

624 W. 47th St., LLC v Flom
2020 NY Slip Op 31677(U)
April 28, 2020
Supreme Court, New York County
Docket Number: 653320/2017
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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624 WEST 47TH STREET, LLC,
Plaintiff,

- v -

GARY FLOM, ALEXANDER BOYKO, and VENJAMIN NILVA,

Defendants.

INDEX NO. 653320/2017
MOTION DATE 04/07/2020
MOTION SEQ. NO. 003

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, and 71 (Motion 003)

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover on a guaranty of a commercial lease, commenced by notice of motion for summary judgment in lieu of complaint, the plaintiff moves for summary judgment on the complaint against the defendant Alexander Boyko. Boyko opposes the motion. The motion is granted, the plaintiff is awarded the principal sum of \$236,705.32, plus statutory interest from June 12, 2017, along with costs and attorneys' fees, and the matter is referred to a referee to hear and report on the amount of attorneys' fees to be awarded to the plaintiff.

By decision and order dated May 1, 2018, this court granted the plaintiff's motion for summary judgment in lieu of complaint against Boyko (SEQ 001), upon Boyko's default in answering the complaint or otherwise appearing in the action. The plaintiff established its prima facie entitlement to judgment as a matter of law in connection with that motion by submitting the affidavit of Scott Lerman, the president of its managing agent, who asserted, upon personal knowledge, that the plaintiff leased premises at 624 West 47th Street in Manhattan to BICOM, LLC, doing business as Jaguar Manhattan (BICOM), a limited liability company. Lerman explained that the defendants, who are members of BICOM, each personally guaranteed the

lease, and he authenticated the lease and guarantees. In particular, the lease guaranty provided that the defendants “absolutely, unconditionally and irrevocably, jointly and severally” guaranteed “the full and prompt payment of all Fixed Rent, Additional Rent, and all other charges and sums (including, without limitation, Owner’s reasonably attorneys’ fees and disbursements).” Additional rent is defined in the lease to include appropriate real estate taxes, utility bills, maintenance fees, garbage pickup fees, repairs, and sprinkler system management fees. The lease also permits the plaintiff to accelerate the guarantors’ obligations to pay rent and additional rent upon BICOM’s default, regardless of whether the plaintiff obtained possession of the leasehold in a Civil Court proceeding, as it did here. Lerman asserted that BICOM defaulted on its obligations under the lease as of June 12, 2017, and that the defendants, as guarantors, failed to satisfy BICOM’s obligations. By order dated September 17, 2017, the court directed the plaintiff to settle a judgment.

On October 17, 2017, the Clerk of the court entered judgment in favor of the plaintiff and against the defendants, jointly and severally, in the principal sum of \$236,705.72, plus statutory interest from June 12, 2017 in the sum of \$28,715.98, along with costs and disbursements in the sum of \$655.00, for a total of \$266,076.69. The judgment recited that, although Boyko’s codefendants, Gary Flom and Venjamin Nilva, had answered the complaint, the judgment was entered against Boyko upon his default.

By so-ordered stipulation dated January 8, 2019, the judgment was vacated against Boyko, the plaintiff was permitted to serve and file a complaint against Boyko, and Boyko was permitted to serve and file and answer. The plaintiff served and filed the complaint on January 28, 2019, and Boyko served and filed an answer on February 18, 2019.

The plaintiff now moves for summary judgment on the complaint against Boyko. It relies on its prior submissions to the court, including Lerman’s affidavit and the exhibits annexed thereto, as well as the affirmations of attorneys Jeffrey S. Lederman and Andrew Solomon, and an affidavit submitted by Boyko in an action against him and others entitled *Atlantic Specialty*

Ins. Co v Bay Ridge Auto. Co. that had been commenced in the Supreme Court, New York County, under Index No. 652833/17 by another creditor to recover on a different guaranty (hereinafter the *Atlantic Specialty* action). The plaintiff also submits a notice to admit that it served in this action and the response thereto, pursuant to which Boyko admitted to the authenticity of his signature on several documents other than the guaranties that were the subjects of the *Atlantic Specialty* action and this action.

Boyko opposes the motion with his own affidavit, in which he avers that the signature on the subject guaranty that purports to be his is not actually his. He also asserts that Flom and Nilva had previously forged his signature on the guaranty that was the subject of the *Atlantic Specialty* action. In addition, Boyko submits an excerpt from the transcript of the deposition testimony of the notary public who notarized the signatures on the *Atlantic Specialty* guaranty. At that deposition, when the notary was asked whether Boyko was present when he notarized the Boyko signature on and affixed his notarial seal to the *Atlantic Specialty* guaranty, he asserted his Fifth Amendment right against self-incrimination. Boyko also submits a copy of the stipulation of discontinuance against him in the *Atlantic Specialty* action, and he avers in his affidavit that that action was discontinued against him without any finding of liability or payment on his part. Boyko, however, does not submit the affidavit of a handwriting expert.

The plaintiff replies with an attorney's affirmation, to which are annexed a copy of the forged signature on the *Atlantic Specialty* guaranty purporting to be that of Boyko, an exemplar of his signature that he admitted to be authentic, and a copy of the signature purporting to be his that appears on the guaranty that is the subject of this action. The plaintiff's attorney asserts that the signature appearing on the *Atlantic Specialty* guaranty is obviously and completely different from the other two, but that the signatures on the admittedly genuine exemplar and the subject guaranty are remarkably similar.

The proponent of a summary judgment motion must make a prima facie showing, by sufficient proof in admissible form, that there are no triable, material issues of fact. Once the

movant meets this burden, the opponent must adduce proof in admissible form to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment to enforce a written guaranty, all that the creditor needs to prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (see *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]; see also *Encore Nursing Ctr. Partners Ltd. Partnership-85 v Schwartzberg*, 172 AD3d 1166, 1168 [2d Dept 2019]). "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" (*Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446-447 [1st Dept 2012], quoting *National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470, 471 [1st Dept 1991]).

There is no requirement that a party seeking to enforce a guaranty make a prima facie showing that the guarantor's purported signature is not a forgery. In other words, it is not required to prove a negative as part of its prima facie showing. Rather, such a party makes a prima facie showing by providing the court with a copy of the guaranty and the signature thereon, and showing that it was notarized in a form consistent with Real Property Law § 309-a (see *Ulm I Holding Corp. v Antell*, 155 AD3d 585, 586 [1st Dept 2017]; *Peyton v State of Newburgh, Inc.*, 14 AD3d 51, 54 [1st Dept 2004]). The plaintiff here has thus made a prima facie showing of BICOM's default, the amount owed under the lease's accelerated rent provisions, and the validity of Boyko's guaranty (see *Royal Equities Operating, LLC v Rubin*, 154 AD3d 516, 517 [1st Dept 2017]; *Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept 2017]; *Bronsnick v Brisman*, 30 AD3d 224, 224 [1st Dept 2006]; *Peyton v State of Newburgh, Inc.*, 14 AD3d at 54). It has thus established its prima facie entitlement to judgment as a matter of law against Boyko.

“Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature” (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]). On this motion for summary judgment, the court may not make a finding of fact as to whether the signature on the subject guaranty is or is not Boyko’s genuine signature. Nonetheless, “although an expert’s opinion is not required to establish a triable issue of fact regarding a forgery allegation” (*id.*), in opposition, Boyko “failed to submit evidence sufficient to raise a triable issue of fact,” as “[h]e provided only a bald assertion that the signature on the guaranty was a forgery” (*Ulm I Holding Corp. v Antell*, 155 AD3d at 586; see *82-90 Broadway Realty Corp. v New York Supermarket, Inc.*, 154 AD3d 797, 799 [2d Dept 2017]; *Bronsnick v Brisman*, 30 AD3d at 224; *Peyton v State of Newburgh, Inc.*, 14 AD3d at 54).

Thus, the plaintiff must be awarded summary judgment on the complaint against Boyko in the principal sum of \$236,705.32, plus statutory interest from June 12, 2017, the date of BICOM’s default, along with costs to be taxed by the Clerk and an award of attorneys’ fees and disbursements.

Since the plaintiff has failed to submit proof in connection with its claim for attorneys’ fees and disbursements, the issue is referred to a referee to hear and report with respect to the appropriate amount of any such award. The court notes that, in light of the current suspension of several court functions and services due to the COVID-19 virus pandemic, it cannot assure that a referee’s hearing can be scheduled expeditiously; nonetheless, the plaintiff shall follow the instructions set forth in this order to the extent possible and, if necessary, shall await the lifting of the suspension on the filing of new papers before attempting to schedule a referee’s hearing.

Accordingly, it is

ORDERED that the plaintiff’s motion for summary judgment on the complaint against the defendant Alexander Boyko is granted; and it is further,

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff, 624 West 47th Street, LLC, and against the defendant Alexander Boyko, jointly and severally with the defendants Gary Flom and Venjamin Nilva, in the principal sum of \$236,705.32, plus a separate award of statutory interest solely against the defendant Alexander Boyko from June 12, 2017, along with costs to be taxed by the Clerk of the court; and it is further,

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the plaintiff for an award of contractual attorneys’ fees and disbursements; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which 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 “References” link under “Courthouse Procedures”), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel for the plaintiff and for the defendant Alexander Boyko shall immediately consult one another, and counsel for plaintiff shall, within 15 days from the date of the entry this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, unless such submission or filing has been rendered impossible by the suspension of all new filings pursuant to the Office of Court Administration order dated March 22, 2020, in which case the submission or filing shall be completed no later than 15 days after the suspension has been lifted ; and it is further,

ORDERED that the plaintiff shall serve a proposed accounting of the attorneys' fees and disbursements that it incurred within 24 days from the date of the entry of this order, and the defendant Alexander Boyko shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers, and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, unless such filing has been rendered impossible by the suspension of all new filings pursuant to the Office of Court Administration order dated March 22, 2020, in which case the filings shall be completed no later than 24 days and 20 days, respectively, after the suspension has been lifted; and it is further.

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they 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 the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; 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, and, upon disposition of that motion, the plaintiff may enter an amended judgment against the defendant Alexander Boyko adding the award of attorneys' fees and disbursements to the total amount recovered against him, if any; and it is further,

ORDERED that the plaintiff shall serve a copy of this order upon the defendant Alexander Boyko by regular first class mail within 15 days of the entry of this order.

This constitutes the Decision and Order of the court.

4/28/2020

DATE

JOHN J. KELLEY, 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