

350 Bklyn Realty LLC v Clarke
2020 NY Slip Op 33494(U)
October 19, 2020
Supreme Court, New York County
Docket Number: 652154/2019
Judge: Melissa A. Crane
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. MELISSA ANNE CRANE PART IAS MOTION 15EFM

Justice

-----X

350 BKLYN REALTY LLC,350
Plaintiff,

- v -

CLARKE, II, JOHN S.
Defendant.

-----X

INDEX NO. 652154/2019
MOTION DATE N/A
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

MELISSA A. CRANE, J.S.C.:

In this action for breach of contract for monies allegedly due and owing on a lease guaranty, plaintiffs move for summary judgment and for entry of a money judgment in their favor. As plaintiffs have failed to meet their prima facie burden and notwithstanding the absence of opposing papers, the court denies the summary judgment motion.

The Pleadings

By summons and unverified complaint dated April 11, 2019, plaintiffs allege that they are the owners of the building known as and located at 350 Sterling Street, Brooklyn, New York (the Building) (NYSCEF Doc. No. [Doc.] 1, ¶¶ 1-2), and defendant resides in New York County (¶ 3). The Building’s immediate prior owner was Park & Coast 1, LLC (PC) and prior to PC, the Building’s owner was 350 Sterling Street LLC (350) (id. ¶ 2). Plaintiffs allege that on or about April 7, 2011, its predecessor in interest, 350, as landlord [Owner], entered into a written lease with tenant Wendy Pierre (Tenant), for Apartment 1J in the Building (id. ¶ 4). The defendant provided the following guaranty (Guaranty) in the Lease (Lease at 5):

“The undersigned Guarantor guarantees to Owner the strict performance of and observance by Tenant of all the agreements, provisions and rules in the attached Lease. Guarantor agrees to waive all notices when Tenant is not paying rent or not observing and complying with all of the provisions of the attached Lease. Guarantor agrees to be equally liable with Tenant so that Owner may sue Guarantor directly without first suing Tenant. The Guarantor further agrees that his guaranty shall remain in full force and effect even if the Lease is renewed, changed or extended in any way and even if Owner has to make a claim against Guarantor. Owner and Guarantor agree to waive trial by jury in any action, proceeding or counterclaim brought against the other or on any matters concerned the attached Lease or the Guaranty.”

Plaintiffs allege that upon purchasing the Building they acquired all rights and interests 350 once held with respect to the Lease and the Guaranty (*id.* ¶ 6). On or about March 21, 2019, a money judgment was entered in favor of plaintiffs and against Tenant in Civil Court, Kings County, under Index No. L & T 104625/15 for money due and owing to plaintiffs under the Lease in the total amount of \$129,225.81 (Money Judgment) (*id.* ¶ 7). Tenant has not paid any amount of this judgment. Plaintiffs allege that pursuant to the terms of the Lease and Guaranty, defendant is liable to plaintiffs for the full amount of the Money Judgment (*id.* ¶¶ 8-9).

By verified answer dated June 28, 2019, defendant denies the complaint’s allegations. Defendant appears as Josh Clark, stating that he was “erroneously named as ‘JOHN S. CLARKE II’” (Doc. 3, at 1). The court notes that the guarantor’s name under the signature line on the Lease is typed as “John S. Clarke II”; the guaranty bears a signature and does not bear any handwritten changes or mark to the typed name.

Defendant also alleges 12 defenses, including: failure to state a cause of action; plaintiffs’ lack of standing; failure to mitigate damages; laches and collateral estoppel; lack of timely notice of the underlying lawsuit and failure to join him as a party thereof; and that he “is not liable for payments of unpaid rent because when the original lease expired the renewal lease was substantially different from the original agreement” (*id.* ¶ 21).

The Motion

In support of their motion, plaintiffs submit the affidavit of Bajram Adzemovic (Adzemovic), the Building's registered managing agent (the Adzemovic aff) (Doc. 6), thirteen accompanying exhibits (Docs. 7-19), and a supporting memorandum of law (memo) (Doc. 20). The exhibits include: the bargain and sale deed from PC to plaintiffs, dated March 3, 2015 and the bargain and sale deed from 350 to PC dated as of December 28, 2011; the lease between 350 and Wendy Pierre (Pierre) as Tenant dated April 7, 2011, for the term beginning on 4/15/2011 and ending on 4/30/2012 (the Lease) (Doc. 9); the renewal lease between Pierre as Tenant and PC as Owner, for the period commencing 5/1/2012 and terminating on 4/30/2013 (the 2012 Renewal Lease) (Doc. 10); and the renewal lease between Pierre as Tenant and PC as Owner commencing on 5/01/2013 and terminating on April 30, 2014 (the 2013 renewal lease).

The exhibits further include: a one page document labeled, in part, as "Notice for Renewal of Lease and Lease Renewal Form," dated July 28, 2015, to Pierre and Gordon James (James) as Tenants (Tenants) and Brooklyn Equities 11 LLC, as agent for owners as set forth in Schedule A (not attached), for a one year term commencing on 11/1/2015 and terminating on 10/31/2016, for a monthly rent of \$2,063.31, or a two year term terminating on 10/31/2017 for a monthly rent of \$2,104.58 (the 2015 Renewal Lease Offer); Landlords' Notice of Termination of Tenancy and of Intention to Commence Summary Proceedings to Tenants dated November 16, 2015 (Notice of Termination); the Notice of Petition and Petition Holdover Dwelling against the Tenants as Respondents dated December 17, 2015 (Petition); the Housing Court's Decision/Order (After Trial) dated October 26, 2018 (Decision); a Stipulation Settling

Respondents' Order to Show Cause between plaintiffs as petitioners and Pierre and James as respondents dated February 5, 2019 (Settlement Stipulation); and a money judgment in favor of petitioners (plaintiffs herein) and against respondents Pierre and James for \$129,225.81, in the amount set forth in the Settlement Stipulation (Money Judgment).

Adzemovic attests that he is "fully familiar with the facts and circumstances set forth below" (Adzemovic aff at ¶ 1), but does not state his personal knowledge of them, and does not state that the documents accompanying the affidavit as exhibits are genuine copies of the originals, maintained in the regular course of business.

Adzemovic asserts that plaintiffs are the Building's owners and that "defendant John S. Clarke II entered into an absolute and unconditional guaranty of a residential lease" to which plaintiffs were "part[ies] as landlord" (*id.* ¶¶ 2, 4). The court notes that plaintiffs do not appear as the landlord or owner on this Lease or the Renewal Leases that followed. Plaintiffs obtained a money judgment "against the tenant of that lease for \$129,225.81 in unpaid rent, use and occupancy and attorneys' fees due under the lease" (*id.*). No amount of the money judgment has been paid, defendant has not performed under the guaranty, and defendant is liable under the guaranty's express terms (*id.*).

Adzemovic asserts that after the 2013 Renewal Lease term ended on April 30, 2014, Pierre continued in occupancy without "the benefit of a renewal lease" (*id.* at 12), and plaintiffs "then purchased the Building and succeeded to the rights and interests once held by 350 and P & C with respect to the Lease and Guaranty (*id.* ¶ 12). On July 31, 2015, plaintiffs "offered to renew the Lease with Pierre for a term beginning November 2, 2015 and ending either October 31, 2016 or October 31, 2017 (*id.* 13). Pierre refused to sign the 2015 Renewal Lease Offer and plaintiffs served upon her the Notice of Termination (*id.* ¶¶ 14-15). Pierre did not vacate, but

remained as a holdover occupant. The Housing Court Decision held that the rent offered in the 2015 Renewal Lease Offer was in accord with all applicable requirements of the Rent Stabilization Code and the court issued a final judgment of possession in favor of petitioners (plaintiffs herein) and against Pierre, with execution stayed for ten days for Pierre to sign the 2015 Renewal Lease Offer (*id.* ¶¶ 17-18).

The court notes that Adzemovic omits in this and other recitations any reference to Gordon James (James), who is named, with Pierre, on all these documents as a tenant, respondent, and party to the Decision, Stipulation of Settlement and Money Judgment, and is a signatory on the Stipulation of Settlement. James does not appear on the Lease or the signed renewal leases as a tenant.

Adzemovic asserts that Pierre did not sign the 2015 Renewal Lease Offer and filed a motion to set aside part of the Decision (*id.* ¶ 19). The Stipulation of Settlement settled that motion. It provided, among other things: 1) for a money judgment in the total amount of \$129,225.81; 2) that respondents [Pierre and James] acknowledge that prior to the onset of the proceedings, there were rent arrears in the amount of \$14,988.20, representing unpaid monthly rent in the amount of \$1,498.92 from February 2015 through November 2015; and 3) that the reasonable value of use and occupancy from December 2015 through November 2018 is \$77,700.91. Defendant did not sign the Stipulation of Settlement. In the Stipulation of Settlement respondents acknowledged that plaintiffs are the prevailing party under the proceeding, and that, pursuant to paragraph 20 of their lease, they are liable for attorneys' fees totalling \$86,000. Additionally, respondents consented to the immediate entry and execution of a separate money judgment against them in the cumulative amount of \$129,225.81. Defendant was not a named party on the Money Judgment.

Plaintiffs argue that defendant's answer contains several denials, "twelve boiler-plate defenses," lacks specificity and merit, and the defenses are inapplicable (*id.* ¶¶ 23, 25).

Legal Standard

The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). "A summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion (i.e., 'defaulted')" (*Liberty Taxi Mgt, Inc. v Gincherman*, 32 AD3d 276, 277 [fn 1] [1st Dept 2006]).

Once the prima facie showing has been made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "It is axiomatic that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact or where such issue is even arguable" (*Trolone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29 [1st Dept 2002], *affd* 99 NY2d 647 [2003] [internal citations omitted]). "On a summary judgment motion, facts must be viewed in the 'light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The role of the court in determining the "drastic remedy" of summary judgment is "issue - finding, rather than issue -

determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotation marks and citation omitted]).

Discussion

Plaintiffs failed to meet their prima facie burden, as they did not demonstrate by admissible evidence that there are no genuine issues of disputed issues of fact and that they are entitled to judgment as a matter of law. This remains movants’ burden whether or not defendant submitted opposition.

The court first notes that the Adzemovic affidavit does not state that it is based on personal knowledge or that the documents upon which the affidavit relies and submits as exhibits are genuine copies of the originals and are kept in the ordinary course of business. Accordingly, much, if not all, of plaintiff’s assertions do not rely on admissible evidence. Nor can the allegations in the complaint serve to fill this evidentiary void, as the complaint is not verified by a person with personal knowledge.

Moreover, “[i]t is well established that ‘[a] guaranty is to be interpreted in the strictest manner’, particularly in favor of a private guarantor” (*Lo-Ho LLC v Batista*, 62 AD3d 558, 559 [1st Dept 2009] [quoting *White Rose Food v Saleh*, 99 NY2d 589, 591 (2003), other internal citations omitted]). “In this regard, a guarantor should not be bound beyond the express terms of his guarantee” (*Lo-Ho LLC*, 62 AD3d at 559-560 [internal quotation marks and citation omitted]).

In *Lo-Ho LLC* (*id.* at 560), the question before the court concerned whether the second lease that followed the first lease qualified as an extension of the first lease under the terms of the guaranty. To answer this question, the Court examined the language of the guaranty, as well as the language, conditions and terms of the original and second leases. The Court found that the

second lease “was not an extension of the lease as would permit plaintiff to recover from defendant guarantor” (*id.* at 560), as the language in the guaranty referenced the attached lease and the first lease’s terms expired at term end as did the second lease, and “[a]n expired lease cannot be extended” (*id.*) The Court further found that, as here, there were new terms and conditions in the second lease, and these new terms and conditions “substantially and impermissibly changed the guarantor’s obligations under the original agreement and thus, impermissibly increased defendant’s risk without his consent” (*id.* at 561 [internal citations omitted]).

To determine this motion, this court similarly examines the language of the guaranty and the Lease and the Renewal Leases. The language mirrors that in the guaranty and leases before the court in *Lo-Ho LLC* (*id.*). Moreover, the case before the court involves a claim arising from circumstances that occurred months and years after the Lease and even the renewal leases expired and involves use and occupancy and attorneys’ fees incurred when no lease was in effect.

The Lease states that defendant was guaranteeing to 350 as owner “the strict performance of and observance by Tenant of all the agreements, provisions and rules in the attached Lease.” The guaranty further states that it “shall remain in full force and effect even if the Lease is renewed, changed or extended in any way and even if Owner has to make a claim against Guarantor.”

The phrase “attached Lease” clearly refers to the lease dated April 7, 2011, for the term beginning on 4/15/2011 and ending on 4/30/2012. The Lease stated its term was “ending on 4/30/2012” (Lease ¶ 2) and that the monthly rent is \$1,870.84 (SEE PREFERENTIAL RIDER)” (*id.* ¶ 3). While the rider was not included as an exhibit, it appears that the preferential monthly

rent was \$1,325, as that was the amount set forth as the security deposit (*id.* ¶ 5). There is no option in the Lease attached to the moving papers to renew or extend, although the court notes that the Lease refers to a rider that sets forth the landlord's and tenant's rights and obligations under the Rent Stabilization Law (RSL) (the rider was not included as an exhibit), and the rider might, or might not, have provided such an option.

The terms and conditions of the renewal leases that followed vary from the Lease, and each renewal lease expired on its terms. The court notes that the defendant did not agree in the renewal leases to extend the guaranty. The 2012 Renewal Lease stated that, depending on whether it was renewed for a one or two year term, it "shall terminate on" 4/30/13 or 4/30/14 (¶ 7). It provides for a legal rent of \$1, 870.84 (¶ 2) and a charged lower rent of \$1,374 for a one year term and \$1,460.64 for a two year term (¶ 5). The 2012 Renewal Lease does not provide an option to renew or extend on its face. Similarly, the 2013 Renewal Lease on its face does not provide an option to renew or extend. It provides that it terminates on 4/30/14 or 4/30/2015 depending on whether it was renewed for a one or two year term (¶ 7), and provides for a "lower rate" to be charged of \$1,402.18 per month for a one year term or \$1,429.68 per month for a two year term (¶ 5). No lease followed the 2013 Renewal Lease, that terminated on 4/30/14.

Plaintiffs have not demonstrated in these papers that defendant is obligated by the guaranty to pay the monies they seek to recover in this action, as they have not demonstrated that the renewal leases were the type of renewal or "extension of lease contemplated in the guaranty" (*Lo-Ho LLC*, 62 AD3d at 560). Moreover, they have not demonstrated in these papers that they can recover on the guaranty as the renewal lease expired on its terms and the circumstances "substantially and impermissibly changed the guarantor's obligations under the original agreement" (*id.* at 561 [citations omitted]).

Here, no lease was in effect in the lengthy period of time following the termination of the 2013 Renewal Lease on April 30, 2014. Plaintiffs extended the 2015 Renewal Lease Offer to Pierre and James (who was not a tenant under the Lease or lease renewals) approximately 15 months after the 2013 renewal lease expired on April 30, 2014, and offered it on terms and conditions different from those in the Lease or even the renewal leases, including the number of tenants and a higher monthly rent of \$2,063.31. It did not contain a guaranty and plaintiffs have not argued in these papers that defendant guaranteed the renewal lease offer or Tenants' payment of rent or use and occupancy or attorneys' fees under a separate document. The Tenants did not sign the 2015 Renewal Lese Offer. No lease was in effect when plaintiffs served their Notice of Termination and Petition against Tenants. No lease was in effect when the Stipulation of Settlement was signed by plaintiffs and the Tenants (but not defendant), and when the Money Judgment against the Tenants (but not the defendant) was entered. The amount set forth in the Stipulation of Settlement was not for rent due under the Lease or even the lease renewals, and does not arise from attorneys' fees incurred in enforcing the Lease or even the renewal leases.

Rather, the monies plaintiffs seek to recover under the guaranty represent the monies agreed upon by the Tenants (but not the defendant) for attorneys' fees, use and occupancy arrears, and incrementally increased use and occupancy during an extensive holdover period beginning February 15, 2015 through the agreed upon vacate date of June 30, 2019. Having noted these remaining issues of fact and law, the court does not reach other issues.

As material issues of disputed fact remain and plaintiffs have not demonstrated their entitlement to judgment as a matter of law, the court denies the summary judgment motion. As defendant did not file opposing papers and plaintiffs have not had an opportunity to respond to the issues raised by the court herein, the court declines to search the record and determine

whether or not judgment should be entered in favor of defendant. The court does not opine on the ultimate merits of this action, which are left to the trial court.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that defendant shall serve a copy of this Decision and Order with Notice of Entry and proof of service upon the County Clerk within 30 days; and it is further

ORDERED that counsel are directed to attend a preliminary conference on November 9, 2020 at ten am via Teams.

10/19/2020
DATE


MELISSA ANNE CRANE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		SUBMIT ORDER	<input type="checkbox"/>
				FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>