

UD 31st St., LLC v Cast Iron Korean BBQ 2 Inc.

2021 NY Slip Op 30803(U)

March 8, 2021

Supreme Court, New York County

Docket Number: 651219/2020

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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UD 31ST STREET, LLC,

Plaintiff,

- v -

CAST IRON KOREAN BBQ 2 INC. f/k/a CAST IRON POT INC. and HYUN PARK

Defendant.

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INDEX NO. 651219/2020
MOTION DATE 1/19/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for JUDGMENT - SUMMARY

By this action, the plaintiff, UD 31st Street, LLC, owner of commercial property in Manhattan, seeks to enforce a stipulation of settlement it entered with defendant Cast Iron Korean BBQ 2, Inc. (Cast Iron), a tenant which operated a restaurant on the premises. The plaintiff also names as a defendant in this action Hyun Park, the president of Cast Iron and personal guarantor on the subject lease. The defendants answered the complaint and asserted several counterclaims largely concerning the condition of the demised premises when they occupied it - breach of covenant of good faith and fair dealing, breach of covenant of quiet enjoyment, actual or constructive eviction, negligent misrepresentation and unjust enrichment.

The so-ordered stipulation, dated December 17, 2019, was entered in settlement of a summary non-payment proceeding brought by the plaintiff in the Civil Court of the City of New York, New York County, and an action brought by Cast Iron in this court in August 2019, Cast Iron Pot v UD 31st Street, LLC, (Index No. 654909/2019). The agreement provided that Cast Iron would vacate the premises by December 20, 2019, and pay \$391,928.00 to the plaintiff. Cast Iron acknowledged that it owed \$467,928.00 in base rent through December 20, 2019, and agreed to allow the plaintiff to retain \$76,000.00 of the security deposit as an offset. The stipulation provided for a judgment of possession and a money judgment in the sum of \$391,928.00 in favor of the plaintiff and against Cast Iron, and that Cast Iron would make satisfy

the judgment by making scheduled payments, *i.e.* \$100,000.00 by December 24, 2019, \$5,000.00 per month from January through June 2020, and \$10,000.00 per month thereafter until paid in full. However, according to the plaintiff, defendant Cast Iron failed to make the first payment, and the default has not been cured despite being demanded.

The plaintiff now moves pursuant to CPLR 3212 for summary judgment against both defendants. It seeks to impose joint and several liability in the sum of \$619,632.08 against both defendants, and an additional sum of \$241,885.20, against defendant Cast Iron, purportedly representing the amount agreed to in the settlement agreement plus additional amounts that accrued thereafter and after surrender of the premises, with costs and attorney's fees. The plaintiff also seeks dismissal of the defendants' counterclaims pursuant to CPLR 3211(a)(1) and (a)(7).

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez v Prospect Hosp., *supra*; Zuckerman v City of New York, *supra*.

In light of the settlement agreement between the plaintiff and defendant Cast Iron, in the first cause of action of the complaint the plaintiff is essentially moving pursuant to CPLR 2104 and 3215(i) to enforce the agreement and enter judgment in the unpaid amount, plus interest, as against defendant Cast Iron. It has met its burden on that regard.

It is well settled that "[s]tipulations of settlement are essentially contracts and subject to principles of contract interpretation." Hotel Cameron, Inc. v Purcell, 35 AD3 153 (1st Dept. 2006); see VNB New York LLC v Maidi, 159 AD3d 556 (1st Dept. 2018). Here, the plaintiff has established that the parties' stipulation was a valid agreement, and that defendant Cast Iron breached the agreement. Furthermore, "[s]tipulations of settlement are favored by the courts and not lightly cast aside ... This is all the more so in the case of 'open court' stipulations ... within CPLR 2104, where strict enforcement not only serves the interest of efficient dispute

resolution but also is essential to the management of court calendars and integrity of the litigation process. Only where there is cause sufficient to invalidate a contract, such as fraud collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation.” Hallock v State of New York, 64 NY2d 224, 230 (1984); see also Hawkins v City of New York, 40 AD3d 327 (1st Dept. 2007); Hotel Cameron, Inc. v Purcell, supra City of New York v 130/40 Essex St. Dev. Corp., 302 AD2d 292 (1st Dept. 2003). There is none here. Defendant Cast Iron raises no cause sufficient to relieve it from the enforcement of the agreement. Its allegations regarding pre-existing unresolved Department of Building (DOB) violations in other parts of the building and the resulting delay in obtaining permits from the DOB for extensive renovations on the premises concern events occurring prior to their settlement and which were known to all prior to execution of the agreement.

The second cause of action of the complaint alleges breach of guaranty as against defendant Park. In support of this claim, the plaintiff submits the “Good Guy Guaranty” signed by Park at the time the lease was executed, October 24, 2017. “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 (1991). The terms of the subject guaranty agreement are clear, unambiguous, absolute and unconditional and the defendants have not shown any fraud, duress or any other wrongful conduct by the plaintiff in regard to the agreement. There can be no reasonable dispute that upon Cast Iron’s default, Park failed to perform under the guaranty. See 4 USS, LLC v DSW MS, LLC, 120 AD3d 1049, 1051 (1st Dept. 2014).

To the extent the plaintiff seeks summary judgment against defendant Park based on the settlement agreement, it has not met its burden. Defendant Park was not a party to the settlement agreement, and is never mentioned in the settlement agreement. However, equally unavailing is Park’s contention that he was released from liability as consideration for Cast Iron’s acknowledgement of the debt and promise to pay. The agreement, negotiated by counsel, contains no such provision. Indeed, Park admits that his attorney signed the settlement, albeit without his approval. While Park may have a claim against his former attorney, this alleged conduct does not relieve him of his obligations under the guaranty agreement.

On these papers, the plaintiff has established entitlement to a judgment in the sum of \$391,928.00, plus costs and statutory interest from December 24, 2019. The defendants have raised no triable issue in that regard. However, the plaintiff fails to establish in the first instance its entitlement to the greater amount of damages it seeks in its motion papers - amounts which allegedly accrued or were incurred after the settlement agreement and after surrender of the premises. To support the motion, it relies largely on an affirmation of counsel. Since the plaintiff's attorney claims no personal knowledge of the underlying facts asserted, the affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Joosten v Gale, 129 AD2d 531 (1st Dept. 1987). In any event, his affirmation does not establish entitlement to the additional amounts. Nor does the plaintiff submit a memorandum of law to support its arguments. Furthermore, the plaintiff's papers do not address NYC Administrative Code 22-1005 (L.L. 2020/55, 5/26/2020), which barred enforcement of personal guaranties on commercial leases under certain conditions and if the alleged liability arose between March 7, 2020 and September 30, 2020, the period of onset of the COVID-19 public health emergency.

The defendants' counterclaims are dismissed on the grounds asserted by the plaintiff.

The court has considered and rejected the parties' remaining contentions.

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion is granted on the first and second causes of action of the complaint to the extent that the plaintiff is awarded judgment in the amount of \$391,928.00, plus costs and statutory interest from December 24, 2019, and the motion is otherwise denied without prejudice, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants, Cast Iron Korean BBQ 2, Inc. f/k/a Cast Iron Pot, Inc. and Hyun Park, jointly and severally, in the sum of \$391,928.00, plus costs and statutory interest from December 24, 2019, and it is further

ORDERED that the parties shall appear for a compliance conference on March 11, 2021, at 2:30 p.m., as previously scheduled.

This constitutes the Decision and Order of the court.



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

3/8/2021

DATE

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER

OTHER

APPLICATION: