

270 Realty LLC v Handa Shi

2020 NY Slip Op 31308(U)

April 29, 2020

Supreme Court, New York County

Docket Number: 652930/2018

Judge: Kathryn E. Freed

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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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270 REALTY LLC

Plaintiff,

- v -

HANDA SHI,

Defendant.

-----X

INDEX NO. 652930/2018
MOTION DATE 02/19/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for breach of a commercial lease, plaintiff 270 Realty LLC ("270 Realty") moves, pursuant to CPLR 3212, for an order granting it summary judgment on its two causes of action, which seek to recover, inter alia, \$40,872.41 of alleged rent and additional rent from defendant Handa Shi ("Shi"), the alleged guarantor of the commercial lease agreement (Docs. 1, 4). After considering the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On June 12, 2018, 270 Realty commenced this action against Shi by filing a summons and complaint (Doc. 1). In the complaint, 270 Realty, the owner of 270 W. 38th Street, New York, NY ("the premises"), alleged that, in or about March 26, 2012, it leased a unit within the premises to nonparty S.H.D. Enterprises Ltd. ("S.H.D.") for a term of five years, commencing on April 1, 2012

(Doc. 1 at 2). On April 1, 2017, said parties executed a modification and extension agreement to the lease, whereby S.H.D. promised to pay monthly installments of \$5,908.91 to 270 Realty for its continued occupancy of the space through December 31, 2017 (Doc. 1 at 2). However, S.H.D. allegedly failed to make payments from August 2017 through December 2017, amounting to \$29,544.55 in unpaid rent (Doc. 1 at 2). 270 Realty also claimed that \$11,327.86 was due and owing for additional rent pursuant to the lease and extension agreement (Doc. 1 at 2-3).

In its first cause of action, 270 Realty asserted that Shi was liable for the total amount of rent and additional rent owed, totaling \$40,872.41, because Shi signed a guaranty of payment for the commercial lease (Doc. 1 at 3). 270 Realty claimed in its second cause of action that Shi was also obligated to pay its attorneys' fees pursuant to both the lease and extension agreement (Doc. 1 at 3). On July 12, 2018, Shi interposed an answer denying the allegations in the complaint and raising several affirmative defenses (Doc. 3). 270 Realty filed the instant motion for summary judgment on January 28, 2020 (Doc. 4).

270 Realty has failed to establish its prima facie entitlement to summary judgment. This Court has previously held that "[w]here, 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'" (*19-23 St. Marks Assoc., LLC v Kanchik*, 2020 NY Slip Op 30159[U], 2020 NY Misc LEXIS 278, *3 [Sup Ct, NY County 2020] [Freed, J.], quoting *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Although 270 Realty submits, *inter alia*, the affirmation of its managing agent Elliot Small ("Small"), who affirms, in pertinent part, that a personal guaranty of payment for the lease was signed by Shi (Doc. 5), the guaranty that 270 Realty provides, and which Small references in his affirmation, reflects that it was signed by Jack Shi (Doc. 16). Jack Shi is identified

as S.H.D.'s president in other exhibits but, from the motion papers, it is unclear whether Shi and Jack Shi are the same individual. In light of this ambiguity (*see generally Sound Distrib. Corp. v Richmond*, 213 AD2d 178, 179 [1st Dept 1995]; *compare Country v Himmelfarb*, 2004 NYLJ LEXIS 2809, *20-21 [Sup Ct, NY County 2004]), the motion is denied.

Further, the personal guaranty 270 Realty furnishes in support of its motion for summary judgment was executed only with respect to the original 2012 lease and, thus, "[w]hether that obligation survives the most recent lease extension, under the terms of . . . [the] original guaranty, remains an issue of fact for trial" (*404 Park Partners, L.P v Lerner*, 75 AD3d 481, 482 [1st Dept 2017]).

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

ORDERED that plaintiff 270 REALTY LLC's motion, pursuant to CPLR 3212, for summary judgment on its causes of action is denied; and it is further

ORDERED that counsel for defendant HANDA SHI shall serve a copy of this order, with notice of entry, upon plaintiff 270 REALTY LLC within 30 days of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on September 8, 2020 at 2:15 p.m.; and it is further

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

4/29/2020

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE