

Eighth Ave. Sky, LLC. v Patel
2019 NY Slip Op 31483(U)
May 23, 2019
Supreme Court, New York County
Docket Number: 154844/2017
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

-----X INDEX NO. 154844/2017

EIGHTH AVENUE SKY, LLC.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

HIMANSHU V. PATEL and MANISHA PATEL,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 208, 210, 211

were read on this motion to/for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

In this action to recover on a personal guaranty, plaintiff Eighth Avenue Sky, LLC moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint as against defendants Himanshu V. Patel and Manisha Patel. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Eighth Avenue Sky, LLC ("EAS") is the owner of the building located at 765 8th Avenue, New York, New York. Doc. 12 at par. 4. On August 21, 2014, EAS, as landlord, entered into a 12-year commercial lease with Metro 765, Inc. ("Metro"), as tenant, pursuant to which Metro was to operate a Subway restaurant franchise and pizza parlor on the ground floor and in a portion of the cellar floor of the building ("the premises" or "the store"). Doc. 12 at par. 4; Doc. 13. Paragraph 23.2 of the lease provided, in relevant part, that:

Metro shall make no claim for and [EAS] shall not be liable in any manner whatsoever for any damage, loss or injury of any kind, including, but not limited to, loss or interruption of business, caused by flooding, leaking, seepage or any other entry of water or any other liquid or substance into or about [the premises], nor shall [Metro] make or be entitled to any claim, set-off, abatement or deduction against or diminution of Minimum Fixed Rent or Additional Rent coming due under this Lease, nor shall [Metro] assert any defense, equitable or otherwise, based on any such condition, nor shall such condition constitute a partial or total, actual or constructive eviction of [Metro] from any part of [the premises], regardless of whether such condition shall be caused, in whole or in part, by the negligence or gross negligence of [EAS]. It is hereby acknowledged that it is the intention of the parties hereto that [Metro] shall obtain insurance coverage for any damage, loss or injury, including loss or interruption of business and rent, caused by flooding, leaking, seepage or other entry of water into or about [the premises].

Doc. 9 at par. 23.2.

Pursuant to a Guaranty Agreement dated August 19, 2014, defendants Himanshu V. Patel and Manisha Patel (collectively “the Patels”) jointly and severally guaranteed all of Metro’s obligations under the lease. Doc. 12 at par. 6; Doc. 14. Specifically, the Patels agreed to:

“personally, irrevocably, unconditionally, directly and absolutely guarantee to [EAS], its successors and assigns, upon the terms and conditions contained herein, the timely and full performance and observance of each and all of the terms, agreements, covenants, warranties and representations contained in the [l]ease on the part of [Metro] to be performed or observed and the payment and satisfaction of any and all liabilities which [Metro] may have or owe to [EAS] under or in connection with the [l]ease . . .

Doc. 14 at par. 1.

Paragraph 2 (c) provided that the liability of the Patels created by the guaranty “shall continue beyond the Surrender Date pursuant to the terms contained herein.” Doc. 14 at par. 2 (c).

The Patels further agreed:

to “defend, indemnify and hold [EAS] harmless from and against any and all actions, claims, losses, liability, damage, costs and expenses, including, but not limited to, reasonable attorneys’ fees, arising out of or in connection with (a) the failure to pay, perform or observe and of [Metro’s] [o]bligations or [EAS’] enforcement of its rights and remedies under the Lease with respect to such default, and (b) a breach of any or all of the terms, agreements, covenants or conditions contained in this Guaranty on the part of [the Patels] to be performed, observed or complied with, or [EAS’] enforcement of its rights and remedies under this Guaranty . . .”

Doc. 14 at par. 4.

Paragraph 6 (e) of the guaranty provided that the Patels “expressly waive[d]” “all suretyship and guarantors’ defenses generally”. Doc. 14 at par. 6 (e).

Paragraph 7 of the guaranty provided that “[t]his [g]uaranty is an absolute and unconditional guaranty of payment and performance, and not of collection.” Doc. 14 at par. 7. It further provided that:

The [o]bligations of the [Patels] under this Guaranty shall not be subject to any counterclaim, set off, deduction or defense based upon any claim the [Patels] may have against [Metro], [EAS] or any other party which may be liable for the [o]bligations . . .

Doc. 14 at par. 7.

The Patels were jointly and severally liable for their obligations under the guaranty. Doc. 14 at par. 8.

In executing the guaranty, the Patels acknowledged that the document was the product of extensive negotiations between the parties and their attorneys and that any ambiguities therein were not to be construed against the drafter. Doc. 14 at par. 11.

On April 11, 2016, Metro commenced an action in this Court (“the Metro 2016 action”) against EAS and AC Hospitality d/b/a The New York Inn (“AC”) under Index Number 153063/16 seeking damages for breach of the lease and the covenant of quiet enjoyment, as well as for

declaratory and injunctive relief. Metro 2016 action, Doc. 1. AC had operated a hotel on the second through fifth floors of the building. Metro 2016 action, Doc. 2. In that action, Metro claimed that EAS and AC failed to take “required steps necessary to cure the pervasive and continuous leaking and flooding from the building into [the store].” Metro 2016 action, Doc. 2, at par. 1.

On or about April 15, 2016, EAS commenced a nonpayment proceeding against Metro in the Civil Court of the City of New York, New York County under Index Number L & T 61696/15-NY (“the summary proceeding”) seeking to collect unpaid rent owed by Metro to EAS, as well as attorneys’ fees. Doc. 12 at par. 5; Doc. 16. As of the time the summary proceeding was commenced, Metro owed EAS \$125,741.25. Doc. 15.

In the Metro 2016 action, Metro moved for a preliminary injunction compelling EAS and AC to repair plumbing and roofing in order to stop leakage into the store (Metro 2016 action, Doc. 13) and to consolidate the summary proceeding with that action. Metro 2016 action, Doc. 27. EAS also moved to dismiss the complaint for failure to state a claim and based on documentary evidence. Metro 2016 action, Doc. 51. By order entered May 4, 2017, this Court (Bannon, J.) denied both of Metro’s motions. Metro 2016 action, Doc. 105. EAS’s motion was granted in part, insofar as Metro’s claims for partial actual and constructive eviction and breach of the covenant of quiet enjoyment were dismissed. Metro 2016 action, Doc. 105. In so holding, this Court reasoned that section 23.2 of the lease provided that EAS “will not be liable for damage, including that attributable to loss or interruption of Metro’s business, arising from flooding, leakage, seepage, or other entry of water into the [premises]. It further provides that Metro will not be entitled to assert any claim based on such flooding, leakage, or seepage, and any water condition

shall not constitute a partial or total actual or constructive eviction, even if caused by EAS's negligence or gross negligence." Doc. 4, at par. 23.2; Metro 2016 action, Doc. 105, at 9.

On October 17, 2016, EAS commenced an action against the Patels in this Court under Index Number 158706/16 ("the EAS 2016 action") seeking summary judgment in lieu of complaint based on the guaranty. EAS 2016 action, Doc. 1. The Patels cross-moved to dismiss the 2016 action on the ground that they were not properly served with process. EAS 2016 action, Doc. 20. In an attempt to rectify any deficiency regarding service of process, EAS commenced the captioned action against Metro in May 2017 by serving a summons accompanied by a second motion for summary judgment in lieu of complaint. Doc. 1.¹

In support of its motion for summary judgment in lieu of complaint in the captioned action, EAS submitted its lease with Metro (Doc. 4); the guaranty (Doc. 5); the petition in the summary proceeding (Doc. 7); the affidavit of Shmuel Bar-Or, a member of EAS, who states, inter alia, that Metro made rent payments to EAS, albeit sporadically at times, until approximately February 2016, when it stopped paying rent completely (Doc. 12, at par. 5); and a ledger, authenticated by Bar-Or, setting forth monies owed by the Patels. Doc. 6. Bar-Or represents that the ledger annexed to his affidavit reflects that, as of October 5, 2016, Metro owed EAS \$444,231.17, representing base rent, late charges, interest, and other charges. Doc. 12 at par. 7; Doc. 6.

¹ Although EAS moved, on September 5, 2017, to consolidate the EAS 2016 action with the captioned action ("the consolidation motion", EAS 2016 action, Doc. 110), that motion became moot when EAS filed a stipulation discontinuing the EAS 2016 action on April 25, 2019. EAS 2016 action, Doc. 154. The resolution of the instant application has been delayed by the consolidation motion, the substitution of two attorneys for the Patels (Docs. 188, 197, 205-206), and settlement conferences conducted by this Court with prior and current counsel for the Patels.

In a memorandum of law in support of the motion (Doc. 9), EAS argues that it established its prima facie entitlement to summary judgment in lieu of complaint by submitting proof of the guaranty and Metro's failure to make payments in accordance therewith.

The Patels oppose the motion for summary judgment in lieu of complaint and cross-move to dismiss the action asserting, inter alia, that: 1) they were not properly served; 2) a prior action for the same relief ("the 2016 action) is pending; 3) the summons and supporting papers had conflicting index numbers; 4) the guaranty is not an instrument for the payment of money only; and 5) they do not owe any rent because Metro was actually and/or partially constructively evicted from the premises. Doc. 35.

In a memorandum of law in opposition (Doc. 67), the Patels argue, among other things, that Manisha Patel was not properly served with process, that she was not served with the same papers which were filed in Court, and that the papers served on the Patels had two index numbers, thereby rendering them defective. The Patels further assert that the captioned action was subject to dismissal because an action seeking the same relief is pending under Index Number 158706/16. Further, the Patels claim that the guaranty is not an instrument for the payment of money only. The Patels also argue that, since EAS breached the lease by failing to make necessary repairs, Metro is permitted to assert as a defense that it owed no rent, a defense they (the Patels) are permitted to raise. Further, they claim that they owe no money to EAS because Metro was evicted from the premises.

In a reply affirmation in further support of the motion and in opposition to the cross motion (Doc. 69), EAS argued, inter alia, that service of process on the Patels was proper.

On June 13, 2018, after the instant motion was submitted, the Civil Court, New York County (Sharpe, J.) entered a judgment against Metro, after a trial, awarding EAS possession of

the premises as well as the sum of \$1,177,698.25. See Doc. 19 filed under Sup. Ct., New York Co. Ind. No. 157711/18 (“the 2018 action”).² In a separate judgment entered on July 25, 2018, after a hearing held the previous day, Judge Sharpe directed Metro to pay legal fees to EAS’s attorneys in the total amount of \$78,405.³ See Doc. 20 filed under Sup. Ct. New York Co. Ind. No. 157711/18. To date, both of these judgments remain unsatisfied.

By so-ordered stipulation entered November 1, 2018, the Patels agreed that they “will no longer pursue the defense that service of process was improper” and that they would “withdraw that portion of the[ir] cross motion” seeking dismissal on jurisdictional grounds. Doc. 207.

On April 19, 2019, EAS discontinued the 2016 action against the Patels. EAS 2016 action, Doc. 154.

LEGAL CONCLUSIONS:

CPLR 3213 provides that “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” The Court of Appeals has held that “[a]n unconditional guaranty is an instrument for the payment of ‘money only’ within the meaning of CPLR 3213.” *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” NY Branch v Navarro*, 25 NY3d 485, 492 (2015). Additionally, the Appellate Division, First Department has granted summary judgment in lieu of complaint to enforce absolute and

² In the 2018 action, EAS sued Metro and the Patels seeking to recover, inter alia, liquidated damages arising from Metro’s failure to pay the rent. See Doc. 1 filed under Sup. Ct., New York Co. Ind. No. 157711/18.

³ Judge Sharpe directed that Scott Brody, Esq. was to receive \$27,405.33 and Leonard Kaplan, Esq. was to receive \$51,000.

unconditional guarantees on a commercial lease. *See Royal Equities Operating, LLC v Rubin*, 154 AD3d 516 (1st Dept 2017).⁴

“On a motion for summary judgment to enforce a written guarantee, 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.” *Royal Equities Operating, LLC v Rubin*, 2016 NY Misc LEXIS 4625 (Sup Ct New York County 2016), affd 154 AD3d 516 (1st Dept 2017). Here, EAS established its prima facie entitlement to summary judgment in lieu of complaint by submitting the “absolute and unconditional guaranty” (Doc. 14) as well as the affidavit of Bar-Or establishing the Patels’ failure to make payment pursuant to its terms and annexing a ledger setting forth the amount of money owed by the Patels pursuant to the guaranty. *See Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 (1st Dept 1968), affd, 29 NY2d 617 (1971).

Although the ledger reflects that, as of October 5, 2016, the Patels owed \$444,231.17, representing base rent, late charges, interest, and other charges (Doc. 12 at par. 7; Doc. 6), the Civil Court, subsequent to the submission of the instant motion, entered a judgment against Metro in the amount of \$1,177,698.25 for unpaid rent and related charges, as well as a second judgment directing Metro to pay legal fees to EAS’s attorneys in the total amount of \$78,405. Since the Patels guaranteed Metro’s obligations pursuant to the lease, they are bound by the judgments against Metro in the Civil Court and are thus required to pay EAS the amounts set forth therein.

The Patels’ arguments in opposition to the motion are moot and/or without merit. Relying, inter alia, on *Tokyo Leasing (U.S.A.) Inc. v G-IV Wash, Clean & Dry, Inc.*, 4 Misc3d 164 (District

⁴ This Court notes that, although the *Royal Equities* decision implied that the guaranty in that case was an instrument for the payment of money only, the Appellate Division did not expressly hold as such.

Ct, Nassau County 2004), the Patels assert that EAS may not move for summary judgment in lieu of complaint since the guaranty was not an instrument for the payment of money only. This, they assert, is because, in addition to guaranteeing Metro's payment of rent, they also guaranteed "the timely and full performance and observance of each and all of the terms" of the lease. Doc. 14 at par. 1. However, as noted above, the First Department recently held that a party was entitled to summary judgment in lieu of complaint to enforce absolute and unconditional guarantees on a commercial lease (*See Royal Equities*, 154 AD3d at 517), implicitly determining that such a guaranty was an instrument for the payment of money only.⁵ Further, "[t]he mere presence of additional provisions in the guaranty referring to [a] defendant's assumption of the tenant's obligations in the lease [does] not constitute a bar to CPLR 3213 relief [where, as here] these provisions did not require additional performance as a condition precedent to repayment, or otherwise alter the defendant's promise of payment." *Juste v Niewdach*, 26 AD3d 416, 417 (2d Dept 2006); *cf. Times Square Associates v Grayson*, 39 AD2d 845 (1st Dept 1972) (guaranty of "the full performance and observance of all the covenants, conditions and agreements" to be performed by a tenant under a lease held not to be an instrument for payment of money only).

While this Court recognizes that *Times Square Associates* involved a similarly worded guaranty, it determines that the said decision is not controlling herein. This is because a judgment of possession has been awarded to EAS and, since Metro no longer occupies the premises, the sole obligation the Patels could possibly have at this time is to satisfy the judgments entered against Metro arising from the now terminated lease.

⁵ This Court notes that, even if the guaranty were not an instrument for the payment of money only, EAS would still be entitled to move for summary judgment in lieu of complaint based on the Civil Court judgments. See CPLR 3213.

Although the Patels assert improper service of process as well as a defect related to the fact that a document served on Ms. Patel bore the index number to the captioned action as well as the index number in the 2016 action, they expressly waived such arguments by consenting to the jurisdiction of this Court (Doc. 207). Thus, these contentions are moot and without merit.

Additionally, although the Patels assert that the captioned action must be dismissed because there is a prior action pending between the parties regarding the same subject matter, the 2016 action was discontinued (EAS 2016 action, Doc. 154). Thus, this argument is moot as well.

The Patels further contend that, since EAS breached the lease by failing to make necessary repairs, Metro was permitted to assert as a defense that it owed no rent, a defense they (the Patels) were permitted to raise. However, this contention completely disregards the fact that the Patels waived "all suretyship and guarantors' defenses." Doc. 14 at par. 6 (e).

Finally, the Patels' argument that they are relieved of their obligations pursuant to the guaranty because Metro was actually and/or partially constructively evicted from the premises is also without merit. As noted above, this Court (Bannon, J.) granted that branch of EAS's motion seeking dismissal of Metro's claims for partial actual and constructive eviction and breach of the covenant of quiet enjoyment. Metro 2016 action, Doc. 105.

Therefore, in light of the foregoing, it is hereby:

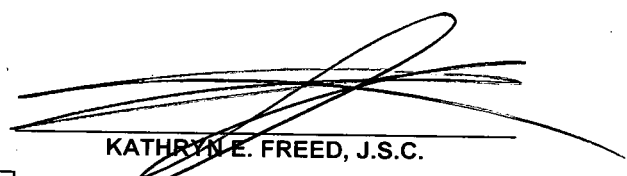
ORDERED that the motion by plaintiff Eighth Avenue Sky, LLC for summary judgment in lieu of complaint pursuant to CPLR 3213 is granted; and it is further

ORDERED that a judgment be entered in favor of plaintiff Eighth Avenue Sky, LLC and against defendants Himanshu V. Patel and Manisha Patel, jointly and severally, in the amount of amount of \$1,177,698.25, plus attorneys' fees in the amount of \$78,405, for a total judgment of \$1,256,103.25; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the Decision and Order of the court.

5/23/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: