| **PRG Assoc. LP v Planet Organic Holding Corp.** |
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| 2020 NY Slip Op 35311(U) |
| May 1, 2020 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 60469/2018 |
| Judge: Sam D. Walker |
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**To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.**

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF WESTCHESTER**
**PRESENT: HON. SAM D. WALKER, J.S.C.**

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PRG Associates Limited Partnership,

Plaintiff,

-against-

Planet Organic Holding Corp., and Mrs. Green's of Larchmont, Inc., and Harold Hochberger,

Defendants.

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**DECISION & ORDER**
Index No. 60469/2018

Sequence Nos. 4, 5 & 6

The following papers were read on Defendant's motion:

| PAPERS | NUMBERED |
|---|---|
| Notice of Motion/Affirmation | 1-2 |
| Stipulated Facts/Exhibits A-K | 3-14 |
| Memorandum of Law in Support | 15 |

The following papers were read on Plaintiff's cross-motion:

| PAPERS | NUMBERED |
|---|---|
| Notice of Cross-Motion[1] | 16 |
| Memorandum of Law in Support of Cross-Motion | 17 |
| Memorandum of Law in Opposition to Cross-Motion | 18 |
| Memorandum of Law in Reply | 19 |

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, PRG Associates Limited Partnership ("PRG"), commenced this action on July 9, 2018 by filing a summons and verified complaint alleging the breach of

[1] Plaintiff filed duplicate Notices of its Cross-Motion (*see* NYSCEF Docs. 117 and 118), which were assigned Sequence Nos. 5 and 6, respectively. This Decision and Order disposes of both Sequences in its treatment of Plaintiff's cross-motion.

a commercial lease. PRG alleges that on or about November 17, 1994, it entered into a Lease Agreement with Larchmont Organic Inc., to lease certain premises identified in the lease. The lease was assigned and assumed by Mrs. Green's of Larchmont, Inc. ("Mrs. Green's"). On or about March 19, 2004, the Lease Agreement was extended for a period of ten years commencing February 15, 2005 and ending February 14, 2015, by a Lease Extension Agreement between PRG and Mrs. Green's. That Lease Extension Agreement included a personal guaranty signed by the defendant, Harold Hochberger ("Hochberger").

When that lease extension expired, Mrs. Green's failed to vacate and continued to occupy the premises without a lease, paying the same monthly rent as if under the lease. PRG subsequently commenced an action against Hochberger based on the guaranty and a separate breach of lease action against Mrs. Green's and Planet Organic Holding Corp. ("Planet Organic"), Mrs. Green's successor in interest.

The Court (Bellantoni, J.) granted Hochberger summary judgment, dismissing that action against him, finding that there was no evidence that Mrs. Green's was in default under the first Extension Lease. The parties in the other action, PRG, Mrs. Green's and Planet Organic, settled by Stipulation of Settlement dated May 20, 2016, whereby they agreed to a judgment in the amount of $413,800.87. The Stipulation provided that PRG would not execute the judgment as long as the defendants complied with the terms of the Lease Extension Agreement and a Second Lease Extension Agreement, which PRG entered into on May 18, 2016, with Planet Organic, successor to Mrs. Green's and was effective June 1, 2016 for seven years seven months, to end on December 30, 2023. Hochberger was not a party to the Second Lease Extension

Agreement.

PRG alleges that Planet Organic or Mrs. Green's has not paid rent since June 1, 2018, is in default of the Stipulation of Settlement and has breached the Second Lease Extension. PRG also seeks payment from Hochberger as guarantor of the Lease Extension Agreement.

Hochberger filed a motion for summary judgment and PRG filed a cross-motion also seeking summary judgment against all defendants and in opposition to Hochberger's motion. This Court granted both motions in part and denied in part, finding that there is an issue of fact as to whether Hochberger is still liable to PRG under the terms of the 2004 lease with regard to deferred judgment and any amount owed due to Mrs. Green's holdover in 2015, but found that there was no further obligation on Hochberger's part, with regard to the Second Extension Lease Agreement, since a guarantor is not bound beyond the express terms of his guarantee and the terms of the lease had been altered and not consented to by Hochberger. The Court found that PRG had made out a prima facie case against Mrs. Green's and Planet Organic on the issue of liability.

Hochberger filed a motion to reargue. This Court denied the motion finding that Hochberger failed to demonstrate that this Court misapprehended the relevant facts and/or law and found that Mrs. Green's failed to comply with the terms of the Stipulation of Settlement, wherein Mrs. Green's admitted that an amount of $413,800.87 was due for the period after the expiration of the lease extension until the new lease was signed, and that there is an issue of fact as to whether Hochberger is liable for such amount based on the terms of the guarantee.

Hochberger now files a motion for summary judgment arguing that Mrs. Green's is not a holdover tenant under the provisions of the lease because PRG consented to Mrs. Green's remaining in the premises after expiration of the lease extension and PRG billed and accepted rent payments from Mrs. Green's for six months, which such actions formed a month-to-month tenancy that bars PRG from collecting holdover payments under the lease, and that the guarantee did not extend to the month-to-month tenancy period and therefore the guarantee lapsed. Hochberger also argues that agreements entered into by PRG and Mrs. Green's subsequent to the month-to-month tenancy period cannot revive the lapsed guarantee.

PRG files a cross-motion also seeking summary judgment and in opposition to Hochberger's motion arguing that delivery of a vacate instrument confirming vacancy of the premises and delivery of full payment under the lease is a precondition to release Hochberger from his guarantee and such never occurred because Mrs. Green's was in possession of the premises up until October 2018, and that the language of the guarantee binds Hochberger to the consent of the judgment in the holdover proceeding.

Hochberger, in opposition to PRG's cross-motion, argues that the language of the guarantee states Hochberger will be bound by a judgment against Mrs. Green's "as long as [Hochberger] has notice and opportunity to defend" and it is undisputed that Hochberger was unaware of the holdover lawsuit or the Stipulation of Settlement.

In support of both of their motions, Hochberger and PRG submit a statement of Stipulated Facts.

DISCUSSION

A party moving for summary judgment bears the initial burden of affirmatively

demonstrating its entitlement to summary judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). To demonstrate its entitlement to relief, the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact (*see McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007]). Once the moving party has established its prima facie entitlement to summary judgment, the burden shifts to the opposing party to submit evidentiary proof in admissible form to establish material issues of fact (*see Alvarez*, 68 NY2d at 324).

Generally, a guaranty does not apply to a holdover period, but an expansive guaranty relating to the full performance and observance of all agreements to be performed by a tenant under a lease may include payment of liquidated damages for a holdover period (*see Clark, Wile & Mayer, Inc. v Kewalranani*, 2008 NY Slip Op 30110[U], 2008 NY Misc LEXIS 8254, *4-5 [Sup Ct, NY County, January 14, 2008], No. 107646/2007). "[A] landlord facing a holdover tenant can either commence a proceeding to remove the tenant or accept rent for any period after the expiration of the lease, thereby creating a month-to-month tenancy unless an agreement either express or implied is made providing otherwise" (*Samson Mgt., LLC v Hubert*, 92 AD3d 932, 933 [2d Dept 2012] [internal citations and quotes omitted]; *see also Bahamonde v Grabel*, 34 Misc 3d 58, 61 [App Term, 2d Dept, 9th & 10th Jud Dists 2011]; RPL § 232-c). An express provision in a lease providing for holdover rent prevents the creation of a month-to-month tenancy (*see Hamilton 65th Partners, LLC v Smallbone Inc.*, 2016 NY Slip Op 31935[U], 2016 NY Misc LEXIS 3727, *7-8 [Sup Ct, NY County, October 11, 2016, No. 652414/2015). However, "[c]ontractual rights may be waived if they are

knowingly, voluntarily and intentionally abandoned" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 104 [2006]). Failure to assert a right to collect holdover rent until a subsequent proceeding can amount to waiver of that right (*see Hamilton 65th Partners*, 2016 NY Misc LEXIS 3727 at *9). "[W]aiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection" (*Fundamental Portfolio Advisors*, 7 NY3d at 104). "Generally, the existence of an intent to forgo such a right is a question of fact" (*id*.).

Here, the primary question before the Court is whether PRG waived its right to holdover payments by its conduct with Mrs. Green's after expiration of the first Lease Extension, for which it seeks recoupment from Hochberger as guarantor. It is undisputed that the first Lease Extension expired on February 14, 2015. During the period of March 2015 through August 2015, Mrs. Green's remained in possession of the premises with PRG's consent and PRG invoiced Mrs. Green's monthly rent statements, which Mrs. Green's paid in full and PRG accepted said payments without objection. Thereafter, PRG commenced a summary proceeding for holdover rent for the period of March 2015 though August 2015, which had not been previously billed during those months. Behind these acts rests a question of fact as to whether PRG had a clear manifestation of intent to relinquish its contractual right to holdover rent.

Moreover, the Stipulation of Settlement awarding PRG a deferred judgment for holdover payments did not involve Hochberger. The language of the guaranty states:

> "The undersigned agrees that Owner may at its option proceed either against Tenant alone or the undersigned alone or jointly and severally, and the undersigned agrees to

> be bound by any judgment that may be obtained against Tenant as if the undersigned were a party **as long as the undersigned has notice and opportunity to defend**."

(Lease Extension, ¶ 4, Ex. C to Stipulated Facts, NYSCEF Doc. 106 [emphasis added]). Hochberger asserts that it is undisputed that he was unaware of the lawsuit underlying the Stipulation of Settlement. However, the Stipulated Facts state only that Hochberger did not consent and had no involvement in the Stipulation of Settlement. Therefore, there is also a question of fact as to whether Hochberger had notice and opportunity to defend in the underlying holdover proceeding.

All other arguments raised on these motions and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

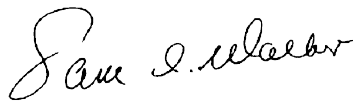
Accordingly, based on the foregoing, it is

ORDERED that Hochberger's motion is denied; and it is further

ORDERED that PRG's cross-motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: May1, 2020



HON. SAM D. WALKER, J.S.C.

To: All counsel via NYSCEF