

Walber 419 Co., LLC v 419 KD Prod. Assoc., Inc.
2019 NY Slip Op 32277(U)
July 30, 2019
Supreme Court, New York County
Docket Number: 159607/2018
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY****PRESENT: HON. BARBARA JAFFE****PART****IAS MOTION 12EFM***Justice*

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WALBER 419 COMPANY, LLC AND 419 PARK
AVENUE SOUTH ASSOCIATES, LLC AS
TENANTS-IN-COMMON,

Plaintiff,

- v -

INDEX NO. 159607/2018**MOTION DATE** _____**MOTION SEQ. NO.** 001**DECISION + ORDER ON
MOTION**419 KD PRODUCTION ASSOCIATES, INC., *et al.*,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5-18
were read on this motion for _____ summary judgment _____.

By notice of motion, submitted on default, plaintiffs move for orders: (1) dismissing defendants' affirmative defenses and granting plaintiffs summary judgment; (2) entering a money judgment against defendants for rent and additional rent from February 1, 2018 to August 31, 2018; (3) entering a money judgment against defendant Kettle; and (3) awarding plaintiff attorney fees.

In October 2018, plaintiffs sued defendants for rent and additional rent from February 1, 2018 to the date of their eviction from the subject premises on August 31, 2018, and sought that amount as a judgment against the guarantor of the parties' lease, Kettle, and against defendant tenant 419 KD Production Associates, Inc. (NYSCEF 1). By answer dated November 16, 2018, defendants denied plaintiffs' allegations and asserted as affirmative defenses that plaintiffs' claims are barred due to (1) their breach of the duty of good faith and fair dealing, (2) their unclean hands, (3) the fact that the guaranty was neither witnessed nor notarized and did not

create a binding contract, (4) their breach of the agreement, causing it to be rescinded; (5) their having been paid as agreed, (6) their failure to mitigate damages, and (6) the absence of documentation supporting the claimed amount. (NYSCEF 4).

In support of their motion, plaintiffs submit the affidavit of their managing agent who confirms the allegations set forth in the complaint and submits relevant documents, including the lease and modification/extension agreements and Kettle's notarized guaranty. He explains that after defendants defaulted in paying rent in 2017, plaintiffs commenced a non-payment proceeding against them, which was resolved by a stipulation dated January 23, 2018, in which defendants agreed to pay \$86,079.99 as rent and additional rent due through January 2018 in monthly payments beginning in February 2018. (NYSCEF 12). Defendants never made the payments, nor did they pay accruing rent, and thus the warrant of eviction was executed on April 11, 2018, although the lease was due to end on August 31, 2018. (NYSCEF 6).

Plaintiffs thereby establish, *prima facie*, that defendants owe them rent and additional rent through August 31, 2018, and that Kettle as guarantor is personally liable for those amounts. Pursuant to the parties' lease, defendants are also liable for plaintiffs' attorney fees and costs.

Defendants' conclusory and unsupported affirmative defenses are insufficient to raise a triable issue. (*See e.g., U.S. Bank Ntl. Assn. v Ahmed*, AD3d , 2019 NY Slip Op 05577 [2d Dept 2019] [affirmative defenses, which were conclusory and bereft of factual allegations, should have been dismissed on plaintiff's motion for summary judgment]). Moreover, the guaranty signed by Kettle is notarized.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for summary judgment is granted as follows:

A money judgment is granted to plaintiffs as against defendants, jointly and severally, in

the sums of:

- (a) \$86,079.99 as rent and additional rent due through January 2018;
- (b) \$57,658 in rent due from February 1, 2018 to April 11, 2018; and
- (c) \$125,066 in rent and additional rent from April 12, 2018 to August 31, 2018;

and plaintiffs are directed to submit a proposed judgment and order within 30 days of the date of this order; it is further

ORDERED, that plaintiffs are granted their reasonable attorney fees as against defendants, jointly and severally, and the issue of their reasonable fees is referred to a Special Referee to hear and report; it is further

ORDERED, that counsel for plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; 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).

7/30/2019

DATE

CHECK ONE:

APPLICATION:

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CASE DISPOSED

GRANTED

SETTLE ORDER

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

☐

OTHER

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BARBARA JAFFE, J.S.C.

¹ Available on the Court's website at www.nycourts.gov/supctmanh under the "References" link on the navigation bar.

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE