

ULM I Holding Corp. v Hillman
2020 NY Slip Op 33575(U)
October 28, 2020
Supreme Court, New York County
Docket Number: 650477/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: I.A.S. PART 42

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ULM I HOLDING CORP.,

DECISION AND ORDER

Plaintiff,

Index No. 650477/2019

- against -

MICHELLE CORBIN HILLMAN and CORBIN-HILLMAN
 COMMUNICATIONS, LTD.,

Defendants.

-----X

NANCY M. BANNON, J.:

Motion sequence nos. 003, 004 and 005 are consolidated for disposition.

This action arises out of an alleged breach of a commercial lease and guaranty. In motion sequence no. 003, plaintiff ULM I Holding Corp. moves for an order striking the jury demand filed by defendants Michelle Corbin Hillman (Hillman) and Corbin-Hillman Communications, Ltd. (CHC) (together, defendants). In motion sequence no. 004, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of defendants' liability, and for an order directing an inquest on damages, including the recovery of its reasonable attorneys' fees, costs and expenses. In motion sequence no. 005, Hillman moves, pursuant to CPLR 3212, for summary judgment, or in the alternative, for dismissal under CPLR 3211 (a) (1).

BACKGROUND

On or about April 23, 2004, plaintiff, as owner, and Corbin & Associates, Ltd. (CAL), as tenant, entered into a standard form of office lease (the Lease) for Suite 1610 (the Premises) in the building located at 1776 Broadway, New York, New York (the Building) for a term commencing June 1, 2004 through April 30, 2013 (NY St Cts Elec Filing [NYSCEF] Doc No. 43, Mark Tannen [Tannen] aff, exhibit A at 1). Hillman executed the Lease and the accompanying Lease rider as

CAL's president (*id.* at 5 and 22). According to the Lease, fixed monthly rent and additional rent was due on the first day of each month (*id.* at 1). If rent was not paid by the fifth of every month, CAL agreed to pay a \$300 administrative charge (*id.* at 10 [¶ 41(B)]), and interest "equal to the lower of (i) one and one-half (1½%) percent per month or (ii) the maximum rate of interest permitted under applicable law and (b) a late payment charge equal to four (4¢) cents for each one (\$1.00) dollar of any Fixed Rent or Additional Rent paid more than five (5) days after the same is due" (*id.* at 8 [¶ 38(C)]). Paragraph 18 sets forth plaintiff's remedies in the event of CAL's default, and paragraph 19, discussing damages, partially reads:

"If Owner ... in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to attorney's fees, in instituting, prosecuting or defending any action or proceeding, then Tenant will reimburse Owner for such sums so paid or obligations incurred with interest and costs If Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages"

(*id.* at 3). CAL agreed to surrender possession and remove its property from the Premises at the end of the Lease term (*id.* at 4 [¶ 22]). In the event CAL did not surrender possession, it would pay plaintiff "a sum equal to the greater of (i) two and one-half (2½) times the aggregate of the Fixed Rent and Additional Rent which was payable under the lease during the last month of the term hereof, or (ii) the then-fair market rental value (i.e., use and occupancy) of the demised premises" for each month it remained in possession (*id.* at 13 [¶ 45]). Plaintiff and CAL agreed to "waive trial by jury in any action, proceeding or counterclaim ... on any matters whatsoever arising out of or in any way connected with this lease" (*id.* at 4 [¶ 26]).

In connection with the Lease, Hillman executed a personal guaranty (the Guaranty), which states in pertinent part:

“1. Guarantor hereby unconditionally and absolutely guarantees to Landlord: (i) the full and prompt payment, when due, by acceleration or otherwise, of the rent and additional rent (however characterized) and all other sums and charges payable by Tenant under the Lease, and as the Lease may be hereafter modified, extended or renewed (collectively, the ‘Monetary Obligations’); and (ii) the full and timely keeping, performance and observance of all of the other material covenants, terms, conditions and agreements now and/or hereafter to be kept, performed or observed by Tenant under the Lease, and as the Lease may be hereafter modified, extended or renewed (collectively, the ‘Non-Monetary Obligations’).

2. This Guaranty is an absolute and unconditional guaranty of payment and of performance ...”

(NYSCEF Doc No. 44, Tannen aff, exhibit B at 1-2). A waiver clause states that “Guarantor hereby waives all right to trial by jury in any action or proceeding hereinafter instituted by Landlord to which the Guarantor may be a party” (*id.* at 2 [¶ 4]). The Guaranty would remain in full force and effect “notwithstanding ... [any] renewal, extension, modification, amendment or assignment ... under, the Lease” (*id.*).

On July 8, 2008, plaintiff and CAL executed an additional space agreement (the Additional Space Agreement) to lease an additional portion of the sixteenth floor at the Building¹ (NYSCEF Doc No. 45, Tannen aff, exhibit C at 1). The Additional Space Agreement contains the following statement:

“The Undersigned, the Guarantor under that certain Guaranty dated April 23, 2004 (the ‘Guaranty’) in favor of Landlord in respect of the obligations of Tenant under the Lease, hereby confirms and agrees that the undersigned’s obligations under the Guaranty shall continue to apply to the Lease, as such Lease has been modified by this Agreement as set forth above”

(*id.* at 4). Hillman signed the agreement in her capacity as CAL’s president and as guarantor (*id.*).

¹ The Additional Space Agreement identifies the original demised Premises as “Suite 1600” (*id.* at 1).

An extension and modification agreement dated November 18, 2010 (the Extension and Modification Agreement) extended the Lease term through December 31, 2018 (NYSCEF Doc No. 46, Tannen aff, exhibit D at 1). The agreement states, in part:

“The undersigned, MICHELLE C. HILLMAN, being the Guarantor under that certain Guaranty dated April 23, 2004 (the ‘Guaranty’), hereby ratifies and confirms that the Guaranty remains in full force and effect and is wholly applicable to the obligations of Tenant as set forth and contained within the Original Lease (as the Original Lease has been modified by the above Extension and Modification Agreement)”

(*id.* at 3). Hillman executed the agreement as president of CHC, as CAL was then known, and as guarantor (*id.*). Dr. René Zemp (Zemp), plaintiff’s then-vice president, returned two executed copies of the Extension and Modification Agreement, together with an “executed copy of the Guarantor transfer agreement,” to CHC on December 2, 2010 (NYSCEF Doc No. 47, Tannen aff, exhibit E at 1). The “Guarantor transfer agreement” took the form of a letter dated November 30, 2010 and printed on CHC letterhead (the 2010 Letter), and states, in part:

“My name is Michelle Corbin Hillman and I am the guarantor on the lease for suite 1610 at 1776 Broadway.

I will retire within the term of the lease and at that time want to transfer the guarantor to my son, Sean-Patrick Hillman who is currently Executive Vice President of Corbin-Hillman Communications, LTD. and will take over as the President and CEO upon my said retirement.

Please sign the bottom of this letter to acknowledge your agreement to this transfer at the appropriate time”

(*id.* at 2). Zemp’s signature appears at the bottom of the 2010 Letter (*id.* at 2; NYSCEF Doc No. 73, Weinstein affirmation, exhibit F [Tannen tr] at 24). Hillman moved her belongings from the Premises and retired from CHC on August 8, 2017 (NYSCEF Doc No. 55, Fred D. Weinstein [Weinstein] affirmation, exhibit A [Hillman tr] at 48; NYSCEF Doc No. 67, Hillman aff, ¶ 12).

CHC subsequently defaulted on the rent due for July 2018 and on the rent due each month thereafter through the end of the Lease term (NYSCEF Doc No. 42, Tannen aff, ¶ 10). CHC remained at the Premises through March 11, 2019, when its last piece of office equipment, a copier, was removed (*id.*, ¶ 14).

Tannen, who had worked previously for the Building's property manager, Cushman & Wakefield (Cushman), replaced Zemp as a vice president in 2014 (NYSCEF Doc No. 73 at 8 and 12). At his deposition, Tannen explained that he knew from lease abstracts that Hillman was the guarantor (*id.* at 16). Hillman was his primary contact for CHC, but her son, Sean-Patrick Hillman (Sean-Patrick), was the day-to-day contact (*id.* at 20-21). Tannen believed he contacted Hillman after CHC defaulted, but her son "was always the main point contact" (*id.* at 38). Tannen expressed that Sean-Patrick always acted "with Michelle's consent and permission," telling Tannen that he had to "check with Michelle. Let me see what Michelle says ... [f]rom day one to the very end" (*id.* at 38-39). Tannen could not recall ever discussing the 2010 Letter with Zemp (*id.* at 18). He understood from reading the letter that "there would be a more formalized transference ... [and] that such a document would be signed at the right time when if all notification was given to our firm" (*id.* at 17-18). Tannen maintained that he was unaware of the date Hillman moved out of the Premises, that she never told him when she would move out, and that there was no formal notification of her retirement (*id.* at 22).

William K. Brickner (Brickner), a senior property manager for Cushman, testified that he met Hillman just once, and that he dealt primarily with Sean-Patrick (NYSCEF Doc 74, Hillman aff, exhibit G [Brickner tr] at 17-18). He had never heard of a "guarantor transfer agreement" (*id.* at 23). He stated that there was no document in Cushman's files pertaining to a transfer of the

Guaranty to Sean-Patrick (*id.* at 24), and it was his understanding from reading the 2010 Letter that it would have been Sean-Patrick's obligation to ensure that a transfer occurred (*id.* at 24-26).

Regarding the 2010 Letter, Hillman expressed that she and Zemp "agreed on language for a letter that would serve as it handing over to my son when I remove myself from the premises" (NYSCEF Doc No. 55 at 39-40). Hillman believed she shared the letter with her son, but she did not ask him to sign it (*id.* at 41). It was her understanding that the transfer of the Guaranty would occur "[w]hen I gave notification I was leaving," and that "it would transfer to Sean Patrick ... [w]hen I retired" (*id.* at 45). Hillman explained, "[h]e was supposed to take over the lease and everything else" (*id.*). However, her son never purchased the company (*id.* at 47). Instead, he formed a new corporation, Hill Corp., and paid rent for the Premises through that entity (*id.* at 56). She never "took her name off" as president of CHC despite her retirement (*id.* at 48).

In an affidavit, Hillman avers that when it came time to sign the Extension and Modification Agreement, she informed Zemp that she intended to retire within the term of the new lease, and that she intended to have the Guaranty remain in effect until her retirement (NYSCEF Doc No. 67, ¶¶ 7-8). Hillman claims Zemp stated "such agreements were not uncommon," and claims he "dictated ... what would be necessary to revoke the [G]uaranty which we agreed would occur when I retired" (*id.*, ¶¶ 8-9). She drafted the 2010 Letter at Zemp's direction. Hillman states that it was her understanding the "[G]uaranty would be automatically revoked and that plaintiff would then look to my son, Sean-Patrick Hillman, then Executive Vice President of Corbin-Hillman, to become successor guarantor" (*id.*, ¶ 8).

Sean-Patrick avers he "had begun phasing in as Corbin-Hillman's primary contact with plaintiff" the year before Hillman retired (NYSCEF Doc No. 78, Sean-Patrick aff, ¶ 3). Neither plaintiff nor Cushman asked him to sign a new Guaranty, even after he personally delivered a copy

of the 2010 Letter to Tannen's office a few weeks before Hillman retired (*id.*, ¶ 4). Sean-Patrick states the business "hit on hard times in late 2017 ... [and] had difficulty meeting its financial obligations" (*id.*, ¶ 5).

Plaintiff commenced this action by filing a summons and complaint asserting two causes of action against Hillman for breach of the Guaranty and to recover its attorneys' fees (NSYCEF Doc No. 56, Weinstein affirmation, exhibit B at 4-5). Plaintiff later amended the complaint to add CHC as a party. The amended complaint pleads causes of action for breach of contract based on the Lease, breach of the Guaranty, and recovery of its attorney's fees (NYSCEF Doc No. 61, Weinstein affirmation, exhibit G at 5-6). CHC and Hillman separately answered the amended complaint, with Hillman verifying CHC's answer as its president (NYSCEF Doc No. 62, Weinstein affirmation, exhibit H at 5; NYSCEF Doc No. 63, Weinstein affirmation, exhibit I). On November 15, 2019, defendants filed a note of issue, on which they checked the box "Trial without Jury," and a certificate of readiness (NYSCEF Doc No. 38, Weinstein affirmation, exhibit E at 1-2). Four days later, defendants filed a demand seeking a trial by jury (NYSCEF Doc No. 39, Weinstein affirmation, exhibit F at 1).

Plaintiff now moves for an order striking the jury demand and for summary judgment on liability, and Hillman moves for summary judgment or dismissal of the complaint against her.

DISCUSSION

A. Motion Sequence No. 003

Plaintiff moves to strike the jury demand filed by defendants on the grounds that the Lease and the Guaranty contain valid clauses waiving defendants' rights to a jury trial. Defendants oppose the motion and argue that Hillman has an adequate basis for challenging the enforcement of the waiver clause, citing her revocation of the Guaranty.

Clauses in a lease providing for the waiver of a jury trial in actions arising out of that lease are generally enforceable (*see Sherry Assoc. v Sherry-Netherland, Inc.*, 273 AD2d 14, 15 [1st Dept 2000]; *11 Park Place Assoc. v Barnes*, 204 AD2d 170, 170 [1st Dept 1994], *lv dismissed* 83 NY2d 1000 [1994]), provided the action does not involve a personal injury or property damage claim (*see Benjamin, Inc. v Trump CPS*, 289 AD2d 113, 113 [1st Dept 2001]). Similar waiver clauses found in a guaranty are also enforceable (*see 4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1052 [1st Dept 2014]; *A. J. Armstrong Co. v Nechamkin*, 55 AD2d 520, 520 [1st Dept 1976]).

Here, plaintiff has demonstrated that the present action arises out of breaches of the Lease and the Guaranty, as opposed to a personal injury or property damage claim (*see Chemical Bank v Stahl*, 258 AD2d 352, 353 [1st Dept 1999]). As such, the waiver clauses found in the Lease and the Guaranty are applicable (*see Stahl v Chemical Bank*, 258 AD2d 352, 353 [1st Dept 1999]). Moreover, plaintiff promptly moved to vacate the jury demand (*see Sapp v Propeller Co., LLC*, 12 AD3d 218, 219 [1st Dept 2004] [stating that a delay in seeking relief “may preclude a party from relying on a contractual waiver of the right to trial by jury”]).

As the party challenging the jury waiver clause in the Guaranty, Hillman must demonstrate an “adequate basis to deny enforcement” of the clause (*Fordham Univ. v Manufacturers Hanover Trust Co.*, 145 AD2d 332, 333 [1st Dept 1988]). Here, Hillman claims she revoked the Guaranty. Because Hillman has raised revocation as an affirmative defense, she is entitled to a jury trial (*see Bank of N.Y. v Royal Athletic Indus.*, 224 AD2d 380, 380 [2d Dept 1996]). Thus, plaintiff’s motion to strike the jury demand is denied.

B. Motion Sequence Nos. 004 and 005

On its motion for partial summary judgment, plaintiff relies on an affidavit from Tannen, who avers that Sean-Patrick “continually acknowledged Tenant’s default in the payment of rent

and promised payment of the arrears” (NYSCEF Doc No. 42, ¶ 12). Sean-Patrick offered a number of excuses for the delinquency, as evidenced in the correspondence, but he never paid (*id.*; NYSCEF Doc Nos. 49 to 51, Tannen aff, exhibits G to I). An invoice dated January 24, 2019 shows a total of \$202,848.70 due in base rent, additional rent, late fees and interest for July 2018 through December 2018 (NYSCEF Doc No. 52, Tannen aff, exhibit J at 1).

As to Hillman, plaintiff posits that the absolute and unconditional nature of the Guaranty renders her liable for CHC’s default. Further, plaintiff contends that Hillman’s first affirmative defense, in which she pled that the Guaranty had been revoked by written agreement in 2017 (NYSCEF Doc No. 63 at 3), lacks merit. Plaintiff submits the 2010 Letter is an unenforceable agreement to agree because its terms are indefinite, with the phrase “at the appropriate time” too vague to be enforceable. Additionally, the revocation was predicated upon the happening of two future events – Hillman’s retirement and Sean-Patrick’s installation as CHC’s president and CEO. Although the first condition has been satisfied, Hillman has admitted that the second condition was never fulfilled. Also, Hillman could not have transferred her obligations under the Guaranty without a writing signed by Sean-Patrick in accordance with General Obligations Law § 5-701 (2). Lastly, plaintiff submits that the 2010 Letter lacks consideration.

Defendants oppose, and Hillman moves for summary judgment. Defendants claim that Hillman bears no liability because she revoked the Guaranty verbally and in writing.

Plaintiff counters that Hillman could not have orally revoked the Guaranty because an oral revocation must be clearly expressed, and that she never effectuated a revocation in writing. It rejects Hillman’s assertion that her retirement automatically triggered a revocation. It repeats the assertions that the 2010 Letter constitutes an unenforceable agreement to agree, that the conditions for revocation were never met, and that Hillman did not pay any consideration. Plaintiff also

contends that a sophisticated businessperson such as Hillman would have included a reference to a revocation of the Guaranty in the Extension and Modification Agreement, but failed to do so.

It is well settled that a party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see CPLR 3212 [b]*). The movant’s “failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

On a motion brought under CPLR 3211 (a) (1), dismissal is warranted “where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). “A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of ‘undisputed authenticity’; and (3) its contents are ‘essentially undeniable’” (*VXI Lux Holdco S.A.R.L. v Sic Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta*, 73 AD3d at 86-87).

“A lease is a contract” (*Genovese Drug Stores, Inc. v William Floyd Plaza, LLC*, 63 AD3d 1102, 1103 [2d Dept 2009]). Therefore, to prevail on a cause of action for breach of contract, a plaintiff must prove the existence of a contract, the plaintiff’s performance, the defendant’s breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Plaintiff has demonstrated prima facie that the existence of a valid Lease, its performance, CHC's default on its payment obligations under the Lease., and damages. CHC has not refuted its default or plaintiff's proof that it did not remove its property from the Premises until March 11, 2019.

Further, the Lease permits plaintiff to recover its attorneys' fees from CHC. Ordinarily, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989] [citations omitted]). A lease provision that provides for payment of attorneys' fees should be strictly construed (*see Andrews 44 Coffee Shops Inc. v TST/TMW 405 Lexington, L.P.*, 40 AD3d 544, 545 [1st Dept 2007]). A plain reading of paragraph 19 of the Lease reveals that plaintiff, as the prevailing party, is entitled to recover its reasonable attorneys' fees in this action (*see Omansky v 160 Chambers St. Owners, Inc.*, 158 AD3d 566, 566 [1st Dept 2018]; *Dee Cee Assoc. LLC v 44 Beehan Corp.*, 148 AD3d 636, 642 [1st Dept 2017]). CHC had not addressed this facet of the motion in its opposition. Accordingly, that branch of plaintiff's motion on the issue of CHC's liability on the first cause of action for breach of the Lease and the third cause of action for attorneys' fees is granted.

Turning to the second cause of action against Hillman for breach of the Guaranty, "[a] guaranty is a promise to fulfill the obligations of another party, and is subject 'to the ordinary principles of contract construction'" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015] [internal citations omitted]; *Louis Dreyfus Energy Corp. v MG Ref. & Mktg., Inc.*, 2 NY3d 495, 500 [2004] [stating that "[a] guaranty is a contract" and should be interpreted by first looking at the words used by the parties]).

At the outset, the Guaranty does not contain a provision detailing the means by which it may be revoked, terminated, or transferred. Thus, as relevant here, "[a] continuing guaranty may

be terminated by the guarantor by notice to the obligee ... revoking his [or her] liability for obligations that may be incurred subsequent to the notice” (*27th St. Assoc. v Lehrer*, 4 AD3d 165, 167 [1st Dept 2004] [citations omitted]). Where a guaranty does not require written notice to effectuate a termination, oral notice is sufficient (*id.* at 168). To that end, the oral notice must be “‘clearly expressed’ ... ‘unqualified and positive’, ‘express and absolute’” (*Associated Food Stores v Siegel*, 10 AD2d 1003, 1003 [2d Dept 1960], *affd* 9 NY3d 816 [1961] [internal quotation marks and citations omitted]).

Hillman asserts that she and Zemp orally agreed she would revoke the Guaranty upon her retirement, with her son succeeding her as guarantor. However, this oral notice was not expressed in unqualified, positive or absolute terms. First, the notice conditioned the termination upon Hillman’s actual retirement, without setting a specific date for that event. Because the revocation was contingent upon the happening of a future event which may not ever occur, it fails to qualify as a positive, express or absolute statement of revocation. Second, Hillman’s conversation with Zemp took place in 2010, seven years before she retired, and there is no indication that she kept plaintiff apprised of her retirement plans. Indeed, Hillman testified that the transfer of the Guaranty would occur “[w]hen I gave notification I was leaving” (NYSCEF Doc No. 55 at 45). Hillman claims that “[p]laintiff clearly knew that I was retiring and moving out and the precise date” because she had arranged to use the freight elevator with Building staff and secured insurance for the move (NYSCEF Doc No. 67, ¶ 13). However, these actions do not conclusively establish that she actually notified plaintiff of her retirement date, thereby triggering a termination and transfer of the Guaranty. Further, Tannen testified that he did not believe Hillman ever furnished plaintiff with a formal notice. Thus, the oral notice is too vague and imprecise to afford plaintiff with specific notice of a revocation or termination.

The case of *27th St. Assoc.*, cited by Hillman in support, is factually distinguishable. In that action, the defendant executed a commercial lease as the president of the tenant corporation and a personal guaranty of the corporation's rent obligations (4 AD3d at 166). In 1996, he sold his entire interest in the corporation to the co-defendant and retired (*id.*). When it came time to execute another lease extension in 2000, the defendant "spoke [with] ... the vice-president of plaintiff's predecessor, about ending his involvement with the corporation" (*id.* at 167). The plaintiff proceeded to negotiate the terms for the extension with the co-defendant, who executed the extension along with a personal guaranty (*id.* at 166). The Court determined that the defendant had severed his relationship with the corporation prior to the corporation's default on the second lease extension based on the defendant's oral notice to plaintiff (*id.* at 168). In addition, "from plaintiff's subsequent dealings with [the co-defendant] Lehrer, it can be inferred that plaintiff understood that defendant's guaranty would not cover leases executed after defendant's involvement in the corporation had ended" (*id.* at 168). Conversely, Hillman admits that she never turned CHC over to her son, and Tannen believed Hillman remained involved with CHC based on his interactions with her son. Hillman also signed CHC's verified answer as its president. Therefore, Hillman has not demonstrated that she completely severed her connection to CHC (*see 27th St. Assoc.*, 4 AD3d at 168).

Next, Hillman claims the 2010 Letter constitutes written notice of a revocation. Close examination of the document, though, reveals that it lacks definiteness (*see Rondeau v Berman*, 2017 NY Slip Op 30079[U]). *6-7 [Sup Ct, NY County 2017], *aff'd* 161 AD3d 429 [1st Dept 2018], *lv denied* 32 NY3d 904 [2018]). "If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *rearg denied* 75 NY3d 863 [1990], *cert denied* 498 US 816 [1990]).

“[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable” (*Joseph Martin, Jr., Delicatessen. v Schumacher*, 52 NY2d 105, 109 [1981]). The exact date on which Hillman would retire is a material term to the parties’ agreement because it dictates when Hillman’s obligations cease under the Guaranty. The 2010 Letter contains the phrases “transfer at the appropriate time” and “at that time,” but these phrases are too ambiguous to establish the exact date of the revocation and transfer. Hillman’s contention that the Guaranty would automatically be revoked upon her retirement is similarly unpersuasive, as the 2010 Letter merely expresses her intent to transfer the Guaranty to her son “at that time.”

In addition, the parties disagree over which party had to ensure that a revocation and transfer was effectuated. Notably, the 2010 Letter is silent on this issue. While Hillman contends that it was plaintiff’s obligation to secure a new guaranty from Sean-Patrick, the language in the letter is insufficient to infer that plaintiff had to ensure the transfer occurred. The document provides only that plaintiff agreed Hillman could transfer the Guaranty “at the appropriate time” and that plaintiff would not object. Hillman has not presented any evidence demonstrating that she validly transferred or assigned her obligations to her son, or that her son agreed to undertake those obligations on behalf of CHC, especially in view of the fact that he had formed a wholly separate corporation, Hill Corp. As plaintiff has argued, “[a]n oral promise to guarantee the debt of another is barred by the Statute of Frauds” (*Karl Ehmer Forest Hills Corp. v Gonzalez*, 159 AD2d 613, 613 [2d Dept 1990], citing General Obligations Law § 5-701). Thus, the procedure to effectuate a revocation and transfer is another material term missing from the 2010 Letter.

Furthermore, the termination of Hillman’s liability under the Guaranty was contingent upon the happening of Hillman’s retirement and Sean-Patrick’s takeover of CHC. Hillman readily admits that her son never purchased CHC and never took over the company. Consequently,

Hillman has not demonstrated her entitlement to summary judgment. Likewise, because the documentary evidence does utterly refute plaintiff's allegations, Hillman motion to dismiss the complaint against her is also denied.

As to plaintiff's motion, "guaranties that are 'absolute and unconditional,' have been consistently upheld by New York courts" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch*, 25 NY3d at 493). A cause of action under a guaranty for payment accrues once there is a default of a payment obligation (*see Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 143 [1993]). "On a motion for summary judgment 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" (*Gansevoort 69 Realty LLC v Laba*, 130 AD3d 521, 521 [1st Dept 2015] [internal quotation marks and citation omitted]).

Applying these principles, plaintiff has demonstrated prima facie that Hillman "executed an absolute and unconditional guaranty of the defaulting tenant's rental obligations under a commercial lease" (*Chip Fifth Ave. LLC v Quality King Distribs., Inc.*, 158 AD3d 418, 418 [1st Dept 2018], *lv dismissed* 32 NY3d 947 [2018]; *H.L. Realty, LLC v Edwards*, 131 AD3d 573, 574 [2d Dept 2015] [granting summary judgment against the defendant, who had executed a guaranty related to a commercial lease, even though the lease had been assigned to another party]). Since plaintiff has demonstrated prima facie that CHC defaulted on its payment obligations, it may enforce the Guaranty and seek payment from Hillman.

Nevertheless, triable issues of fact preclude granting plaintiff summary judgment on the second cause of action. Hillman and Sean-Patrick both aver that Sean-Patrick personally delivered a copy of the 2010 Letter to Tannen's office a few weeks before Hillman retired. Hillman states this was done "for the express purpose of reminding him of my imminent move-out, my retirement

and the revocation of my guaranty” (NYSCEF Doc No. 67, ¶ 13). While Sean-Patrick did not describe the specific date on which he delivered the letter, or to whom, plaintiff has not accounted for whether it received a copy of the letter on or near August 8, 2017. Hillman also stated that she and Kemp had verbally agreed the revocation of the Guaranty would occur upon her retirement. At his deposition, Brickner testified Sean-Patrick told him that “[his] mother is retiring” (NYSCEF Doc No. 74 at 27). Thus, a question of fact exists whether delivery of the copy of the 2010 Letter, together with Sean-Patrick’s statement that his mother was retiring, constitutes oral notice to plaintiff of a revocation. Therefore, that part of plaintiff’s motion for partial summary judgment on the second and third causes of action against Hillman is denied.

Accordingly, it is

ORDERED that the motion of plaintiff ULM I Holding Corp. to strike the demand for a jury trial filed on November 19, 2019 (NYSCEF Doc No. 29) (motion sequence no. 003) is denied; and it is further

ORDERED that the motion of plaintiff ULM I Holding Corp. for summary judgment (motion sequence no. 004) is granted to the extent of granting summary judgment on the issue of the liability of defendant Corbin-Hillman Communications, Ltd. on the first and third causes of action, and the motion is otherwise denied as to defendant Michelle Corbin Hillman; and it is further

ORDERED that an inquest on damages against defendant Corbin-Hillman Communications, Ltd. shall be held at the time of trial; and it is further

ORDERED that the motion of defendant Michelle Corbin Hillman for summary judgment or for dismissal of the complaint against her (motion sequence no. 005) is denied; and it is further

ORDERED that counsel are directed to appear for a telephonic settlement conference
November 20, 2020 at 11:00 a.m.

This constitutes the Decision and Order of the court.

Dated: October 28, 2020

ENTER:



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON