

**Ace Real Estate Assoc., LLC v Sheriff**

2020 NY Slip Op 30878(U)

March 30, 2020

Supreme Court, New York County

Docket Number: 153326/2019

Judge: Louis L. Nock

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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: PART 38

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ACE REAL ESTATE ASSOCIATES, LLC, : Index No. 153326/2019  
  
Plaintiff, : DECISION AND ORDER  
  
-against- :  
  
SALUMBA M. SHERIFF, :  
  
Defendant. :  
-----X

LOUIS L. NOCK, J.

Plaintiff moves for summary judgment in lieu of complaint (CPLR 3213) in connection with a guaranty of lease. A commercial lease was entered into between plaintiff, as lessor, and non-party Papa Fish Market Corp., as lessee, dated September 30, 2013, for a term of ten years. A guaranty of lease was entered into, of even date, between plaintiff, as guarantee, and defendant, as guarantor. The motion alleges that defendant is liable under the guaranty for a sum of \$140,520.95 per its ledger and accompanying utility and tax bills submitted on this motion. The motion is opposed.

The tenant was evicted from the premises by order of the Civil Court, dated June 12, 2018. As for monetary obligations asserted by plaintiff for non-payment of sums required by the lease, the guaranty waives any defenses that might have been assertible by the tenant. Such waiver operates to render the defendant guarantor liable irrespective of any possible defenses that might have been personal to the tenant (*see, e.g., Chip Fifth Ave., LLC v Quality King Distributors, Inc.*, 158 AD3d 418 [1<sup>st</sup> Dept], *appeal dismissed* 32 NY3d 947 [2018]). Speaking of such defenses, defendant’s assertion in opposition that he was told prior to signing that he would only be liable for a 24 month period; such defense could not succeed, in any event, by

virtue of the guaranty's merger clause, in Article 9 thereof, superseding any prior negotiations, discussions, commitments, representations, agreements, and understandings (*see, W&M Operating, LLC v Bakhshi*, 159 AD3d 520 [1<sup>st</sup> Dept 2018]). Moreover, any such assertion grounded in the wording of paragraph 15 of the guaranty, which does make reference to a 24 month period, is entirely nullified by a plain reading of that paragraph, which permitted the tenant to vacate and surrender the premises prior to natural termination only if it satisfied clear conditions: (i) the giving of six-months' advance written notice of such vacatur and surrender; (ii) the consecutive and timely payment of all Fixed Rent due under the lease for 24 months; and (iii) the payment of all Fixed Rent and Additional Rent (including water and sewer, tax escalation, and late fees) due at the noticed vacatur date. None of those conditions were satisfied.

Further to the point of tenant defenses – again, not necessary for the within disposition; but still appropriate for discussion – plaintiff's charges for Additional Rent under the lease, including water and sewer, tax escalation, and late fees, are all supported by plain readings of Articles 28, 63.4, 65.4, 74 of the lease, as well as the provision in Article 63.2 which reverses an \$11,400 Fixed Rent abatement in the event of default. In addition, defendant's assertion that he was not to be liable for tenant's post-termination use and occupancy is belied by Article 1 (c) of the guaranty, expressly recognizing defendant's liability therefor. The asserted defense of lack of consideration for the guaranty is entirely meritless in light of the plain fact that it was given in return for plaintiff's grant of the leasehold (*see, Michelin Mgt. Co., Inc. v Mayaud*, 307 AD2d 280 [2d Dept 2003]; *see also, General Trading Co., Inc. v A&D Food Corp.*, 292 AD2d 266 [1<sup>st</sup> Dept 2002] [execution of an absolute and unconditional guaranty, like here, waives any possible defense of lack of consideration]). Finally, no estoppel effect is had from the Civil Court order

granting possession back to plaintiff, as no litigation regarding the quantum of tenant's monetary obligation was reflected in that purely possessory order, on account of tenant's default in responding to the Civil Court petition, served through conspicuous service of process (*see, Oppenheim v Spike*, 107 Misc 2d 55 [App Term 1<sup>st</sup> Dept 1980]).

Defendant's obligations as guarantor stand alone and independent of the tenant's obligations pursuant to Article 6 of the guaranty. And that is so even in the event of the tenant's bankruptcy, pursuant to Article 5 of the guaranty.<sup>1</sup>

It is elementary that a guaranty of a lease obligation can be the subject of a motion for summary judgment in lieu of complaint pursuant to CPLR 3213 (*SpringPrince, LLC v Elie Tahari, Ltd.*, 173 AD3d 544 [1<sup>st</sup> Dept 2019]). Moreover, an unconditional guarantor, as is the case here, cannot rely on defenses of his principal, even were those defenses to have merit (and they do not have merit, as discussed above) (*European American Bank v Lofrese*, 182 AD2d 67 [2d Dept 1992]). Finally, the need to refer to extrinsic submissions, such as plaintiff's ledger, water/sewer bills, and real estate tax bills, in support of the motion, in order to ascertain the precise sum payable under the guaranty, does not preclude summary judgment in lieu of complaint (*id.*).<sup>2</sup>

Based on plaintiff's submissions of amounts due, identified by plaintiff's managing agent (Affidavit of Joselito San Diego, sworn to January 17, 2019), defendant is obligated, principally, in the sum of \$140,520.95, and plaintiff is entitled to a judgment therefor.

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<sup>1</sup> Tenant, in fact, did file a Chapter 11 Bankruptcy Petition on December 12, 2016, which was dismissed by the Bankruptcy Court on October 30, 2017.

<sup>2</sup> Defendant does not challenge the factual or arithmetic accuracy of plaintiff's ledger and bills. Rather, he asserts that he should not be charged for certain of the charges, if at all. Defendant's said assertion, of course, has been disposed of in the body of this decision.

Plaintiff also draws the court’s attention to the guaranty’s attorneys’ fee provision (Article 10). Plaintiff is entitled to its reasonable attorneys’ fees incurred in this matter, which is referred for calculation to a Referee’s hearing for determination.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment is granted, and accordingly, it is

ORDERED and ADJUDGED that plaintiff shall have judgment against defendant in the principal sum of \$140,520.95, with interest accrued thereon at the legal rate from the date hereof through the date of satisfaction of judgment, and that plaintiff have execution therefor; and it is further

ORDERED that plaintiff shall have judgment against defendant, further, for its reasonable attorneys’ fees incurred in this matter, in an amount to be heard and determined by a Special Referee, and that plaintiff have execution therefor, and that plaintiff, if it desires to obtain such judgment, shall commence coordinated efforts with the Special Referee Clerk’s Office of this court within 60 days from the date hereof.

Dated: New York, New York  
March 30,2020

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Hon. Louis L. Nock, J.S.C.