(b) governs a motion to dismiss affirmative defenses. On such a motion, "plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. The allegations set forth in the answer must be viewed in the light most favorable to the defendant, and the defendant is entitled to the benefit of every reasonable intendment

of the pleading, which is to be liberally construed'. Further, the court should not dismiss a defense where there remain questions of fact requiring a trial" (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015] [citations omitted]).

Defendant's affirmative defenses are: (1) lack of personal jurisdiction; (2) that the sums for unpaid rent are "overstated"; (3) that there is no agreement to pay legal fees in this proceeding; (4) that the premises was rented with significant conditions which interfered with the use and occupancy of the space by licensor, such as lack of heat and plaintiff taking space; and (5, though labeled 'Sixts') improper verification (NYSCEF #9 – Answer at ¶¶26-39).

As to defendant's first affirmative defense, plaintiff's motion is granted. As discussed previously, service in this matter was proper and this court has personal jurisdiction over defendant. Defendant's first affirmative defense is dismissed.

As to defendant's second affirmative defense, plaintiff's motion is granted. Plaintiff offers a copy of the final arrears that clearly indicates that \$28,072.31 is due and owing (Final Arrears). Defendant does not offer any reason to question the validity of plaintiff's accounting and is merely conclusory. Accordingly, defendant's second affirmative defense is dismissed.

Defendant's third affirmative defense is also dismissed. Defendant argues that there is no agreement to pay legal fees in this proceeding. However, it is clear from the License Agreement and Guaranty that defendant is obligated to pay plaintiff's attorneys' fees if plaintiff must enforce the terms of the agreement.

Next, defendant's fourth affirmative defense argues that plaintiff interfered with the premises by failing to provide heat and occupying space in the premises. On the provision heat claim, paragraph 12 of the Stipulation of Settlement deleted Article 5(b) of the Extension regarding the furnishing of heat, so plaintiff cannot be in breach on this count. Further, defendant's lack of heat claim is belied by the Stipulation of Settlement wherein defendant acknowledged that plaintiff provided sufficient heating (NYSCEF #28 – Stipulation of Settlement at ¶12). Plaintiff avers that the obligation to pay rent was not waived and that it did not interfere with the use and occupancy of licensee's space. Defendant does nothing to establish that its claims are anything more than conclusory. In sum, defendant's fourth affirmative defense is dismissed.

Finally, defendant's fifth affirmative defense (though labeled 'Sixts') states simply that there is "improper verification" (Answer at ¶39). There is nothing wrong with plaintiff's attorney verification of its complaint. CPLR 3020 specifically states that "if all the material allegations of the pleading are within the personal knowledge of an agent or the attorney, the verification may be made by such agent or attorney." Plaintiff's counsel avers that he has personal knowledge of the material allegations in the summons and verified complaint (NYSCEF #33 – Plt's Aff in Opposition and

Support at ¶35). As such, plaintiff's complaint is properly verified and defendant's fifth affirmative defense is dismissed.

Accordingly, it is hereby ORDERED that defendant's motion to dismiss is denied; it is further

ORDERED that plaintiff's motion for summary judgment is granted; it is further

ORDERED that defendant owes \$28,072.31 for unpaid rent plus interest accruing from May 16, 2017 until entry of judgment; it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report on the issues of ascertaining and computing the amount due to plaintiff for attorneys' fees, costs, and disbursements in this matter; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 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 the Court at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days for the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) 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 Referee Part; it is further

ORDERED that the plaintiff shall serve a proposed accounting within 30 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they 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 Referees Part in accordance with the Rules of that Part; it is further

ORDERED that, the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a)) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; it is further

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

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant and the Clerk of the Court within 20 days of entry; it is further

ORDERED that plaintiff's motion to dismiss defendant's affirmative defenses is granted; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the decision and order of the court.

3/4/2019  
DATE

  
MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: