

500 Eighth Ave. LLC v Jackies Dept. Store
2019 NY Slip Op 31440(U)
May 21, 2019
Supreme Court, New York County
Docket Number: 156218/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

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INDEX NO. 156218/2017

500 EIGHTH AVENUE LIMITED LIABILITY COMPANY,

MOTION SEQ. NO. 001

Plaintiff,

- v -

JACKIES DEPARTMENT STORE, INC. a/k/a JACKIES DEPT.
STORE, INC., and MOSHE MIZRAHI,

DECISION AND ORDER

Defendants.

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

were read on this motion for

SUMMARY JUDGMENT

In this landlord-tenant action, plaintiff 500 Eighth Avenue Limited Liability Company (“500 Eighth Avenue”) moves, pursuant to CPLR 3212, for summary judgment and the entry of a money judgment for rent and additional rent from June 1, 2017, through the date of entry of judgment as against tenant Jackies Department Store, Inc. (“Jackies”), and for a money judgment in the sum of \$434,326.73 as against guarantor Moshe Mizrahi (“Mizrahi”). The motion is unopposed. Upon reviewing the motion papers, it is ordered that the motion is **decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff owns a building located at 500 Eighth Avenue in Manhattan. (Docs. 8 at 2; 10.) On May 30, 1991, plaintiff’s predecessor-in-interest, F.H.E.A. Associates, executed a lease agreement with Jackies for a lease term ending on December 31, 2006. (Docs. 8 at 2; 11 at 1, 5.) On October 20, 2005, Jackies and 500 Eighth Avenue, as landlord, executed a modification and an extension of the lease. (Docs. 8 at 2; 11 at 31.) The lease modification extended the lease term

through March 31, 2019 (Doc. 8 at 2), and added the second floor of the building as part of the demised premises (*id.*). Defendant Mizrahi executed a guaranty. (Doc. 12.)

On March 20, 2017, due to Jackies' failure to pay rent, plaintiff commenced a nonpayment summary proceeding styled *500 Eighth Ave. Ltd. Liab. Co. v Jackie's Dept. Store, Inc.*, Civil Court, New York County Index Number 057831/2017 ("the nonpayment proceeding"). (Doc. 13.) At the time the nonpayment proceeding was commenced, Jackies' arrearage amounted to \$70,804.78. (Doc. 8 at 3.)

This proceeding ultimately resulted in a stipulation dated May 8, 2017, which granted plaintiff a final judgment of possession (Doc. 14 at 2) and a money judgment in the sum of \$434,326.73 (*id.*). The stipulation also awarded plaintiff additional rent owed through May 31, 2017. (*Id.*) Jackies vacated the premises on May 31, 2017. (Doc. 8 at 3.)

On July 11, 2017, 500 Eighth Avenue commenced the instant action against Jackies and Mizrahi by filing a summons and complaint. (Doc. 15.) The complaint asserted six causes of action: (1) liability against Mizrahi for the \$434,326.73 pre-vacatur money judgment on the basis of the guaranty (*id.* at 6–7); (2) a judgment against Jackies in the amount of \$2,152,747.79, plus additional charges, representing the monthly post-vacatur rent through the date of the commencement of this action (*id.* at 7–8); (3) that Jackies is liable for \$5,000.00 for the costs of the nonpayment summary proceeding (*id.* at 8); (4) that Mizrahi is liable for \$5,000.00 for the costs of the nonpayment summary proceeding on the basis of the personal guaranty (*id.* at 9); (5) that Jackies is liable for \$5,000.00 for the costs of the instant action (*id.* at 9–10); and (6) that Mizrahi is liable for \$5,000.00 for the costs of the instant action on the basis of the personal guaranty (*id.* at 10).

Defendants filed their answer on August 28, 2017. (Doc. 16.) In their answer, they asserted five affirmative defenses: (1) that Mizrahi is not liable because the personal guaranty was never fully executed (*id.* at 1); (2) that Mizrahi is not liable because the personal guaranty is unenforceable due to lack of consideration (*id.* at 2); (3) that the second cause of action for judgment in the amount of \$2,152,747.79 is “improper” because the lease agreement does not give plaintiff the right to accelerate future rent (*id.*); (4) that the second cause of action for judgment in the amount of \$2,152,747.79 should be denied because liquidated damages is an unenforceable penalty (*id.*); and (5) that plaintiff overcharged defendants for various services, such as “hazardous disposal charges” (*id.*). Their answer also asserted one counterclaim against plaintiff for overcharges. (*Id.*)

500 Eighth Avenue now moves, pursuant to CPLR 3212, for a money judgment against Jackies for additional rent that has accrued since June 1, 2017, since the premises have not been re-let. (Doc. 9 at 2.) As of the date that the instant motion was filed, this amounted to \$482,395.85. (Doc. 8 at 4.) Plaintiff seeks \$434,326.73 from Mizrahi for pre-vacatur arrearage on the basis of the guaranty. (Doc. 9 at 2.)

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.*) If the moving party 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. (*See Mazurek v Metro. Museum*

of Art, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (See *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

This Court finds that plaintiff's motion for summary judgment as against Jackies must be denied. 500 Eighth Avenue seeks judgment in the amount of \$482,395.85, plus additional rent through the date of entry of judgment, for post-vacatur rent. (Docs. 8 at 4; 9 at 2.) However, plaintiff has not submitted a rent ledger establishing how it calculated that sum. Further, nowhere in its affidavit, affirmation, or memorandum of law does plaintiff specify any provision in the lease, lease modification agreement, or the stipulation from the nonpayment summary proceeding which provides that Jackies' obligations under the lease were to continue after vacatur. (*Contra Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 102 AD3d 543, 544 [1st Dept 2013] (court granted accelerated rent where the lease expressly provided that tenant's rent obligation was to continue after lease termination); *Ring v Printmaking Workshop, Inc.*, 70 AD3d 480, 481 [1st Dept 2010] (defendant was liable for rent after eviction where lease provided so).) Rather than showing this Court how it came up with the \$482,395.85 sum or what lease provision entitles it to such judgment, plaintiff merely asks this Court to grant it judgment as against plaintiff and submits a 52-page document containing both the lease and the modification agreement (Doc. 11).

Nevertheless, this Court determines that summary judgment is appropriate as against defendant Mizrahi. Importantly, Mizrahi 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). “[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].) Plaintiff therefore established its prima facie case to hold Mizrahi personally liable for the \$434,326.73 pre-vacatur arrearage that was consented to by Jackies in the stipulation in the nonpayment summary proceeding. (*See* Doc. 14.)

Moreover, defendants’ first 2 affirmative defenses, asserted on behalf of Mizrahi, must be stricken. The first affirmative defense alleges that the personal guaranty is unenforceable because it was never fully executed. (Doc. 16 at 1.) Although this Court makes the observation that the guaranty has a page for a notary public’s signature (Doc. 12 at 3), and that such page is left blank (*id.*), a personal guaranty “does not have to be notarized to make it legally binding on the parties.” (*82-90 Broadway Realty Corp. v New York Supermarket, Inc.*, 154 AD3d 797, 798 [2d Dept 2017].) What is important is that Mizrahi signed the guaranty in writing. (*Id.*; *Paribas Properties, Inc.*, 146 AD2d at 525.) The second affirmative defense alleges that the guaranty is unenforceable due to lack of consideration. (Doc. 16 at 2.) However, the guaranty references the lease. (Doc. 12.) Where the lease and guaranty being sued on were delivered as one document, “[c]onsideration for the guaranty was the lease delivered at the same time.” (*Beacon Hotel Corp. v Springer*, 256 AD 606 [1st Dept 1939].)

Finally, this Court determines that the fifth affirmative defense and the first counterclaim—both of which assert that plaintiff is impermissibly seeking overcharges in the form of hazardous disposal charges and late fees (Doc. 16 at 2)—must be dismissed, since the complaint does not seek charges for waste disposal or late fees. (Doc. 15.)

In accordance with the foregoing, it is hereby:

ORDERED that the branch of the summary judgment motion by plaintiff 500 Eighth Avenue Limited Liability Company seeking the entry of a money judgment for rent and additional rent in the amount of \$482,395.85 as against defendant Jackies Department Store, Inc. is denied; and it is further

ORDERED that the branch of the summary judgment motion by plaintiff 500 Eighth Avenue Limited Liability Company seeking a money judgment in the sum of \$434,326.73 as against guarantor Moshe Mizrahi is granted; and it is further

ORDERED that the branch of plaintiff's motion seeking to strike the affirmative defenses and to strike the counterclaim of defendants is granted to the extent that the first, second, and fifth affirmative defenses, as well as the first counterclaim, are stricken; 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 that the Clerk is ordered to enter judgment accordingly in favor of plaintiff as against defendant Moshe Mizrahi; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties are to appear for a preliminary conference on August 13, 2019, at 2:15 PM in Room 280 at 80 Centre Street; and it is further

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

5/21/2019
DATE


KATHRYN E. FREED, 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