

<b>Nicholas v Kuzmkowski</b>
2022 NY Slip Op 31076(U)
March 30, 2022
Supreme Court, New York County
Docket Number: Index No. 653453/2019
Judge: Laurence Love
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LAURENCE LOVE PART 63M

*Justice*

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ALEXANDER NICHOLAS

Plaintiff,

- v -

JOSEF KUZMKOWSKI,

Defendant.

-----X

INDEX NO. 653453/2019

MOTION DATE 12/22/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

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

Upon the foregoing documents, it is

The following read on plaintiff's motion for summary judgment on his first cause of action, and entering a money judgment based upon "an unconditional and absolute guaranty in the principal sum of \$80,000 together with interest;" and defendant's motion for summary judgment, dismissing the plaintiff's action.

A complaint states causes of action for i) "liable ... in the principal sum of \$80,000," and ii) attorney's fees. An answer submits a counterclaim for "failure to give notice of the litigation" (see NYSCEF Doc. No. 3 Par. 33).

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact." *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

Plaintiff – Alexander H. Nicholas submits an affidavit,

Defendant Nicokuz Incorporated is a corporation. Prior to on or about June 20, 2008, Kuzmowski and I each owned 50% of the authorized and outstanding Nicokuz stock. An entity by the name of Second 800 No.2 LLC (the “landlord”) is the owner of the condominium unit ... 800 Second Avenue. On or about March 20, 2007, the Landlord and Nicokuz, as tenant, entered into a written lease, commencing on March 20, 2007 and ending on May 31, 2017 (the “lease”). Nicokuz rented this space to run a bar to be managed by Kuzmowski. Unfortunately, the business was not successful and Nicocua (sic) began to fall behind in its rent obligations. Eventually Kuzmowski closed the business leaving behind a considerable amount of unpaid rent. On or about October 17, 2013, the Landlord brough suit against Nicokuz and myself personally. In or about May, 2019, I settled all claims brought by the landlord against me personally for the sum of \$80,000. Years prior to the institution of the Landlord action, Kuzmowski and I agreed to party ways. I sold my interest in Nicokuz to Kuzmowski, following which he became the sole owner of the Corporation. As part of that transaction, on or about June 20, 2008, Kuzmowski executed a Guaranty in my favor. (see NYSCEF Doc. No. 9 Par. 23456, 11, 12).

Plaintiff submits The Guaranty between Kuzmkowksi and Nicokuz (each a “Guarantor”), “in favor of Alexander H. Nicholas (the “Primary Obligor”)” (see NYSCEF Doc. No. 17).

The Guaranty states in pertinent part

1. Guarantee. The Guarantor hereby directly and unconditionally guarantees to the Primary Obligor the full and prompt payment...
10. Confession of Judgment. This instrument contains a confession of judgment provision which constitutes a waiver of important rights you may have as a guarantor and allows the principal obligor to obtain judgement against you without any further notice.

The affidavit of Plaintiff – Alexander H. Nicholas continues, “[t]he landlord action named me and Nicokuz as the sole defendants. I no longer had any interest in Nicokuz so I did not defend the action on its behalf nor would I have any right to do so. I defended and settled the claim against me” (see NYSCEF Doc. No. 9 Par. 17).

“The guaranty was unconditional and ... contained a provision imposing primary liability on the guarantor and stating that the existence of any lien was immaterial” (see *GCCFC 2006-007 Westheimer Mall, LLC v. Okun*, U.S. Dist. Lexis 64152, \*8-9 [S.D.N.Y. 2008]). “All that the creditor need prove ... is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guarantee” (see *Citicorp Leasing, Inc. v. Kusher Family Ltd. P’ship*, 2006 U.S. Dist. LEXIS 50682, \*9 [S.D.N.Y. 2006]).

“Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact.” *Zuckerman v City of New York*, 49 NY2d 557 (1980).

Defendant – Josef Kuzmowski submits an affidavit,

“Plaintiff failed to provide notice of the Landlord’s underlying action against Nicokuz to Defendant Kuzmowski, and, therefore, Plaintiff is in material breach of his obligations under the express terms and conditions of the Kuzmowski Guarantee. Plaintiff fails to provide admissible evidence clearly proving payment, and likewise, fails to provide an evidentiary nexus connecting the payment, if in fact made, to any settlement of claims by Landlord against Plaintiff, resulting from Plaintiff’s liability under the Primary Guarantee. The Plaintiff providing me ‘notice’ of the Landlord’s claim in the underlying case against Nicokuz and Plaintiff is a material term of the Guaranty giving me, individually, an opportunity to appear and defend any claims brought by the Landlord and asserted against the Plaintiff as the Primary Guarantor” (see NYSCEF Doc. No. 23 Par. 2, 6).

Defendant – Josef Kuzmowski highlights the Guarantee, paragraph 3,

3. Notice. The Primary Obligor shall deliver notice to the Guarantor of any notice of a claim by the Landlord against the Guarantor, and the Primary Obligor shall afford the Guarantor the opportunity (at the Guarantor’s sole expense) to participate in the defense of any such claim by the Landlord. In addition, the Guarantor waives any right to seek contribution, indemnification, subrogation or reimbursement from the Primary Obligor or the Company, until all of the Guaranteed Obligations have been indefeasibly paid in full.

Plaintiff's Memorandum of Law argues, "Nicholas was sued personally under the terms of the Primary Guaranty, and there was no obligation to provide notice of a claim against him. Further, even if the language of the Kuzmkowski Guaranty were somehow to be distorted into giving rise to a duty by Nicholas to notify the Landlord's personal claim against him, the language nowhere even hints that such was a condition of Kuzmkowski's liability under the Kuzmkowski Guaranty"(see NYSCEF Doc. No. 28 P. 3).

"When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document, and the court must enforce it without recourse to parol evidence" (see *ABS Partnership v. AirTran Airways, Inc.*, 1 A.D.3d 24 [1st Dept. 2003]).

Defendant's Memorandum of Law in Reply states, "[t]he fact remains that the Plaintiff failed to provide notice to the Defendant, Mr. Kuzmkowski, thereby failing to provide Kuzmkowski an opportunity to appear and participate in the action. The argument that Plaintiff had no individual duty to provide notice since the action was against the corporation is without basis and unavailing. Plaintiff was sued individually on his primary guarantee to the corporation, and the Defendant's guarantee to the plaintiff required Plaintiff to give Defendant notice of any action against it on said guarantee. Whether semantics requires notice be deemed a 'condition' or 'covenant' is of no moment. The parties intended that notice be given and the failure of that notice constitutes a breach disqualifying this action" (see NYSCEF Doc. No. 29 P. 2).

"To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented." *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968).


"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004). On summary judgment, "facts must be viewed in the light

most favorable to the non-moving party.” *Vega v Restani Constr Corp*, 18 NY3d 499, 503 (2012).

As the parties have put forth affidavits and memorandum of law, there remain questions of fact that pertain to whether proper notice was given per the Guaranty as well as clear confirmation that plaintiffs \$80,000 payment was related to the underlying matter. The parties had a long – term relationship that goes back a number of years, and this Court needs further inquiry to decipher the questions of fact that persist in this litigation.

ORDERED that plaintiff’s motion for summary judgment is DENIED; and it is further

ORDERED that defendant’s cross – motion for summary judgment is DENIED.

<b>3/30/2022</b> <b>DATE</b>		 <b>LAURENCE LOVE, J.S.C.</b>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input checked="" type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE