

Nostrand Ave. Partners, LLC v Flamingo Transp. & Limousine Servs., Inc.

2019 NY Slip Op 32355(U)

August 1, 2019

Supreme Court, New York County

Docket Number: 154218/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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. 154218/2017

NOSTRAND AVENUE PARTNERS, LLC,

MOTION SEQ. NO. 002

Plaintiff,

- v -

FLAMINGO TRANSPORTATION & LIMOUSINE SERVICES, INC. and SAVITRI SOODHOO,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51

were read on this motion for

SUMMARY JUDGMENT

In this landlord-tenant dispute, plaintiff Nostrand Avenue Partners, LLC ("Nostrand") moves, pursuant to CPLR 3212, for summary judgment on its causes of action for breach of contract, unjust enrichment, and breach of guaranty against defendants Flamingo Transportation & Limousine Services, Inc. ("Flamingo") and Savitri Soodhoo ("Soodhoo"). Defendants oppose the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is decided as follows.

On March 15, 2012, Nostrand, as landlord, entered into a lease agreement with defendant Flamingo, as tenant, for property located at 860 Nostrand Avenue in Brooklyn. (Docs. 40 at 1; 41 at 2.) Defendant Soodhoo signed a guaranty dated March 23, 2012, guaranteeing Flamingo's obligations under the lease agreement. (Doc. 42.) The lease term was to last from March 15, 2012, to February 14, 2022. (Doc. 41 at 2.) However, Nostrand alleges that, beginning in April of 2015,

Flamingo stopped making rent payments. (Doc. 40 at 3.) The tenant was eventually evicted from the premises on December 15, 2015. (*Id.*)

Plaintiff commenced the instant action on May 1, 2017, by filing a summons and complaint. (Doc. 44.) In the complaint, plaintiff alleged four causes of action: (1) breach of contract as against defendant Flamingo (*id.* at 5); (2) unjust enrichment (*id.* at 5–6); (3) quantum meruit (*id.* at 6); and (4) breach of guaranty as against defendant Soodhoo (*id.* at 7). The total amount that plaintiff seeks in this action is \$88,968.24, plus statutory interest. (*Id.*)

Plaintiff subsequently filed a motion for a default judgment (motion sequence 001) against defendants. (Doc. 7.) On March 20, 2018, this Court denied the motion. (Doc. 33.) Defendants filed their answer on August 16, 2017. (Doc. 45.)

In the instant motion (motion sequence 002), plaintiff now moves, pursuant to CPLR 3212, for summary judgment against defendants on his causes of action for breach of contract, unjust enrichment, and breach of guaranty. (*See* Doc. 40.) In support of his motion, plaintiff submits the pleadings (Docs. 44–45), the lease agreement (Doc. 41), the guaranty (Doc. 42), and the rent ledger (Doc. 43). The ledger establishes that rent went unpaid from April 1, 2015, through December 1, 2015. (Doc. 43 at 5.) Plaintiff also alleges that no rent was paid from the periods of March 1, 2016, through February 1, 2017 (Doc. 40 at 3), and from March 1, 2017, through April 1, 2017 (*id.*).¹ Further, additional charges for taxes, sewage, and water appear on the ledger for July 2, 2015 (Doc. 43 at 5), and December 15, 2015 (*id.*). Additionally, there are late charges for April of 2015 (*id.*) and from August to December of 2015 (*id.*). The total amount that plaintiff asserts defendants owe for these charges is \$88,968.24. (Doc. 40 at 3.)

¹ This Court notes that the rent ledger submitted in Document 43 only shows payments and non-payments up through December of 2015. Therefore, to the extent plaintiff alleges that rent went unpaid in 2016 and 2017, such an allegation is certainly not established by the rent ledger.

Defendants assert only two arguments in opposition to the motion. First, they argue that the motion should be denied as premature. (Doc. 48 at 3.) Second, and relatedly, they allege that they continued making rent payments after April of 2015, but that plaintiff refused their checks, did not cash them, and ultimately returned them. (Doc. 48 at 1.)

The motion is granted with respect to plaintiff's first cause of action for breach of contract. 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].)

With respect to the issue of defendant Flamingo's liability, plaintiff established its prima facie showing for breach of contract by submitting the lease (Doc. 41), the rent ledger (Doc. 43), and the complaint (Doc. 44), which plaintiff verified. (*See Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] (elements of breach of contract are the existence of such a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages); *see also 82-90 Broadway Realty Corp. v New York Supermarket, Inc.*, 154 AD3d 797, 798 [2d Dept 2017] ("plaintiff established its prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action to recover for damages for breach of contract by submitting a copy of the lease and an affidavit from its president"); CPLR 105[u] (a verified pleading may be used as an affidavit).) The contract was executed between plaintiff and defendant Flamingo. (Doc. 41 at 2.) Plaintiff has therefore established that defendant Flamingo is liable for breach of contract.

Defendant Flamingo failed to raise an issue of fact in opposition. It argues that the motion should be denied as premature (Doc. 48 at 3), but a “grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.” (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000].) This potential relevant evidence, Flamingo maintains, stems from its allegation that it continued making rent payments to plaintiff after April of 2015. (*Id.* at 1.) However, this allegation comes only from defense counsel’s affirmation, which does not even allege that defense counsel has personal knowledge of the facts therein (*see* Doc. 48 at 1), and is therefore insufficient to defeat a motion for summary judgment. (*See Brookman & Brookman, P.C. v Schiavoni*, 245 AD2d 93, 93 [1st Dept 1997] (affirmation of counsel lacking personal knowledge was insufficient to defeat a motion for summary judgment).) Indeed, while the answer is verified (Doc. 45), it does not assert that defendants continued making rent payments (*see id.*).

Plaintiff has also established its prima facie showing of entitlement on its cause of action for breach of guaranty as against defendant Soodhoo. “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.” (*Paribas Properties, Inc. v Benson*, 146 AD2d 522, 525 [1st Dept 1989].) Here, the guaranty is in writing with Soodhoo’s signature. (Doc. 42 at 4.) “[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].) Defendant Soodhoo is therefore liable for the satisfaction of defendant Flamingo’s obligation under the lease. And, again, this Court finds that defendants’ arguments are insufficient to raise a triable issue of fact.

Further, this Court notes that the branch of plaintiff's motion for summary judgment on its cause of action for unjust enrichment is mooted by this Court's finding that defendant Flamingo is liable for breach of contract and that defendant Soodhoo is liable under the guaranty. The damages that plaintiff pleads in its complaint for the causes of action for breach of contract and unjust enrichment are the same: \$88,968.24, plus statutory interest. (Doc. 44 at 5-6.) Even if this Court were to grant plaintiff summary judgment for unjust enrichment, plaintiff cannot recover any more than that amount.

Finally, while plaintiff has proved defendants' liability under breach of contract and breach of guaranty, the amount of damages to which plaintiff has proved its entitlement is \$49,120.94. Once again, plaintiff seeks \$88,968.24, plus statutory interest. (*See* Doc. 40 at 6.) However, as mentioned on page two of this decision, the rent ledger that plaintiff has submitted contains no entries later than December of 2015. (*See* Doc. 43.) Thus, to the extent plaintiff alleges that rent went unpaid from March 1, 2016, to February 1, 2017 (\$33,912.60 [Doc. 40 at 3]), and again from March 1, 2017, through April 1, 2017 (\$5,934.70 [*id.*]), such an allegation is certainly not established by the rent ledger. The amounts for those periods should therefore be subtracted from the total plaintiff is claiming. Thus, plaintiff is entitled to judgment in the amount of \$49,120.94, plus statutory interest, reasonable attorneys' fees and costs, fees and disbursements of \$603.20. *See* Doc. 9.

In light of the foregoing, it is hereby:

ORDERED that plaintiff Nostrand Avenue Partners, LLC's motion for summary judgment against defendants Flamingo Transportation & Limousine Services, Inc. and Savitri Soodhoo is granted on its causes of action for breach of contract and breach of guaranty in the amount of \$49,120.94, plus statutory interest from April 15, 2015, reasonable attorney's fees and costs and disbursements as charged by the Court; and it is further


ORDERED that the remaining branches of plaintiff's motion is otherwise denied as moot; 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 it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff in the amount of \$49,120.94, plus statutory interest from April 15, 2015, as calculated by the Clerk, and costs, fees, and disbursements of \$603.20 plus reasonable attorneys' fees; and it is further

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

08/01/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	<input checked="" type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE