

19-23 St. Marks Assoc., LLC v Kanchik

2020 NY Slip Op 30159(U)

January 23, 2020

Supreme Court, New York County

Docket Number: 150872/2018

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. 150872/2018

19-23 ST. MARKS ASSOCIATES, LLC,

Plaintiff,

MOTION SEQ. NO. 002

- v -

IGOR KANCHIK,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover on a lease guaranty, plaintiff/owner 19-23 St. Marks Associates, LLC moves, pursuant to CPLR 3212, for summary judgment against defendant/guarantor Igor Kanchik. After a review of the motion, as well as the relevant statutes and case law, the application, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are set forth in detail in the order of this Court entered January 30, 2019 (“the January 2019 order”), which denied plaintiff’s motion for summary judgment in lieu of complaint against defendant and converted the motion into a complaint. Doc. 26. To the extent additional facts are relevant, or facts from the January 2019 order warrant repeating herein, they are set forth below.

Following the denial of plaintiff’s motion for summary judgment in lieu of complaint, defendant joined issue by service of its verified answer, in which it denied all substantive

allegations of wrongdoing and asserted affirmative defenses including, inter alia, actual and/or constructive eviction of Addiction World, Inc. d/b/a NYC Kulture (“tenant”), which executed a 10-year lease for the premises in 2011. Docs. 29, 56.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on the guaranty executed by defendant, who was tenant’s “president/owner.” Docs. 53, 55. The notice of motion reflects that plaintiff seeks “an amount of no less than \$334,565.95”, as well as interest, attorneys’ fees and costs. Doc. 53.

Craig Wood, plaintiff’s authorized agent, submits an affidavit in support of the motion in which he asserts, inter alia, that: 1) pursuant to the judgment of the Civil Court entered November 9, 2017 (“the Civil Court judgment”), tenant breached the lease and owed plaintiff \$134,073.81, plus attorneys’ fees in an amount to be determined (Doc. 5); 2) subsequent to the entry of the Civil Court judgment, tenant accrued additional rent arrears, late charges, and attorneys’ fees in the amount of \$59,216.16, thereby increasing the amount set forth in the Civil Court judgment to \$193,289.97 (Doc. 58); 3) in November 2017, following the issuance of the Civil Court judgment, tenant advised plaintiff that it would vacate the premises by March 15, 2018 (Doc. 62); 4) on June 5, 2018, plaintiff entered into a commercial lease with a new tenant, Mi Tea St. Marks Inc. (“Mi Tea”), which took possession of the premises on June 19, 2018 and that, in order to induce Mi Tea to enter into the lease, plaintiff gave it a rent abatement of \$55,550, representing three free months of rent (Doc. 59); and 5) plaintiff was charged a real estate brokerage fee of \$85,775.98 by Colliers International NY LLC for finding Mi Tea as a tenant for plaintiff. Doc. 60. Thus, asserts Wood, plaintiff has been damaged by the tenant in the total amount of \$334,565.90, plus attorneys’ fees, as well as interest at the rate of 10% per annum pursuant to Article 57.02 of the lease, and defendant is unconditionally liable to pay this sum. Doc. 54.

LEGAL CONCLUSIONS

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.* Where, as here, summary judgment is being sought to enforce a written guaranty, "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." *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 (1st Dept 1998).

Plaintiff is entitled to summary judgment on its claim for payment of outstanding rent and other monetary obligations owed by tenant. The Civil Court found tenant liable to plaintiff for unpaid rent pursuant to the lease. The lease was executed between plaintiff and tenant and defendant executed the lease and guaranty in his capacity as tenant's president. Further, defendant executed the guaranty in writing (*Paribas Properties, Inc. v Benson*, 146 AD2d 522, 525 [1st Dept 1989] ["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."]), and the guaranty incorporates the lease by reference.

Additionally, the guaranty clearly obligates defendant to ensure satisfaction of tenant's responsibilities under the lease, and no condition limiting defendant's liability appears in the guaranty. Specifically, the guaranty provides that defendant:

hereby guarantees, unconditionally and absolutely, to [plaintiff] . . . the full and faithful keeping, performance and observance of all the covenants, agreements, terms, provisions and conditions of the [l]ease provided to be kept, performed and observed by [t]enant (expressly including, without being limited to, the payment as and when due of the fixed rent and additional rent payable by [t]enant under the [l]ease) and the payment of any and all other damages for which [t]enant shall be liable by reason of any act or omission contrary to any of said covenants, agreements, terms, provisions or conditions, including (but not limited to) reasonable legal fees and disbursements, due under the [l]ease and which are in arrears, together with interest thereon at the late payment rate set forth in the [l]ease.

Doc. 55.

"[W]here [as 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). Since defendant did not oppose the motion, he has thus failed to raise any triable issues of fact to defeat plaintiff's entitlement to the relief sought.

"To sustain its burden on damages, plaintiff must come forward with supporting documentary evidence or an explanation as to how the total amount of the debt was calculated; conclusory allegations as to the amount due are insufficient." *24 Fifth Owners, Inc. v Glazier*, 2015 NY Misc LEXIS 148, 2015 NY Slip Op 30078(U) (Sup Ct New York County 2015) quoting *Sterling Nat. Bank v. Biaggi*, 2006 NY Misc. LEXIS 9404, 2006 NY Slip Op 30685(U) (Sup Ct New York County 2006). Although plaintiff demonstrates that defendant executed an absolute and unconditional guaranty pursuant to which he agreed to guarantee the annual rent and additional rent due under the lease, as well as that defendant failed to make any payment under the guaranty, it fails to adequately support its claim that the total amount due is \$334,565.95, plus interest at the rate of 10% per annum pursuant to Article 57.02 of the lease. As noted previously, Wood claims in his affidavit that defendant owes plaintiff: 1) \$134,073.81, the amount of the Civil Court

judgment, plus attorneys' fees; 2) additional rent arrears, late charges, and attorneys' fees accruing from the date of the Civil Court judgment until January 2018 in the amount of \$59,216.16 (thereby allegedly increasing the amount set forth in the Civil Court judgment to \$193,289.97); 3) \$55,500, representing the three free months of rent credit plaintiff gave Mi Tea to induce it to enter into a lease for the premises; and 4) the \$85,775.98 brokerage fee plaintiff paid Colliers.

Despite the calculations set forth in Wood's affidavit, tenant's ledger reflects that the total arrears plaintiff seeks to collect from defendant improperly includes legal fees. Doc. 58. Thus, plaintiff's motion for summary judgment on its breach of guaranty claim is granted as to liability only and this Court refers the issue of damages to a JHO/Special Referee to hear and report.

Plaintiff is also entitled to summary judgment on its claim seeking attorneys' fees. A prevailing party may only collect attorney's fees if "an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491 (1989); *see also Atlantic Dev. Group, LLC v. 296 East 149th Street, LLC*, 70 A.D.3d 528, 529 (1st Dep't 2010). Paragraph 19 of the lease provides that, if plaintiff, "in connection with any default by [tenant] in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees . . . then [tenant] will reimburse [plaintiff] for such sums so paid or obligations incurred with interest and costs." Doc. 56 at par. 19. Therefore, tenant is liable pursuant to the lease for any attorneys' fees incurred by plaintiff as a result of its nonpayment of rent. *See Berns v Halberstam*, 46 AD3d 808, 809 (1st Dept 2007). As noted above, defendant is obligated to fulfill tenant's responsibilities, which includes reimbursement of plaintiff for reasonable attorneys' fees pursuant to the guaranty. Doc. 55. Since plaintiff has not yet provided a bill of costs or an affidavit attesting to the attorneys' fees incurred and the reasonableness thereof, this Court directs that the JHO/Special Referee also

determine the amount of attorneys' fees incurred by plaintiff as a result of tenant's breach of the lease, for which defendant is liable pursuant to the guaranty.

Given this Court's findings, it is unnecessary to address plaintiff's remaining arguments.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff 19-23 St. Marks Associates, LLC for summary judgment on its complaint against defendant Igor Kanchik pursuant to CPLR 3212 is granted on the issue of liability only; and it is further

ORDERED that this matter is referred to a JHO/Special Referee for the purpose of conducting a hearing on the issue of damages, attorneys' fees, costs, and interest owed to plaintiff; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order, with notice of entry, on defendant within five days, and that counsel for plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (available at <http://www.nycourts.gov/courts/ljd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise the parties or their attorneys of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed on the date first fixed by the Special Referee Clerk, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

ORDERED that the JHO/Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the JHO/Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and section 202.44 of the Uniform Rules for the Trial Courts; it is further

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

1/23/2020

DATE

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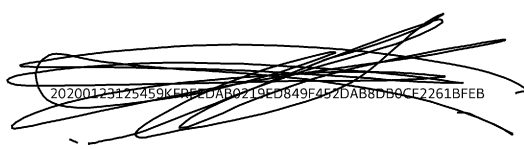
CASE DISPOSED DENIED
 GRANTED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN



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KATHRYN E. FREED, J.S.C.

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE