

<b>Daval 37 Assoc. LLC v Mobile Training &amp; Educ., Inc.</b>
2019 NY Slip Op 32664(U)
September 9, 2019
Supreme Court, New York County
Docket Number: 157142/2017
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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DAVAL 37 ASSOCIATES LLC,

Plaintiff,

- v -

INDEX NO. 157142/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

MOBILE TRAINING & EDUCATION, INC.,  
RICHARD BACHRACH,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 47-55 were read on this motion to/for reargument/reconsideration.

In this action, plaintiff landlord sues defendants tenant Mobile Training & Education, Inc. and guarantor Bachrach for breach of a lease and guaranty. By decision and order dated February 6, 2019, plaintiff's motion for summary judgment was granted as against Mobile and a money judgment and attorney fees were awarded against it. (NYSCEF 42).

However, the motion was denied as against guarantor on the guaranty, on the ground that the guaranty shielded the guarantor from liability for Mobile's lease violations unless Mobile failed to vacate the premises, and Mobile had vacated the premises before the instant action commenced. In making that determination, a particular section of the guaranty was relied upon, which provides:

[Plaintiff] does not desire to have [guarantor] guarantee the obligations of [Mobile] under the lease. [Plaintiff] is concerned, however, that if [Mobile] defaults under the Lease, [Mobile] may continue to occupy the Demised Premises, to the detriment of [plaintiff]. Therefore, in order to avoid that situation, [plaintiff] has requested [guarantor] to guarantee to [plaintiff] that if [Mobile] defaults under the Lease, [Mobile] will vacate the Demised Premises. The result being that if [Mobile] vacates the Demised Premises at the time of the default, after the expiration of any notice, grace, (sic) cure period, [guarantor]

will have no obligation or liability under this Agreement (although the obligation and liability of [Mobile] under the Lease will continue in accordance with the Lease).

(NYSCEF 13).

Plaintiff now moves for leave to reargue, arguing that a portion of the guaranty was overlooked. The portion allegedly requires the guarantor to guarantee the payment of the tenant's obligations even if the tenant vacates the premises. (NYSCEF 48). That section of the guaranty follows the one relied on in the decision, and is preceded with the sentence "[a]ccordingly, Principal agrees as follows:

Until Tenant vacated (sic) the entire Demised Premises (for any reason and at any time), Principal guarantees to Landlord the payment and performance of Tenant's obligations under and in accordance with the Lease, including, without limitation, the payment of fixed and additional rent (the "Obligations"), so that Principal will have no obligation or liability for obligations which accrue under the Lease following the date Tenant vacates the entire Demised Premises. If, however, Tenant defaults and does not vacate the entire Demised Premises, then until Tenant does vacate, Landlord may, at its option, proceed against Principal and Tenant, jointly and severally, or Landlord may proceed against Principal under this agreement without commencing any suit or proceeding of any kind against Tenant, or without having obtained any judgment against Tenant.

(NYSCEF 13).

Contrary to plaintiff's argument, nothing in this paragraph of the guaranty is inconsistent with or would lead to a different result than the earlier finding. The first cited paragraph clearly and unambiguously sets forth that plaintiff's intent is not that guarantor pay Mobile's unpaid rent but that Mobile vacate the entire premises. It spells out plaintiff's intent in that regard, that if Mobile vacates the premises, guarantor will have no liability under the guarantee. The second cited paragraph then memorializes that intent by directing that guarantor guarantee the payment and performance of Mobile's obligations *until* Mobile vacates, and that if Mobile does not vacate the entire premises, "then until [Mobile] does vacate," plaintiff may proceed against guarantor under the guaranty. Moreover, both of the paragraphs are described as "recitals," and thus

plaintiff fails to show that the first paragraph is a non-binding recital paragraph whereas the second paragraph is the operative one.

As acknowledged by plaintiff in its reply papers (NYSCEF 55), Mobile vacated the premises, but, according to plaintiff, when Mobile vacated in May 2017 owing past due rent pursuant to the stipulation, the guaranty was triggered.

That interpretation is not supported by the guaranty, which does not provide that guarantor is liable for any rent due at the time that Mobile vacates. Rather, the guaranty provides that guarantees payment until Mobile vacates the premises and that until Mobile vacates, plaintiff may proceed to enforce the guaranty against guarantor. It is undisputed that when plaintiff filed the instant action, Mobile had already vacated the premises.

Had plaintiff intended that guarantor remain liable for unpaid rent unconditionally and regardless of the circumstances of Mobile's default and/or vacatur, it could have so written. Instead, it conditioned enforcement of the guaranty on Mobile's failure to vacate, and, as the guaranty's drafter, the language must be construed strictly and against plaintiff. (*See Madison Ave. Leasehold, LLC v Madison Bentley Assocs. LLC*, 30 AD3d 1 [1<sup>st</sup> Dept 2006] [rejecting attempt to interpret guaranty without regard to condition that first had to be satisfied to make it effective; "contract of guaranty is subject to the fulfillment of any condition precedent to the liability imposed on the guarantor."]; *see e.g., PC 444, LLC v Priority Pediatrics, PLLC*, 133 AD3d 645 [2d Dept 2015] [guaranty must be construed in strictest manner, and guarantor should not be liable beyond guaranty's express terms]; *Continental Indus. Cap., LLC v Lightwave Enter., Inc.*, 85 AD3d 1639 [4<sup>th</sup> Dept 2011] [personal guaranty limited liability to specific amount of fees, and if parties had intended to provide otherwise, they could have done so]).

Plaintiff thus fails to establish that the portion of the lease on which it relies was overlooked or misconstrued. Accordingly, it is hereby

ORDERED, that plaintiff's motion for leave to reargue is denied.

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BARBARA JAFFE, J.S.C.

9/9/2019  
DATE

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