SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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JERICHO EMPIRE LLC,

Plaintiff,

-against-

CLEW Z. ANGUS (USA) INC., and STEPHEN LI,

Defendants.

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Index Number: 714553/2019

Motion Date: February 3, 2020

Motion Seq. No.: 1

The following numbered papers read on this Motion by Defendant Stephen Li, for an Order: pursuant to CPLR 3211(a)(1) and (7) granting Defendant Stephen Li's Motion to Dismiss the Complaint with prejudice as against him and for such other and further relief as this Court may deem just and proper.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affirmation - Exhibits…..……...…… | 6-20 |
| Affirmation in Opposition.....…….……..……... | 24 |
| Affirmation in Reply…….……... | 25 |

## FACTUAL BACKGROUND[1]

Plaintiff is the landlord for real property located at 15 Greenwich Avenue, New York, N.Y. 10014 (hereinafter the "subject premises"). Plaintiff and Defendant Clew Z. Angus (USA) Inc. (hereinafter " Defendant Angus (USA) Inc.") entered into a written lease and rider collectively together the "original lease" agreement on March 28, 2012 for the subject premises for a term of five (5) years and according to the lease it was to expire on March 31, 2017.

The original lease contained a five (5) year extension option and according to the original lease agreement said option is required to be exercised at least six (6) months prior to the expiration of the original lease. The original lease states that "time is of the essence" regarding the exercise of the lease extension option.

[1] The facts recited are taken from the Verified Complaint and the documentary evidence submitted by the parties.

Plaintiff and Defendant Stephen Li (hereinafter "Defendant Li") entered into a written guaranty entitled "Good Guy Guaranty" (hereinafter "guaranty agreement") executed on February 28, 2012.

On or about May 17, 2017, Plaintiff and Defendant Angus (USA) Inc. entered into a lease amendment agreement, which was only executed by Plaintiff and Defendant Angus (USA) Inc. The lease amendment agreement leased the subject premises to Defendant Angus (USA) Inc. beginning April 1, 2017 and ending on March 31, 2020.

**ARGUMENTS**

Defendant Li filed the instant Motion to Dismiss pursuant to CPLR 3211(a)(1) and (7) to dismiss the Complaint with prejudice against him. In support of Defendant Li's moving papers, he submits the following: Summons and Verified Complaint, Lease dated March 28, 2012, Good Guy Guaranty Dated February 12, 2012, Renu Contracting and Restoration Report dated My 15, 2019, Letter to Plaintiff's Attorney dated May 31, 2019, Letter to Plaintiff's Attorney dated June 28, 2019, Plaintiff's Department of Buildings work permit dated July 16, 2019, Notice of Termination dated July 24, 2019.

Defendant Li asserts that the instant case should be dismissed against him because nothing in the guaranty agreement expressly states that the guarantee's obligations continue as to any renewal or extensions of the original lease. Defendant Li further asserts that he was not a party to the lease amendment agreement nor did he sign the lease amendment agreement. According to Defendant Li, the lease amendment agreement makes no mention of the guaranty agreement nor did Plaintiff attach a copy of the guaranty agreement to the lease amendment agreement. Defendant Li further asserts that the lease amendment agreement does not constitute a lease extension to the original lease because it was not exercised in accordance with the option in the original lease specifically, regarding the time is of the essence provision. Lastly, Defendant Li asserts that the original lease expired on March 31, 2017 causing the guaranty agreement to lapse and as such, he is not responsible or liable for any rent or damages accrued after the expiration of the original lease.

Plaintiff opposes Defendant Li's motion and asserts *inter alia* that Defendant Li's motion should be denied and that the documents in which Defendant Li relies upon in support of his moving papers do not definitively dispose of Plaintiff's claim.

Defendant Li seeks dismissal of the instant Complaint pursuant CPLR 3211(a)(1) and (7). CPLR 3211 in pertinent part reads as follows:

> "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> 1. a defense is founded upon documentary evidence; or
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> 2. the court has no jurisdiction of the subject matter of the cause of action; or
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> 3. the party asserting the cause of action has not legal capacity to sue; or

4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or

5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

6. with respect to a counterclaim, it may not properly be interposed in the action; or

7. the pleading fails to state a cause of action;…".

A party seeking relief pursuant CPLR 3211(a)(1) on the ground that its defense is founded upon documentary evidence " has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Flushing Sav. Bank, FSB v. Siunykalimi,*94 A.D.3d 807, 808, 941 N.Y.S.2d 719, quoting *Mazur Bros. Realty, LLC v. State of New York,* 59 A.D.3d 401, 402, 873 N.Y.S.2d 326; *see Leon v. Martinez,* 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Camisa v. Papaleo,* 93 A.D.3d 623, 939 N.Y.S.2d 559; *Makris v. Darus–Salaam Masjid, N.Y., Inc.,* 91 A.D.3d 729, 936 N.Y.S.2d 325). "If the evidence submitted in support of the motion is not 'documentary,' the motion must be denied." see *Phillips v. Taco Bell Corp*., 152 A.D.3d 806, 807, 60 N.Y.S.3d 67 (N.Y. App. Div. 2017) citing (CPLR 3211 [a] [1]; *see Prott v Lewin & Baglio, LLP*, 150 AD3d 908 [2017]). To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2010]).

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. The plaintiff's ultimate ability to prove those allegations is not relevant" (*Nouveau El. Indus., Inc. v. Glendale Condominium Town & Tower Corp.,* 107 A.D.3d 965, 966, 969 N.Y.S.2d 77 [citations and internal quotation marks omitted] ). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,* 38 A.D.3d 34, 38, 827 N.Y.S.2d 231; *see EBC I, Inc. v. Goldman, Sachs & Co.,* 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26).

Here, Plaintiff makes the conclusory assertion that the documents do not "definitively dispose of plaintiff's claim" as is required on a 3211(a)(1) application. In support of Defendant Li's moving papers he *inter alia* submits a lease, guaranty agreement, and lease amendment agreement. "From the cases that exist, it is clear that judicial records, as well *as documents reflecting out-of-court transactions* such as mortgages, deeds, *contracts*, and any other papers, the contents of which are "essentially undeniable," would qualify as "documentary evidence" in the proper case." *Fontanetta v. Doe*, 73 A.D.3d 78(2010). (Emphasis add). Thus, the leases and guaranty agreement that Defendant Li relies upon are considered contracts and would qualify as documentary evidence. The Court notes that Plaintiff's opposing papers do not contest the authenticity or validity of the leases or guaranty agreement.

The Court finds that despite Plaintiff's assertion that the lease amendment agreement states " all terms and conditions of the original lease shall reman in full effect during the renewal term" the lease amendment agreement does not constitute an extension of the original lease that would permit Plaintiff to recover from Defendant Li for any rent or damages that accrued after the expiration of the original lease.

It is well established that "[a] guaranty is to be interpreted in the strictest manner" (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]), particularly in favor of a private guarantor (*see 665-75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD 2d 270 [1999]), and cannot be altered without the guarantor's consent (*see White Rose Food v Saleh*, 99 NY2d at 591). In this regard, a "guarantor should not be bound beyond the express terms of his guarantee" ( see *665-75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD 2d 270 [1999]).

In addition, "[w]here a guaranty obligates a guarantor as to any 'renewal, change, or extension of the lease,' upon the expiration of the lease, the guaranty lapses and can no longer bind defendant" (see *In re 504 Assocs. LLC*, 47 Misc. 3d 1204(A), 16 N.Y.S.3d 792 (N.Y. Sup. Ct.), *judgment entered sub nom. 504 Assocs. LLC v. Nason* (N.Y. Sup. Ct. 2015) citing (*Lo–Ho LLC v. Batista,* 62 AD3d 558 [2009]; *see also, 665–75 Eleventh Ave. Realty Corp. v. Schlanger,* 265 A.D.2d 270, 271 [1999] [holding that "[b]ecause the guaranty clause created an obligation on the part of the individual defendant guarantor as to "any renewal, change or extension of the lease," upon the expiration of the lease it lapsed and cannot be a vehicle to bind the individual defendant"]).

Here, the guaranty agreement executed by Plaintiff and Defendant Li created an obligation for Defendant Li as guarantor to the original lease. However, the guaranty agreement does not state that it obligated Defendant Li as to any renewal, change, or extensions of the original lease. In addition, the original lease expired on March 31, 2017 and thus, Defendant Li was released from his liability as guarantor under the original lease upon its expiration. See *In re 504 Assocs. LLC*, 47 Misc. 3d 1204(A), 16 N.Y.S.3d 792 (N.Y. Sup. Ct.), *judgment entered sub nom. 504 Assocs. LLC v. Nason* (N.Y. Sup. Ct. 2015). See also *Lo–Ho LLC v. Batista,* 62 AD3d 558 [2009].

The Court further finds that the amendments contained in the lease amendment agreement constitute a substantial modification relieving Defendant's Li's obligation under the guaranty agreement.

It is well established that where a lease is modified without the guarantors consent, a guarantor is relieved of its obligation under the guaranty (*White Rose Food v. Saleh,* 99 N.Y.2d 589, 591 [2003]. See also *In re 504 Assocs. LLC*, 47 Misc. 3d 1204(A), 16 N.Y.S.3d 792 (N.Y. Sup. Ct.), *judgment entered sub nom. 504 Assocs. LLC v. Nason* (N.Y. Sup. Ct. 2015). See also *Lo–Ho LLC v. Batista,* 62 AD3d 558 [2009]. A "guarantor should not be bound beyond the express terms of his guarantee" (see *665-75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD 2d 270 [1999]).

Here, it is undisputed that the original lease was modified by the amendments contained in the lease amendment agreement. One of the amendments included, the increase in the monthly rent for the subject premises.

The rider to the original lease agreement regarding the monthly rental rates reads in pertinent part as follows:

| From | To | Monthly Rent | Annual Rent |
|---|---|---|---|
| 4/1/2012 | 10/31/2012 | $ 7, 166.25 | N/A |
| 11/1/2012 | 10/31/2013 | $ 7, 524.56 | $ 90, 294.75 |
| 11/1/2013 | 10/31/2014 | $ 7, 900.79 | $ 94, 809.49 |
| 11/1/2014 | 10/31/2015 | $ 8, 295.83 | $ 99, 549.46 |
| 11/1/2015 | 10/31/2016 | $ 8, 710.62 | $ 104, 527. 46 |
| 11/1/2016 | 3/31/2017 | $ 9, 146.15 | N/A |

The lease amendment agreement regarding the monthly rental rate in pertinent part reads as follows:

| From | To | Monthly Rent | Annual Rent |
|---|---|---|---|
| 4/1/2017 | 3/31/2018 | $ 20,000.00 | $ 240,000.00 |
| 4/1/2018 | 3/31/2019 | $ 21,000.00 | $ 252,000.00 |
| 4/1/2019 | 3/31/2020 | $ 22,050.00 | $ 264,600.00 |

The amendments regarding the increase in the monthly rent contained in the lease amendment agreement constitute a substantial modification that Defendant Li was not notified of nor did he give consent to said modifications. Thus, due to the substantial modifications contained in the lease amendment agreement, the guaranty agreement can no longer bind Defendant Li as guarantor. See *In re 504 Assocs. LLC, 47 Misc. 3d 1204(A)*, 16 N.Y.S.3d 792 (N.Y. Sup. Ct.), *judgment entered sub nom. 504 Assocs. LLC v. Nason* (N.Y. Sup. Ct. 2015). See also (*Lo–Ho LLC v. Batista,* 62 AD3d 558 [2009].

The Complaint seeks rent and late fees that accrued on or after June 2017, which is after the expiration of the original lease and for the reasons stated above Defendant Li was released from his liability as guarantor under the original lease upon its expiration. See *In re 504 Assocs. LLC*, 47 Misc. 3d 1204(A), 16 N.Y.S.3d 792 (N.Y. Sup. Ct.), *judgment entered sub nom. 504 Assocs. LLC v. Nason* (N.Y. Sup. Ct. 2015). See also *Lo–Ho LLC v. Batista,* 62 AD3d 558 [2009].

Based on the foregoing Defendant Li's motion is granted to the extent that the portions of the Complaint and causes of action that are alleged against Defendant Li are dismissed and severed from the remaining allegations in the Complaint, and any cross claims asserted against Defendant Li are dismissed and severed. Defendant Li may enter Judgment dismissing the

Complaint and cross claims against it. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Date: April 27, 2020

LOURDES M. VENTURA, J.S.C.

FILED
05/04/2020
COUNTY CLERK
QUEENS COUNTY