

**Jeffrey Mgt. Corp. v One Commercial Realty Servs.
LLC**

2022 NY Slip Op 30289(U)

January 26, 2022

Supreme Court, New York County

Docket Number: Index No. 656323/2018

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

Justice

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JEFFREY MANAGEMENT CORP. AS MANAGER FOR
FRENCH PARTNERS LLC; NEW YORK FRENCH
SOUNDVIEW LLC; and NEW YORK 551 FIFTH OWNER
CO-INVESTORS LLC AS TENANTS-IN-COMMONS,

Plaintiff,

- v -

ONE COMMERCIAL REALTY SERVICES LLC and
AVTANDYL CHKHEIDZE a/k/a DAVID CHASE,

Defendants.

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INDEX NO. 656323/2018
MOTION DATE 03/21/2020,
07/14/2020
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 57

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

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

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that

Defendant Avtandyl Chkhiedze’s motion to dismiss the complaint based on documentary evidence pursuant to CPLR 3211(a)(1), or to convert the motion to one for summary judgment pursuant to CPLR 3211(c) (Mot. Seq. No. 002); and plaintiff’s motion for summary judgment against defendant (Mot. Seq. No. 003), are consolidated for disposition and decided in accordance with the following memorandum decision.

Background

In this action for breach of a commercial lease and accompanying limited guarantee, plaintiff Jeffrey Management Corp. (“plaintiff”) asserts three causes of action for breach of the

lease, against defendant One Commercial Realty Services LLC (“OCRS”), and a fourth for breach of the guarantee against defendant Avtandyl Chkhiedze a/k/a David Chase (“Chase”). Chase now moves to dismiss the fourth cause of action under the guarantee, or, in the alternative to convert the motion to summary judgment.¹ In response, plaintiff in effect cross-moves for summary judgment under the guarantee.

Pursuant to a lease dated March 25, 2017, plaintiff leased to OCRS 551 Fifth Avenue, Suite 620, New York, New York (the “premises”) for a term of one year, from April 1, 2017 through March 31, 2018 (NYSCEF Doc. No. 37). OCRS agreed to pay rent at a yearly rate of \$134,179.00 (*id.*, Exhibit B). OCRS extended the lease for an additional year through March 31, 2019, at a yearly rate of \$130,486.00, plus electric and real estate tax escalations (*id.* at 31). The lease further provided that OCRS would deposit \$31,390.50 as security for OCRS’ obligations under the lease (*id.*, ¶ 57). If OCRS ever defaulted “in the payment of [rent, additional rent, charges and damages] or in the keeping, observance or performance of any such other covenant, agreement, term, provision or condition, [plaintiff] may, at its election, apply the security so on deposit with [plaintiff] to the payment of any such default” (*id.*). Further, if OCRS fully fulfilled all its obligations under the lease, plaintiff agreed to return the security deposit following the termination of the lease and OCRS’ delivery of the premises to plaintiff (*id.*, ¶ 34).

Together with the lease, Chase signed a limited guarantee of “all annual rent and additional rent and other charges due to [plaintiff] under the lease or otherwise” (NYSCEF Doc. No. 38). The guarantee provides that Chase’s liability for the rent ceased upon the date OCRS

¹ While Chase’s motion is made as one to dismiss pursuant to CPLR 3211, to avoid elevating form over substance and given the prior direction by Mediator Kevin J. Egan to make such a motion (NYSCEF Doc. No. 33, ¶ 7), this court will treat the motion as one for summary judgment pursuant to CPLR 3212.

vacated the premises, provided that OCRS had given at least 60 days written notice of its intent to vacate (*id.*). The guarantee also provides that:

[plaintiff] may (but is not obligated to) first look to the Guarantors for any Annual Rent, additional rent, or other guaranteed obligations of Tenant, before applying any security monies held under this Lease. In such event, Guarantors would be obligated to pay to Owner any Annual Rent and/or additional rent, and perform any of the above obligations prior to Owner's applying any security held" (*id.*, ¶ 1).

On July 6, 2018, OCRS notified plaintiff of its intent to vacate the premises on or before September 30, 2018 (NYSCEF Doc. No. 40). In a later letter to plaintiff, Chase proposed that the security deposit held by plaintiff be used to cover any outstanding rent (*id.* at 3). OCRS subsequently vacated the premises on September 27, 2018 and returned the keys to plaintiff (NYSCEF Doc. No. 41). Plaintiff asserts that an outstanding balance of \$36,224.71 through the end of September 2018 remains to be paid (NYSCEF Doc. No. 52), for which Chase is liable as Guarantor.

Plaintiff commenced this action by filing a summons and complaint on December 19, 2018 (NYSCEF Doc. No. 1). Defendants appeared and answered the complaint (NYSCEF Doc. No. 9). The parties now both move for summary judgment on the issue of Chase's liability under the guarantee.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and

give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Discussion

The issue at the core of the parties' dispute regarding the guarantee is whether plaintiff's security deposit of \$31,390.50, and the accrued interest thereon should be used to satisfy the outstanding balance leading up to OCRS vacating the premises.

Whenever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for performance of the contract or agreement . . . such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made (General Obligations Law § 7-103[1]).

"The security deposit remains the property of the tenant unless and until he has defaulted in his obligations under the lease. Upon such default, of course, the deposit may be used to offset actual damages" (*Rivertower Assoc. v Chalfen*, 153 AD2d 196, 199 [1st Dept 1990]). Where an individual agrees to guarantee the tenant's obligations to its landlord, however, the terms of the guarantee must control, and may prohibit an offset where the landlord may recover from the guarantor without first applying the security deposit (*501 Fifth Ave. Co., LLC v Aslam*, 136 AD3d 535, 536 [1st Dept 2016] ["By the clear and unambiguous terms of the commercial lease and the unconditional guaranty . . . plaintiff landlord was entitled to recover from defendant guarantor . . . the full amount of the accrued pre-vacatur arrears, i.e., without a setoff in the amount of the tenant's security deposit"]; *Wiener v Tae Han*, 291 AD2d 297 [1st Dept 2002] ["Moreover, appellants' guarantee was expressly "independent of and in addition to any other security or other remedies which Owner has or may have" and provided that "Owner shall not be required to resort to any other security or other remedies before proceeding on this Guaranty"]]). Moreover, where the landlord has post-vacatur damages that are not guaranteed, the landlord

may choose to apply the security deposit to those damages and collect the full amount of guaranteed obligations without any setoff in the amount of the security deposit (*511 W. 25th St. Owner LP v WESTKIDS25, LLC*, 2019 NY Slip Op 32056[U], 5-6 [Sup Ct, NY County 2019] [“Accordingly, Landlord, by the clear and unambiguous terms of the Lease and the Guarantees, may elect to apply the security deposit cover post-vacatur damages because the Dangin Guarantee only covers the Tenant's Lease obligations until Tenant vacated the Premises”]).

Here, the guarantee states that Chase guarantees all of OCRS’ obligations until the day OCRS vacates the premises (NYSCEF Doc. No. 38). Plaintiff claims various post-vacatur damages from OCRS in its complaint and may elect to apply the security deposit to those damages. In addition, the guarantee provides that plaintiff may seek compensation of guaranteed obligations from Chase “before applying any security monies held under this lease,” and Chase is obligated to “pay to [plaintiff] any annual rent and/or additional rent . . . prior to [plaintiff’s] applying any security held” (*id.*, ¶ 1). Thus, the guarantee’s express terms allow plaintiff to resort to Chase for payment without applying the security deposit (*501 Fifth Ave. Co., LLC*, 136 AD3d at 536; *Wiener*, 291 AD2d at 297). Allowing Chase to claim the security deposit as a setoff against his obligation to pay the outstanding balance that accrued prior to OCRS vacating the premises would render this provision of the guarantee meaningless (*Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009] [“a contract should not be interpreted so as to render any clause meaningless”]). Because Chase does not otherwise establish that he is not obligated to pay the outstanding balance he agreed to guarantee, he is not entitled to summary judgment, and his motion is denied.²

² To the extent that Chase claims, without any evidentiary support, that plaintiff is unlawfully withholding the security deposit or has commingled it with plaintiff’s own funds, neither Chase nor OCRS “indicate that [they have]

Turning to plaintiff's motion for summary judgment on its fourth cause of action for breach of the guarantee, "[o]n 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" (*4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st Dept 2014]). Plaintiff submits the guarantee (NYSCEF Doc. No. 50), a record of the underlying outstanding rent in the amount of \$36,224.71 (NYSCEF Doc. No. 52), and an affidavit from Donna Vocaturo, plaintiff's agent, stating that Chase remains obligated for that amount pursuant to the guarantee (NYSCEF Doc. No. 44). In opposition, Chase does not raise a triable issue of fact with respect to his obligations under the guarantee or the amount due. His arguments are limited to the proposed application of the security deposit, which as set forth above he is not entitled to. Therefore, plaintiff is entitled to summary judgment against Chase for the outstanding rent prior to OCRS vacating the premises, in the amount of \$36,224.71 (*Zuckerman*, 49 NY2d at 562).

Accordingly, it is hereby

ORDERED that Chase's motion to dismiss the complaint against him or for summary judgment (Mot. Seq. No. 002) is denied; and it is further

ORDERED that the plaintiff's motion for summary judgment (Mot Seq. No. 003) is granted to the extent of granting partial summary judgment in favor of plaintiff and against Chase on the fourth cause of action as follows; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff Jeffrey Management Corp. and against defendant Avtandyl Chkheidze a/k/a David Chase in the amount of \$36,224.71, together with interest at the statutory rate from the date of October 18, 2018, as calculated by the

commenced an action to recover it, and certainly [have] interposed no counterclaim for the deposit here" (*Traders Co. v Ast Sportswear, Inc.*, 2006 WL 5111060 [Sup Ct, NY County, Jan. 11, 2006, No. 107300/04]).

Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the action is severed, and the balance of the claims are continued; and it is further

ORDERED that counsel are directed to appear for a virtual status conference on Microsoft Teams on February 16, 2022, at 10:00 AM.

This constitutes the Decision and Order of the Court.

ENTER:



<u>1/26/2022</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE