

56 Scarlett Assoc. LLC v Sakele
2020 NY Slip Op 31824(U)
June 12, 2020
Supreme Court, New York County
Docket Number: 159735/2018
Judge: W. Franc Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

56 SCARLETT ASSOCIATES LLC

Plaintiff,

- v -

BRADFORD SAKELE,

Defendant.

-----X

INDEX NO. 159735/2018

MOTION DATE 11/07/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45

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

Plaintiff 56 Scarlett Associates LLC brings this action against Defendant Bradford Sakele as the guarantor of a lease between Plaintiff and Dylman Restaurant, a former tenant of Plaintiff's property located at 867 9th Avenue. Plaintiff now moves for summary judgment and Defendant opposes the motion.

BACKGROUND

Pursuant to a lease agreement dated September 1, 2009 (the "Lease"), Plaintiff agreed to lease the ground floor and basement of 867 9th Avenue (the "Premises") to Dylman Restaurant (the "Tenant") for a period of eight years and 10 months, to end on June 30, 2018. Defendant owned a majority interest in the Tenant and signed a Guaranty of Lease, Completion Guaranty, and Guaranty of Tenant's Guarantors (collectively, the "Guaranty"), also dated September 1, 2009. (NYSCEF Doc No. 16.)

After Tenant failed to surrender the Premises on the expiration date of the Lease, Plaintiff commenced a holdover proceeding against the Tenant in New York City Civil Court. The Civil

Court issued an interim order directing Tenant to pay for one month's use and occupancy in the amount of \$62,238.66, and, pursuant to a stipulation of settlement, the Tenant agreed to surrender the Premises in broom clean condition by September 30, 2018. Plaintiff filed suit against Defendant on October 15, 2018, seeking \$619,544.89 in damages and alleging that the Tenant failed to pay the court ordered occupancy fee, failed to vacate the Premises on time, failed to adequately clean the Premises, and removed certain items. (NYSCEF Doc No. 1 at ¶¶ 11, 15, 44.)

Plaintiff now moves for an order permitting the amendment of the complaint to increase the amount of damages sought to \$625,615.18 and granting summary judgment on its prima facie case. Defendant opposes, arguing that the Guaranty is not unconditional or unlimited in scope. (NYSCEF Doc No. 26 at 6.) Additionally, Defendant argues that Plaintiff is not entitled to the full amount of rent due to excessive scaffolding that affected Tenant's business, that Plaintiff incorrectly asserts the amount of damages stemming from repairs it made after Tenant vacated the Premises, and that Plaintiff failed to apply Tenant's \$75,000 security deposit to any alleged amounts owed. (*Id.* at 7-8.) Plaintiff filed its Reply one day late.¹

DISCUSSION

“Leave to conform a pleading to the proof pursuant to CPLR 3025 [c] should be freely granted absent prejudice or surprise resulting from the delay.” (*Limestone Assocs., LLC v American Rest. Holdings, Inc.*, 2018 NY Slip Op 32986[U], *3 [Sup Ct, NY County 2018], quoting *Rodriguez v Panjo*, 81 AD3d 805, 806 [2nd Dept 2011].)

Here, Plaintiff's amendment would increase the total amount of damages by \$6,070.29 but would also decrease the amount of Late Fees from \$131,278.66 to \$10,502.28, increase Cleanout,

¹ The court will accept the Reply and deem it timely filed as the delay was de minimis, resulted in no prejudice to Defendant, and furthers the public policy goal of resolving disputes on their merits.

Removal & Renovation Costs from \$15,000.00 to \$146,846.67, and remove \$5,000 in Fixture Replacement Costs. (*Compare* NYSCEF Doc No. 1 at 8 *with* NYSCEF Doc No. 10 at 11.) In support, Plaintiff submits a spreadsheet indicating that repairs on the Premises will amount to \$146,846.67. (NYSCEF Doc No. 20.) Defendant argues that this part of Plaintiff's motion should be denied because the spreadsheet submitted is unauthenticated and speculative. (NYSCEF Doc No. 26 at 19.)

The court finds that the minimal amount of the increase in damages precludes a finding of prejudice and this portion of the motion is hereby granted. (*177th Upper Broadway Holdings LLC v Camacho*, 2015 WL 9240718, *2 [Sup Ct, NY County 2015].) However, the court notes that Plaintiff's changes in damages requested must be further explained at the damages hearing, as discussed below.

When deciding a motion for summary judgment, the court's role is solely to determine if there are any triable issues of fact, not to determine the merits of any such issues. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The court must view the evidence in the light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012].) On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial. (CPLR 3212; *Winegrad*, 64 NY2d at 853; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) A failure to make such a showing requires denial of the motion. (*See Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008].)

A party opposing a motion for summary judgment may not rely upon conclusory allegations, but must present evidentiary facts sufficient to raise a triable issue of fact. (*Mallad*

Construction Corp. v County Federal Savings & Loan Assoc., 32 NY2d 285, 290 [1973]; *Tobron Office Furniture Corp. v King World Productions*, 161 AD2d 355, 356 [1st Dept 1990] [“the opponent of a motion for summary judgment must assemble, lay bare and reveal his proofs; merely setting forth factual or legal conclusions is not sufficient”]; *Polanco v City of New York*, 244 AD2d 322, 322 [2d Dept 1997] [“a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment”].) The opposing party has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman*, 49 NY2d 557 at 562.)

“[W]here 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, 446-47 [1st Dept 2012] [internal quotation marks omitted], citing *National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470, 471 [1st Dept 1991].) To complete its prima facie case, a plaintiff must also prove an underlying debt and the guarantor’s failure to perform under the guaranty. (*598 Broadway Realty Assocs., Inc. v Kaufman Realty Group, LLC*, 2011 WL 11075844, *5 [Sup Ct, NY County 2011], quoting *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006].)

First, the court finds that the Guaranty is clear and unambiguous on its face and absolute and unconditional. The Guaranty of Tenant’s Guarantors states that Defendant:

hereby unconditionally and irrevocably guarantees to Landlord, its successors and assigns the full and prompt payment of Fixed Rent, Additional Rent (as such terms are defined in the Lease) and *all other charges payable by Tenant*, its successors and assigns under the Lease through and including the Vacate Date (as hereinafter defined); and Guarantor hereby covenants and agrees to and with Landlord that if default shall at any time be made by Tenant or its successors or assigns, in the payment of any Fixed Rent, Additional Rent or other charges due in respect of any time periods occurring on or prior to the Vacate Date, *Guarantor, in each and every*

instance, shall and will forthwith as primary obligor (jointly and severally with Tenant), pay such Fixed Rent, Additional Rent and other charges to Landlord and any arrears thereof. including without limitation, all reasonable attorneys' fees and disbursements incurred by Landlord or caused by or in any way related to any such default and/or the enforcement of this Guaranty.

(NYSCEF Doc No. 16 at 11 [emphasis added].)

The court also finds that Plaintiff has proven an underlying debt owed by the Tenant and the failure of Defendant to perform under the terms of the guaranty. Plaintiff has thus made out its prima facie case.

Defendant admits in his Verified Answer that he executed the Guaranty (NYSCEF Doc No. 7 at ¶ 41) and does not argue fraud or duress. Rather, Defendant's arguments concern the amount of damages owed to Plaintiff by the Tenant. (NYSCEF Doc Nos. 26 at 12-17; 27.) Because Defendant fails to raise an issue of fact against Plaintiff's prima facie case, Plaintiff's motion for summary judgment is granted as to liability and the matter is set down for a hearing to determine the exact measure of damages as provided under the Lease and the Guaranty. Additionally, pursuant to the terms of the Guaranty (NYSCEF Doc No. 16 at 11), Plaintiff is entitled to reasonable attorneys' fees which shall also be determined at the hearing. It is hereby

ORDERED that the branch of Plaintiff's motion to amend the pleadings to the proof pursuant to CPLR 3025 [c] is hereby granted; and it is further


ORDERED that the branch of Plaintiff's motion seeking summary judgment on its claims for breach of guaranty and attorneys' fees is granted as to liability only; and it is further

ORDERED that the matter is to be set down for a hearing for the assessment of damages, interest, costs, disbursements, and attorneys' fees; and it is further

ORDERED that Plaintiff is directed to serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of

issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment herein above directed.

Any request for relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

<u>6/12/20</u> DATE		 W. FRANC PERRY, 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 <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE