

ALQ, LLC v Kane

2020 NY Slip Op 30702(U)

March 6, 2020

Supreme Court, New York County

Docket Number: 654984/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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ALQ, LLC,

Plaintiff,

- v -

PETER KANE,

Defendant.

INDEX NO. 654984/2018

MOTION DATE 03/06/20

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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PETER KANE

Plaintiff,

-against-

ANTHONY SERIGNESE

Defendant.

Third-Party
Index No. 595059/2019

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and for the reasons set forth on the record (11.26.19 and 3.6.20) and as otherwise set forth below, ALQ, LLC's (**ALQ**) motion for summary judgment against Peter Kane on the first cause of action for breach of guaranty pursuant to CPLR § 3212 is granted.

Facts Relevant to the Motion

Reference is made to a certain Agreement of Lease (the **Original Lease**), dated May 18, 2016, by and between ALQ and Casual Hospitality LLC (**Tenant**), as amended by a First Lease

Modification Agreement (the **Amended Lease**, and together with the Original Lease, collectively, the **Lease**), dated June 13, 2016, by and between ALQ and Tenant (NYSCEF Doc. No. 49).

Pursuant to the Lease, ALQ leased to Tenant the ground floor retail and cellar space of the property located at 509 East 6th Street, New York, New York, 10013 (the **Premises**), for a term of 12 years, commencing July 21, 2016 and terminating on July 31, 2028 (NYSCEF Doc. No. 49 § 2). Section 21 of the Lease provides:

21. ASSIGNMENT AND/OR SUBLETTING.

21.01. Restrictions and limitations. Tenant shall not assign this lease nor sublet all of the Demised Premises without the prior written consent of Owner. Owner shall not unreasonably withhold or delay its consent to an assignment of Lease, or the subletting of the entire Demised Premises, provided that (i) the proposed use of the Demised Premises by the proposed assignee or subtenant shall be in accordance with the provisions of Article 8 hereof and shall not otherwise violate the terms, covenants and conditions of this lease, or of any applicable law; (ii) the proposed assignee or subtenant and its proposed use of the Demised Premises shall be in keeping with the character of the Building and the Condominium; (iii) Tenant is not in default in the performance of any of the terms, covenants and conditions of this lease; (iv) the principal or principals of the proposed assignee or subtenant, have never been convicted of a crime, are financially responsible, and have experience in the operation and management of first class eating and drinking establishment, toward making such determinations, the Tenant shall furnish Owner with the name and business address of the principal or principals of the proposed assignee or subtenant, a counterpart of the proposed assignment or sublease, and satisfactory information with respect to the nature and character of the business, and business experience, of the proposed assignee or subtenant, and its principal or principals, together with current financial information and references reasonably satisfactory to Owner;... (NYSCEF Doc. No. 49, at 23).

A certain Form of Guaranty (the **Guaranty**) was attached to and incorporated into the Lease (NYSCEF Doc. No. 49, Ex. A). Pursuant to the Guaranty, Peter Kane and Anthony Serignese, each of whom owned 50% interests in Tenant, as a specific and material inducement for ALQ to

enter into the Lease with Tenant, agreed to guarantee Tenant's compliance with and performance of all of Tenant's obligations set forth in the Lease (*id.*).

Specifically, Paragraph one of the Guaranty provides:

The Guarantors, for themselves and their successors and legal representatives, guaranties the prompt payment when due, or whenever payment may become due, under the terms, covenants and conditions of the Lease, of all payments of rent, additional rent, and all other charges, expenses and costs of every kind and nature, which are or may be due now or in the future under the terms, covenants and conditions of the Lease, any agreements or documents related to the Lease, or any other transaction between Owner and Tenant directly or indirectly related to the Lease; and the complete and timely performance, satisfaction and observation of the terms, covenants and conditions of the Lease, and the rules and regulations and related obligations arising by reason of the Lease, required to be performed, satisfied or observed by Tenant. This is an absolute and unconditional guaranty of payment and not of collection and the Guarantors further waives any right to require that any action be brought against Tenant or any other person or entity or to require that resort be had to any security or to any balance of any deposit account or credit on the books of Owner in favor of Tenant or any other person or entity.

(*id.*, ¶ 1). In addition, Paragraph 2 of the Guaranty states:

This guaranty extends to all liability which the Tenant has or may have to Owner by reason of matters occurring before the signing of the Lease by the parties, or commencement of the Term, or by matters occurring after the expiration of the term of the Lease by reason of removal of Tenant's property, surrender of possession, or other matters. This guaranty extends to the obligations of any successor, assignee, or subtenant of Tenant, to any extensions or renewals of the Lease, and to any term established by reason of the holdover of Tenant, an assignee or subtenant.

(*id.*, ¶ 2). Moreover, Paragraph 3 of the Guaranty provides:

If Tenant fails to perform, satisfy, or observe any term, covenant or condition of the Lease, or obligation related to the Lease, the Guarantors, will promptly and fully do so in Tenant's place. The Guarantors shall pay, reimburse, and indemnify Owner for all damages and reasonable costs, expenses, losses, and other liabilities arising or resulting from Tenant's failure to perform or satisfy the required terms, covenants and conditions.

Paragraph 15 of the Guaranty expressly provides that the guarantors shall be responsible for paying ALQ's costs and expenses incurred in connection with bringing any action or proceeding to enforce the Guaranty, including ALQ's attorneys' fees (*id.*, ¶ 15).

Tenant failed to timely pay rent for the months of February 2017, March 2017, April 2017, May 2017, June 2017, July 2017, August 2017, September 2017, October 2017, November 2017, January 2018, April 2018, May 2018, June 2018, July 2018 and August 2018. ALQ alleges that Tenant owed a total of \$161,883.16 in rent, late fees, and additional rent due under the Lease. ALQ served a Notice of Final Damages Pursuant to Section 26.02 of the Lease on January 15, 2019, notifying Tenant that ALQ was electing to accelerate all rent payments and demanding immediate payment of \$2,406,671.86 (NYSCEF Doc. No. 50).

After Tenant defaulted on its obligations under the Lease, ALQ commenced an eviction proceeding in the Civil Court of the City of New York entitled *ALQ, LLC v. Casual Hospitality LLC*, Index No. LT 074660/2018 (the **Eviction Proceeding**) (NYSCEF Doc. No. 52). The court granted a judgment of eviction in the Eviction Proceeding (NYSCEF Doc. No. 53). On January 7, 2019, the New York City Marshal executed the warrant of eviction and returned legal possession of the Premises to ALQ. Mr. Kane has not paid ALQ the accelerated rent.

ALQ commenced this action by filing a summons and complaint on October 5, 2018. On January 31, 2019, ALQ filed another summons and complaint against Mr. Kane in a separate action in this court entitled *ALQ, LLC v Peter Kane*, Index No. 650638/2019 (the **Second Action**). ALQ subsequently filed an amended complaint in this action, consolidating the claims

herein with the claims asserted in the Second Action. By order dated June 4, 2019, the court dismissed the Second Action without prejudice.

Discussion

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

To prevail on a breach of guaranty cause of action, a plaintiff must prove the existence of an absolute and unconditional guaranty and the guarantor's failure to perform (*Reliance Const. Ltd. v Kennelly*, 70 AD3d 418, 419 [1st Dept 2010]). As the First Department has held, "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" (*National Westminster Bank USA v Sardi's, Inc.*, 174 AD2d 470, 470 [1st Dept 1991]).

Here, ALQ submits copies of the Lease and the Guaranty (NYSCEF Doc. No. 49), a ledger showing Tenant and Mr. Kane's failure to make payments (NYSCEF Doc. No. 71), and the affidavit of ALQ's principal, Ismael Alba in support of the motion for summary judgment (NYSCEF Doc. No. 46). Accordingly, ALQ has made its *prima facie* showing of breach of the Guaranty.

Mr. Kane argues that (i) pursuant separate, verbal agreements, Mr. Alba agreed to forbear exercising his rights under the Lease and Guaranty if Tenant made certain payments, which payments were made, (ii) ALQ unreasonably withheld approval to assign the Lease, and (iii) the accelerated rent amount is unconscionable and therefore unenforceable. The arguments are unavailing.

First, to the extent that Mr. Kane alleges the existence of separate oral agreements, reference to such agreements is precluded by the merger clause set forth in Section 43.06 of the Lease.

Section 43.06 states, in relevant part: “[a]ll understandings and agreements, if any, heretofore had between the parties are merged in this agreement, which alone fully and completely expresses the agreement of the parties” (NYSCEF Doc. No. 49 ¶ 43.06). Further, Section 28 provides:

All understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between Owner and Tenant and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

(*id.*, ¶ 28.01). The parole evidence rule precludes the introduction of an oral agreement that purports to alter the terms of a written contract, especially where such contract contains a merger clause (*NAB Const. Corp. v Consolidated Edison Co. of New York, Inc.*, 222 AD2d 381, 381 [1st Dept 1995]). Accordingly, Mr. Kane is precluded from relying on any alleged oral agreements with ALQ or Mr. Alba.

In addition, Mr. Kane's argument that there is a material issue of fact as to whether ALQ unreasonably withheld consent to the assign the Lease is similarly unavailing. The problem with Mr. Kane's argument is that this defense is not available to a guarantor (*I Bldg, Inc. v Hong Mei Cheung* (137 AD3d 478, 478 [1st Dept 2016])). For completeness, the assignment provisions in the lease with respect to assignment of the Lease and assignment of the Guaranty are asymmetrical. For an assignment of the Lease, the landlord (ALQ) could not unreasonably withhold its consent. Assignment of the Guaranty, by contrast, was within ALQ's "sole discretion". These are different words and they are words of art. In addition, Section 21.01, requires as a prerequisite to approval for assignment of the Lease that the tenant not be in default under the Lease (NYSCEF Doc. No. 49, at 23). In its moving papers, ALQ indicates that the Tenant was in default in that it owed \$161,883.16 in rent, late fees, and additional rent due under the Lease and \$2,406,671.86 in accelerated rent as of January 15, 2019 and submitted its ledgers in support of its allegation (NYSCEF Doc. No. 50). Although Mr. Kane disputes that the Tenant was in default at the time of the proposed assignment of the Tenant's Lease, this does not raise an issue of fact for trial because the Lease provided that the landlord (ALQ)'s consent to an assignment of guaranty was within its "sole discretion" – i.e., as opposed to consent to any assignment of the Lease which consent could not be unreasonably withheld. In other words,

even if the landlord should have consented to an assignment of the Lease, the assignment of the Lease would not necessarily have resulted in a release of Mr. Kane as guarantor as there was no obligation for landlord to not unreasonably withhold its consent to an assignment of the guarantor's obligations. To wit, assignment of the Lease without a release of Mr. Kane's obligations as guarantor would not have in any way effected Mr. Kane's obligations under the Guaranty.

Finally, Mr. Kane argues that the accelerated rent in this case is unconscionable and should not be enforced. The argument also fails. First, a landlord in a commercial lease has no duty to mitigate its damages when a tenant is in default under the lease and may continue to collect the full rent due under the lease (*Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995]). Moreover, parties are generally free to agree to a liquidated damages clause in a contract "provided that the clause is neither unconscionable not contrary to public policy" (*Truck Rent-A-Ctr. V Puritan Farms 2nd*, 41 NY2d 420, 424 [1977]). To the extent that Mr. Kane relies on *172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assoc. Inc.* (24 NY3d 528 [2014]) for the proposition that accelerated rent that is grossly disproportionate to actual losses constitutes a penalty and is unenforceable, such reliance is misplaced. In *172 Duzer Realty Corp.*, the Court of Appeals held that defendants "should have had the opportunity to present evidence that the undiscounted accelerated rent amount is disproportionate to Van Duzer's actual losses, notwithstanding that the landowner had possession, and no obligation to mitigate" (*id.*, at 537). Unlike in *172 Duzer Realty Corp.*, the accelerated rent in this case is discounted and approximates ALQ's actual losses.

And, Mr. Kane's reliance on *Madison Ave. Leasehold, LLC v Madison Bentley Assocs. LLC* (30 AD3d 1 [1st Dept 2006]), is also misplaced. In *Madison Ave. Leasehold*, the guaranty by its terms terminated after three years provided that there was "no monetary default" by the tenant during such time (*id.*, at 2). The tenant defaulted on the lease approximately three years and three months after the commencement date and the landlord commenced an action to recover the rent due for the remainder of the term (*id.*). Before defaulting, the tenant made frequent late payments of rent, generally within 10 days of the due date, and the landlord accepted each payment without protest and did not raise the issue of the timeliness of the payments until it commenced the action, after initial three-year period (*id.*, at 6-7). The Court in looking at the lease in that case held that the landlord could not now argue that the Guaranty did not terminate according to its express three year term having never declared a "monetary default" during the relevant term of the Lease (i.e., the term as it related to the term of the Guaranty). Unlike in *Madison Ave. Leasehold*, the Guaranty in this case was absolute and unconditional and did not expire by its terms upon the lack of occurrence of a specific event (i.e., "monetary default" for a period of time). Rather, the obligations of the Guarantor remain in full force and effect unless in its "sole discretion" ALQ otherwise agreed.

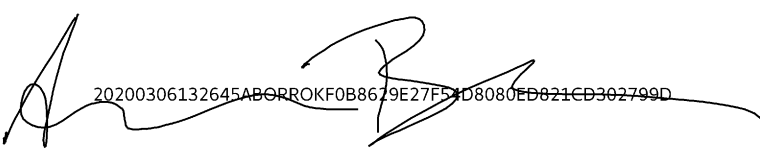
Therefore, the motion for summary judgment is granted.

Accordingly, it is

ORDERED that ALQ, LLC's motion for summary judgment on the first cause of action for breach of the Guaranty is granted and the Clerk is directed to enter judgment in favor of ALQ,

LLC and against Peter Kane in the amount of \$2,568,555.02, plus interest at the statutory interest at the rate of 9% per annum from the date of the entry of judgment, together with costs and disbursements as allocated by the Clerk upon submission of an appropriate bill of costs, and the plaintiff shall have execution thereof; and it is further

ORDERED that, upon the filing by the plaintiff with the General Clerk’s Office (60 Centre Street, Room 119) of a copy of this Order with notice of entry and a note of issue, and the payment of the fee therefor, the Clerk shall place this matter upon the inquest calendar for an assessment of reasonable attorneys’ fees.


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3/6/2020
DATE

ANDREW BORROK, J.S.C.

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