

China Co. NYC, LLC v Yang

2019 NY Slip Op 32590(U)

August 30, 2019

Supreme Court, New York County

Docket Number: 159403/2017

Judge: John J. Kelley

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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. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 159403/2017

CHINA CO. NYC, LLC, doing business as CHINA CO., and
QUON DUNN CORP.,

MOTION DATE 08/13/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

FIONA RUIHUA YANG,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action to recover on a personal guaranty of a commercial lease, the plaintiffs move for summary judgment on the complaint and dismissing the defendant's affirmative defenses. The defendant opposes the motion. The motion is granted to the extent that the plaintiffs are awarded partial summary judgment for recovery of rent, additional rent, and associated charges, and all of the affirmative defenses are dismissed. The motion is otherwise denied, as there are triable issues of fact with respect to whether the plaintiffs are entitled to recover on the guaranty for repair damages.

The plaintiff, Quon Dunn Corp. (QDC), owns a commercial building in Manhattan, managed by the plaintiff, China Co. NYC, LLC (China Co.). In 2012, QDC leased out several floors of the building to Paris Wedding Center Corp. (Paris) for a term of seven years. The lease was personally guaranteed by the defendant, Fiona Ruihua Yang. The lease obligated Paris to pay rent, additional rent, and additional charges, such as water and elevator maintenance charges. China Co. was identified on the lease as landlord.

Paris agreed to pay China Co., without any deduction or set-off whatsoever, as follows:

(i) for the period from January 1, 2016 through December 31, 2016, fixed monthly rent in the amount of \$14,852.60 per month; (ii) for the period from January 1, 2017 through December 31, 2017, fixed monthly rent in the amount of \$15,298.18 per month; and (iii) for the period from January 1, 2018 through December 31, 2018, fixed Monthly rent in the amount of \$15,757.13.

Paris also agreed to pay China Co., as additional rent, 37.5% of the building's real estate taxes and all costs and expenses associated with the use, operation, and maintenance of the elevator.

After Paris did not pay rent, additional rent, and applicable charges during 2015, QDC commenced a commercial landlord-tenant proceeding against it in the Civil Court. That matter was settled when QDC accepted \$84,600 of the \$113,418 that was due and owing. As part of the settlement agreement, Paris agreed to vacate the leasehold. The terms of the lease, nonetheless, obligated Paris to pay for the entire lease term regardless of whether it vacated the leasehold prior to the end of the term. QDC and China Co. now seek to recover unpaid rent, additional rent, and applicable charges from Yang, as guarantor, for the remainder of the lease term, i.e., from January 2016 forward. The plaintiffs also assert that, by failing to pay for the remainder of the lease term, and by damaging the building's heating, ventilation, and air-conditioning (HVAC) system, Paris forfeited the waived and accrued arrears, i.e., the difference between the amount owed through December 31, 2015, and the amount of the Civil Court settlement, and became obligated to pay for the damages. QDC thus seeks from Yang the total sum of \$657,263.76 for rent, additional rent, and accrued charges, plus \$87,625.00 in repair costs.

The plaintiffs have made a prima facie showing that the terms of the subject guaranty is clear, unambiguous, absolute, and unconditional. "Where 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, 446-447 [1st Dept 2012], quoting *National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470, 471 [1st Dept. 1991]). In moving for summary judgment to enforce an absolute and unconditional guarantee on a commercial lease, the plaintiffs here made a prima facie showing of the tenant's default and the amount owed under the lease's accelerated rent provision (see *Royal Equities Operating, LLC v Rubin*, 154 AD3d 516, 517 [1st Dept 2017]; *Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept 2017]). Moreover, "[a]lthough an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please" (*Holy Properties Ltd., L.P. v Kenneth Cole Prods.*, 87 NY2d 130, 135 [1995]; see *Gallery at Fulton St., LLC v Wendnew LLC*, 30 AD3d 221, 222 [1st Dept 2006]). Here, "the parties clearly contracted to make the defaulting tenant[s] liable for rent after such termination" (*Gallery at Fulton St., LLC v Wendnew LLC*, 30 AD3d at 222). Hence, the plaintiffs established, prima facie, that they are entitled to recover rent, additional rent, and applicable charges until the end of the lease term, regardless of whether or when they re-leased the premises, as they reserved their right to collect the remaining rent from Paris (see *id.*; see also *Jimenez v Henderson*, 144 AD3d 469 [1st Dept 2016]; *Ring v Printmaking Workshop, Inc.*, 70 AD3d 480, 480, 897 NYS2d 11 [1st Dept 2010]).

Crucially,

"[g]uaranties and leases are separate documents; the former impose obligations on the guarantors and the latter impose obligations on the landlord and the tenant. When a guarantor is sued on the guaranty, as is the case here, he or she cannot raise a claim or defense which is personal to the principal debtor, such as breach of the principal contract, unless it extends to a failure of consideration for the principal contract, and therefore for the guarantor's contract" (*I Bldg, Inc. v Hong Mei Cheung*, 137 AD3d 478, 478 [1st Dept 2016]; see *Park Towers S. Co., LLC v 57 W. Operating Co., Inc.*, 96 AD3d 443 [1st Dept 2012]).

Thus, the fact that China Co. relet the leasehold after Paris vacated it, and thus purportedly mitigated its damages, cannot serve as a defense to this action on the guarantee, as any defense in this regard, as well as any defense that the acceleration clause is unenforceable as a penalty, were personal to Paris (see *Royal Equities Operating, LLC v Rubin*, 154 AD3d at 517).

As explained by the First Department,

“defendant[’s] claim that rent could not be accelerated because the premises had been re-let was properly rejected by the motion court, as defendants are foreclosed from raising all defenses which are personal to the obligor tenant, except a failure of consideration, which does not apply here. . . As [a] guarantor[] who expressly waived all rights and remedies generally accorded under law, defendant[’s] liability can be greater than that of the obligor tenant, as the lease and guaranties were separate undertakings, and the latter are enforceable without qualification or reservation” (*id.*)

Even if Yang were permitted to assert Paris’s personal defense that the rent acceleration clause is an unenforceable penalty, she would be unlikely to succeed, as it appears to constitute a proper liquidated damages provision (*see generally 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn. Inc.*, 24 NY3d 528 [2014]). A determination as to whether a rent acceleration clause is unconscionable, and hence an unenforceable penalty, is a matter of law to be determined by the court (*see id.*, at 536; *Matter of Krodel v Amalgamated Dwellings, Inc.*, 166 AD3d 412 [1st Dept 2019]). Yang would likely be unable to satisfy her burden of showing that the rent acceleration clause here is unconscionable (*see RES Exhibit Servs., LLC v Genesis Vision, Inc.*, 155 AD3d 1515 [4th Dept 2017]).

In opposition to the plaintiffs’ showing, Yang, as guarantor, failed to refute their calculations as to the amount of rent, additional rent, and accrued charges that were owed, or challenge any specific line-item in the papers submitted by the plaintiffs, thus entitling the plaintiffs to summary judgment as to the amount of damages (*see Royal Equities Operating, LLC v Rubin*, 154 AD3d at 517; *Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept 2017]). “Defendant[’s] nonspecific argument that plaintiff[’s] calculations were flawed and uncertain is conclusory, and insufficient to raise a triable issue” (*Royal Equities Operating, LLC v Rubin*, 154 AD3d at 517; *see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004]) as to the rent, additional rent, and accrued charges due and owing.

Although the result here may be harsh, this court is constrained by the Court of Appeals’ and First Department’s precedents holding that, under the circumstances presented, a

guarantor who unconditionally guarantees a tenant's obligations will be held liable for more than that owed to the obligee by the obligor tenant.

There is no merit to Yang's contention that China Co., as QDC's agent, lacked capacity to enter into the lease. Nelson Dunn, who avers in his affidavit that he was an officer of both QDC and China Co., and the principal of QDC, explains that, in his capacity as QDC's principal, he gave China Co. the authority to enter into the lease on QDC's behalf. "A principal is bound to a third person by acts of another person when the principal has expressly given the latter authority to act on his behalf" (*Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 148 [2d Dept 1986]; see *Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2d Dept 1993]; Restatement [Second] of Agency §§ 26, 27). Yang thus became obligated to China Co., which was named in the lease. The court also rejects Yang's contention that there are triable issues of fact as to whether Paris actually defaulted under the terms of the lease.

Nor is there merit to Yang's contention that this motion violates the rule against successive summary judgment motions. Although the plaintiffs commenced this action pursuant to CPLR 3213 by motion for summary judgment in lieu of complaint, that motion was denied only because the plaintiffs had yet to establish that they were authorized to do business in New York, not because there were triable issues of fact with respect to the causes of action that they asserted. On the instant motion, the plaintiffs cured the insufficiencies in the initial motion by establishing that China Co. was a domestic limited liability company organized in 2012 and that QDC was a domestic corporation incorporated in 1966. Inasmuch as the plaintiffs submitted new evidence on this motion that they did not initially deem to be necessary to an award of summary judgment, sufficient cause exists for consideration of this motion (see generally *Sutter v Wakefern Food Corp.*, 69 AD3d 844, 845 [2d Dept 2010]). The instant motion is thus more in the nature of a renewed motion for summary judgment, rather than a successive, new motion for summary judgment.

Yang provides no legal authority for her contention that QDC should have, but failed to, commence a tax certiorari proceeding against the City of New York to challenge an increased real property tax assessment in order to assure that Paris's obligation to pay real property taxes did not increase dramatically. There is no proof that QDC would have prevailed in such a proceeding in any event, and its failure to commence one is not a defense to the nonpayment of rent and additional rent.

Yang also asserts that Dunn sexually harassed her, and that this was a significant factor leading to Paris's vacatur of the leasehold. While she may have a cause of action to recover for assault, prima facie tort, or violation of the City Human Rights Law, her allegations of harassment, even if true, do not constitute a defense to a guaranty on a commercial lease.

In light of the foregoing, the plaintiffs established their prima facie entitlement to judgment as a matter of law dismissing Yang's affirmative defenses of lack of standing, lack of capacity, failure to state a cause of action, failure to mitigate damages, lack of authorization to enter into the subject lease, lack of validity of the lease, waiver, estoppel, laches, unclean hands, statute of limitations, absence of a personal guaranty, fraud, statute of frauds, the plaintiffs' failure to perform under the lease, res judicata, and collateral estoppel. In opposition to the plaintiffs' showing in this regard, Yang failed to raise a triable issue of fact.

With respect to the plaintiffs' claim for repair damages, however, Yang raised a triable issue of fact in opposition to their prima facie showing of entitlement to judgment as a matter of law. In her affidavit, Yang asserts that Paris was not actually responsible for any damage to the building's HVAC system because those damages arose after Paris vacated the leasehold. The disposition of that claim, as well as the entry of a final judgment, must await trial of that issue.

Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment is granted to the extent that they are awarded judgment against the defendant in the sum of \$657,263.76 on their causes of

action to recover rent, additional rent, and accrued charges, and the defendant's affirmative defenses are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the parties shall appear for a compliance conference on October 15, 2019, at 11:00 a.m.

This constitutes the Decision and Order of the court.

8/30/2019
DATE


JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: