323-325 Bleecker Realty LLC v Maxluxe, Inc.
2022 NY Slip Op 31285(U)
April 19, 2022
Supreme Court, New York County
Docket Number: Index No. 157712/2019
Judge: Frank Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK NERVO** **PART** **04**

Justice

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323-325 BLEECKER REALTY LLC,

Plaintiff,

- v -

MAXLUXE, INC.,MANOUCHER HEDVAT

Defendant.

----------X

INDEX NO. 157712/2019

MOTION DATE 02/21/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

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

This matter was transferred to Part IV and the Court held argument on this motion on April 13, 2022. Following consideration of the parties' submissions and arguments proffered on the record, the Court issues the instant decision and order.

BACKGROUND

In this commercial landlord/tenant action, plaintiff 323 Bleecker, as owner of the subject building at 323-325 Bleecker Street in the County, City and State of New York, moves for summary judgment to dismiss the affirmative defenses of co-defendants Maxluxe, Inc. (Maxluxe) and Manoucher Hedvat a/k/a Monoucher Hedvat (Hedvat; together, defendants), as well as for summary judgment on the complaint (motion sequence numbers 001). Plaintiff

has brought four related actions against Hedvat and his businesses, which leased space in the subject building (NY Index Nos. 157714/2019; 157715/2019; 157716/2019).

Maxluxe and 323 Bleeker executed a 14-year commercial lease for the building's "North Store and Basement Beneath" that ran from February 1, 2009 through September 30, 2023 (the lease). *Id.*, ¶¶ 5, 16; notice of motion, exhibit 2. As relevant to this action, the "acceleration clause" contained in subparagraph 40 (b) states as follows:

> Notwithstanding anything to the contrary . . ., in the event that the Tenant [i.e., Maxluxe] intends to vacate and/or abandon the premises or does vacate and/or abandon the premises, whether said Tenant is then in default of any rental installment or in default of any other obligation of this Lease due and owing, the Landlord [i.e., 323 Bleeker] has the right to declare without notice the total rent reserved for the full term of this Lease to be then due and owing and may bring any legal action to collect such amount. This right is in addition to any other right and remedy which the Landlord may have in law or in equity, and an election of one remedy shall not constitute a bar to the pursuit of other remedies.

Id., notice of motion, exhibit 2.

On March 2, 2009, Hedvat, as principal of Maxluxe, executed a guaranty with 323 Bleeker on behalf of Maxluxe (the guaranty), the relevant provisions of which state as follows:

> A. The Undersigned [i.e. Hedvat] guarantees to Landlord [i.e., 323 Bleeker], its successors and assigns, that he/she shall pay to Landlord all base rent, Additional Rent and all other charges including but not limited to use and occupancy that have accrued or may accrue under the terms of the Lease (hereinafter collectively referred to as ('Accrued Rent'), through and including the latest date that Tenant and its assigns, subtenants . . . if any, (hereinafter collectively referred to as 'Tenant') shall have completely vacated and surrendered possession of the premises ('Vacate Date') to the Landlord and have paid all rent and additional rent due through such Vacate Date. Upon the undersigned's full compliance with the payment requirements of this Guaranty, the liability of [Hedvat] hereunder shall cease and terminate.
>
> B. The undersigned guarantees to Landlord, its successors and assigns that he/she will pay to Landlord any damages suffered or incurred by Landlord as a result of Tenant holding-over in the Demised Premises after the expiration or sooner termination of this Lease.
>
> C. It is agreed that any security deposited under the Lease shall not be computed as a deduction from any amount owed and payable by Tenant or the Guarantor under the terms of this Guaranty of Lease.
>
> D. This Guaranty is absolute and unconditional and is a Guaranty of payment and not of collection. The undersigned hereby waives all notice of non-payment, nonperformance, non-observance, or proof, notice, or

> demand, whereby to charge the undersigned therefore, all of which the undersigned waives and agrees that the validity of this Guaranty, and the obligation of the Guarantor hereto shall in no wise be terminated, affected or impaired by reason of the assertion by Landlord against Tenant of any of the rights or remedies reserved to Landlord pursuant to the performance of the within Lease. The undersigned further covenants and agrees that this Guaranty shall remain and continue in full force and effect, as to any renewal, modification or extension of the Lease and during any period when Tenant is occupying the premises as a 'statutory tenant' (including, but not limited to a month-to-month tenancy). As a further inducement to Landlord to make this Lease and in consideration thereof, Landlord and the undersigned covenants and agree that in any action or proceeding brought by either Landlord or the undersigned against the other on any matters whatsoever arising out of, under, or by virtue of the terms of this Lease or of this Guaranty that Landlord and the undersigned shall and do hereby waive trial by jury.
>
> E. The Guarantor shall reimburse Landlord for any and all reasonable costs incurred in connection with the enforcement of this Guaranty including without limitation Landlord's reasonable attorney fees.

See notice of motion, exhibit 5.

323 Bleeker, Maxluxe and Hedvat subsequently executed two lease modification agreements while Maxluxe occupied the unit (the first and second lease modifications). *See* verified complaint, ¶¶ 6-7; notice of motion, exhibits 3, 4. The second lease modification, dated May 13, 2014, authorized Maxluxe to

sublet its space on certain conditions and in return for certain consideration. Id., exhibit 4. The relevant portion of the second lease modification provided as follows:

> 7. The Lease as modified herein is in full force and effect except as specifically provided for herein and is hereby ratified and reaffirmed as is the guaranty of Manoucher Hedvat dated February 24, 2009 and that Tenant acknowledged the Premises in 'as is' condition.

Id., exhibit 4.

Maxluxe thereafter executed an eight-year sublease with non-party Arianna Skincare LLC (Arianna) which was to have run from 2014 through 2022 (the sublease). *Id.* Annexed to the sublease was a "consent to sublease" that was executed by 323 Bleeker, Maxluxe and Arianna on June 1, 2014, the relevant portions of which provide as follows:

> 3. No Modification of Lease: Lease Ratified. Nothing contained in this Agreement shall be construed to (a) modify, waive, impair or affect any of the provisions, covenants, agreements, terms or conditions contained in the Lease, (b) waive any present or future breach or default under the Lease or any rights of Landlord against any person, firm, association or corporation liable or responsible for the performance of the Lease, or (c) enlarge or increase Landlord's obligations or Tenant's or Subtenant's rights under the Lease or otherwise; and all provisions, covenants, agreements, terms and conditions of the Lease are hereby declared by Tenant and Subtenant to be in full force and effect.

> 4. Tenant to Remain Liable. (a) Neither the Sublease nor Landlord's consent under this Agreement shall release or discharge Tenant from any liability or obligation under the Lease, and Tenant shall be and remain liable and responsible for the due keeping, and full performance and observance, of all of the provisions, covenants, agreements, terms and conditions set forth in the Lease on the part of Tenant to be kept, performed and observed with the same force and effect as though the Sublease had not been made, including, without limitation, the payment of the fixed rent, additional rent and other charges payable by Tenant under the Lease. Any breach or violation by Subtenant of any provision of the Lease (whether by act or by omission) shall be deemed to be, and shall constitute, a default by Tenant in fulfilling such provision, and, in such event, Landlord may exercise its rights and remedies to the extent provided under the Lease in the case of such a default. In addition, any breach or violation of any provision of this Agreement (whether by act or by omission) by Tenant or Subtenant shall be deemed to be and shall constitute a default by Tenant under the Lease, and, in such event, Landlord may exercise its rights and remedies under the Lease in the case of such a default.

Id., exhibit 6.

Arianna ceased paying rent sometime in 2018. 323 Bleecker subsequently served a notice of acceleration on Maxluxe and commenced a summary commercial nonpayment proceeding against both Maxluxe and Arianna in the Civil Court of the City of New York (the Civil Court proceeding; L&T Index Number 081123/2018). *See* verified complaint, ¶¶ 11, 13, 14; notice of motion,

exhibits 7 and 8. The Civil Court proceeding was resolved via a stipulation between the parties, dated January 29, 2019, that provided for both a possessory judgment against Manluxe and Arianna (with warrants of eviction issued forthwith, and stayed through March 31, 2019) and a money judgment against Maxluxe only in the amount of $113,351.02 for accrued rent and additional rent due through January 2019 (the stipulation). *Id.*, ¶ 15; notice of motion, exhibits 9, 10. The other relevant portion of the stipulation provides as follows:

> 7. It is understood and agreed that this Stipulation, the terms contained therein and the money judgment granted to Petitioner [i.e., 323 Bleeker] as against Respondent Maxluxe as well as the issuance of the warrant of eviction as against both Respondents is without prejudice to the (i) rights, remedies and defenses arising from and in response to the cross claims brought by Arianna Skincere, LLC as against Maxluxe, Inc.; and (ii) without prejudice to the claims of Petitioner as against Maxluxe with respect to the balance of the term of the Lease between those parties and any and all defenses thereto . . .

Id., exhibit 9.

After the Civil Court proceeding was resolved, 323 Bleeker commenced this action on August 19, 2019 by serving the New York State Secretary of State with a summons and verified complaint that set forth causes of action against Maxluxe and Hedvat for: 1) a money judgment against Hedvat for the amount

specified in the stipulation (pursuant to the terms of the guaranty); 2) a money judgment against Maxluxe for the amounts due for the remainder of its lease term (pursuant to the lease's acceleration ,lause and the acceleration notice); 3) a money judgment against Hedvat for the amounts due for the remainder of Maxluxe's lease term (pursuant to the terms of the guaranty and the acceleration notice); 4) an award of attorney's fees against Maxluxe (pursuant to the terms of the lease); and 5) an award of attorney's fees against Hedvat (pursuant to the terms of the guaranty). *See* verified complaint.

On October 15, 2019, Maxluxe and Hedvat served a verified answer that included the affirmative defenses that: 1) the complaint fails to state causes of action; 2) Hedvat's obligations under the guaranty ended on March 31, 2019, when Maxluxe and Arianna vacated the building; 3) 323 Bleeker's right to accelerate its demand for Maxluxe's future rent is an unenforceable liquidated damages request; and 4) 323 Bleeker's demands for money judgments are subject to "set-off and reduction" in accordance with Maxluxe's existing security deposit. *See* verified answer. On February 10, 2020, 323 Bleeker filed the instant motion for summary judgment to dismiss defendants' affirmative defenses and for summary judgment on the complaint. *See* notice of motion.

DISCUSSION

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact. *Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]. Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial. *Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]. "Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact". *Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006].

However, a "feigned issue of fact" will not defeat summary judgment. *Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]. A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers. *Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005].

FIRST CAUSE OF ACTION – RENT AND ADDITIONAL RENT

323 Bleeker's first cause of action seeks a money judgment against Hedvat in the amount of $113,351.02, which equals the money judgment against Maxluxe for rent and additional rent that was negotiated in the January 29, 2019 Civil Court stipulation. *See* verified complaint, ¶¶ 18-22. 323 Bleeker bases this claim on the terms of the lease, the guaranty and the stipulation. *See* notice of motion, Pollock affirmation, ¶¶ 27-30; exhibits 2, 5, 9. Respondents concede that "the Tenants [i.e., Maxluxe and Arianna] remain liable for these rents . . . less the security deposits," but assert that "Hedvat's personal liability is not necessarily co-extensive" because he was relieved of liability "under principles of *strictissimi juris*." *See* respondents' mem of law at 7. 323 Bleeker replies that "the material facts are not in dispute and the matter can be submitted on the resulting issues of law." *See* plaintiff's reply mem at 6.

As was recently discussed by the Appellate Division, Second Department:

> "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 [2015] [internal quotation marks omitted]; *see Encore Nursing Ctr. Partners Ltd. Partnership–85 v Schwartzberg*, 172 AD3d 1166, 1167 [2d Dept 2019]). "A guaranty is to be

> interpreted in the strictest manner" (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]; *see Wider Consol., Inc. v Tony Melillo, LLC*, 107 AD3d 883, 884 [2d Dept 2013]; *Arlona Ltd. Partnership v 8th of Jan. Corp.*, 50 AD3d 933, 933 [2d Dept 2008]). A guarantor should not be bound beyond the express terms of the written guaranty (*see Solco Plumbing Supply, Inc. v Hart*, 123 AD3d 798, 800 [2d Dept 2014]; *Wider Consol., Inc. v Tony Melillo, LLC*, 107 AD3d at 884; *Walker v Roth*, 90 AD2d 847, 847 [2d Dept 1982]). "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"(*H.L. Realty, LLC v Edwards*, 131 AD3d 573, 574 [2d Dept 2015] [internal quotation marks omitted]; *see Encore Nursing Ctr. Partners Ltd. Partnership–85 v Schwartzberg*, 172 AD3d at 1168)

2402 E 69th St., LLC v. Corbel Installations, Inc., 183 AD3d 859, 861 [2d Dept 2020].

Here, plaintiff has established that it is entitled to summary judgment pursuant to the principles discussed in *2402 E 69th St v. Corbel Installations*, *supra*, in that Hedvat's guaranty was absolute and unconditional; Maxluxe is liable for the rent and additional rent as modified by the Civil Court stipulation; and Maxluxe has not yet satisfied that debt. Likewise, the Court finds that defendants have not raised any triable issue of fact related to this claim, nor does the Court find defendants' affirmative defense related to this claim, that

plaintiff has failed to state a claim, meritorious.[1] Consequently, plaintiff is entitled to judgment in the amount of $113,351.02 against Hedvat.

SECOND AND THIRD CAUSES OF ACTION – ACCELERATED RENT

Plaintiff next seeks judgment for accelerated rent against defendants Maxluxe and Hedvat for the remainder of the lease term, that is, the amount of rent Maxluxe would have paid from the date it vacated the premises through the end of the lease term.[2]

Plaintiff is entitled to recover for accelerated rent based upon the parties' lease and guaranty agreements based upon the documentary evidence. *See e.g. Hawthorne Gardens, LLC v. Salman Home, Inc.*, 94 AD3d 425 [1st Dept 2012]. However, the determination as to the amount of accelerated rent, as liquidated damages, requires a finding that same does not amount to an impermissible penalty. *See e.g. Trustees of Columbia Univ. in the City of N.Y. v. D'Agostino*

[1] Defendants second and third affirmative defenses relate to claims of accelerated rent, not at issue in plaintiff's first cause of action. Likewise, to the extent that defendant contends in the fourth affirmative defense that a claim for unpaid rent must be offset by the security deposit, paragraph C of the guaranty agreement expressly provides "any security deposited under the Lease shall not be computed as a deduction from any amount owed and payable by Tenant or the Guarantor." *See also* notice of motion, exhibit 5.

[2] The commencement date of Arianna's sublease is not specified by the parties, but the parties agree same occurred in 2014. Consequently, Arianna's 8-year sublease expired in 2022, before the lease's expiration on September 30, 2023.

Supermarkets, Inc., 36 NY3d 69 [2020]; *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Assn. Inc.*, 24 NY3d 528 [2014]. Here, on these papers, it is clear that plaintiff regained possession of the premises on April 17, 2019; however, it is unknown whether the premises was re-let. As such, the determination as to whether the accelerated rent sought amounts to impermissible penalty, or double dipping, cannot be made at this time. Accordingly, the Court grants summary judgment on plaintiff's second and third causes of action as to liability only, subject to a determination of whether the accelerated rent amounts to an impermissible penalty if the premises has be re-let and the appropriate amount of damages for same;[3] as such, the Court refers this issue to a referee, as below.

Notably, to the extent the defendants contend they were to be afforded notice of plaintiff's intent to accelerate rent for the entire term of the lease, and that notice was not provided, such argument is entirely without merit. Paragraphs 17(2) and 40(b) of the parties' lease agreement does not provide for a notice and cure period and, instead, provides that upon default by the tenant

[3] A determination of the amount of damages necessarily encompasses defendants' argument that Maxluxe paid $16,066.34 in rent/additional rent for February and March 2019, although the Court is constrained to note that no evidentiary proof of this payment has been submitted by defendants.

plaintiff may seek recovery of the without further notice. In any event, plaintiff served an acceleration notice. *See*, *supra*. Likewise, to the extent that defendants contend the stipulation effectuated in Civil Court prohibits or limits recovery for accelerated rent, this Court does not so find. *See* defendants' mem of law at 6-11. It is beyond cavil that as guarantor, Hedvat was not a party to the Civil Court stipulation and the stipulation did not alter Hedvat's obligations under the guaranty agreement. Guarantors are not proper parties to non-payment proceedings against the tenant whose rent they guaranty. *See e.g. PB 2180 Pitkin Ave., LLC v. Tress*, 65 Misc 3d 12 [App Term, 2d Dept 2019]; *State Realty, LLC v. Ger*, 55 Misc 3d 133(A) [App Term, 2d Dept 2017].

FOURTH AND FIFTH CAUSES OF ACTION – ATTORNEY'S FEES

Plaintiff seeks an award of attorney's fees against Maxluxe, pursuant to paragraph 19 of the parties' lease which provides that plaintiff may seek reasonable attorney's fees when it prevails on an action related to the lease. Furthermore, paragraph 7 of the parties' Civil Court stipulation expressly reserves plaintiff's right to seek these costs and fees. Likewise, plaintiff seeks an award of attorney's fees against Hedvat pursuant to the express terms of the guaranty agreement.

Accordingly, having determined that plaintiff is entitled to judgment on its first, second, and third causes of action, plaintiff has prevailed on its claims related to the lease and guaranty and is, therefore, entitled to reasonable attorney's fees. The calculation of same, however, is referred to a referee, as below.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff shall have judgment on its first cause of action in the amount of $113,351.02 against defendant Manoucher Hedvat; and it is further

ORDERED that plaintiff's second and third causes of action are granted as to liability, in an amount to be determined by the referee, as below; and it is further

ORDERED that plaintiff's fourth and fifth causes of action for attorney's fees are granted, in an amount to be determined by the referee, as below; and it is further

ORDERED that defendants' first affirmative defense is stricken; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court, , in conjunction with the related matters under NY Index Nos. 157714/2019; 157715/2019; and 157716/2019, on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

1. The amount of accelerated rent due plaintiff from defendants, if any, including whether same amounts to an impermissible penalty pursuant to *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Assn., Inc.* and its progeny;
2. The amount of attorney's fees due plaintiff from defendants in bringing this action;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR: and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that

conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

[continued on following page]

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

THIS CONSTITUTES THE DECISION, ORDER, AND ORDER OF REFERENCE OF THE COURT.

4/19/2022
DATE

FRANK NERVO, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE