

525 Delaware LLC v CSCO, LLC
2022 NY Slip Op 31686(U)
May 23, 2022
Supreme Court, New York County
Docket Number: Index No. 656034/2021
Judge: Sabrina Kraus
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PRESENT: <u>HON. SABRINA KRAUS</u> <i>Justice</i> -----X 525 DELAWARE LLC, Plaintiff, - v - CSCO, LLC, DAVID APPERMAN, ALBERT GAMMAL Defendant.	PART 57TR INDEX NO. <u>656034/2021</u> MOTION DATE <u>05/16/2022</u> MOTION SEQ. NO. <u>001</u> DECISION + ORDER ON MOTION
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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, 23, 24, 25 ¹

were read on this motion to/for

JUDGMENT - SUMMARY

Plaintiff commenced this action seeking monies alleged due from the tenant of record and guarantors pursuant to a lease and guaranty executed for Suite 1006 at 525 Seventh Avenue, New York, New York (Subject Premises).

On April 8, 2022, plaintiff moved for summary judgment and dismissal of defendants' affirmative defenses. On May 16th, 2022, the motion was fully briefed, marked submitted and this court reserved decision.

For the reasons set forth below, the motion is granted.

¹ The court also considered email correspondence from counsel dated May 23, 2022 confirming that the tenant has vacated and surrendered possession as of March 31, 2022.

ALLEGED FACTS

On November 6, 2014, plaintiff, as landlord, and CSCO, as tenant, entered into a five-year lease (Lease) for Suite 1006 at 525 Seventh Avenue, New York, New York. On March 6, 2019, plaintiff, and CSCO, entered into an Extension Agreement and Modification of Lease, which, among other things, extended the term of the Lease through December 31, 2024.

On March 18, 2019, David Apperman (Apperman) and Albert Gammal (Gammal)(collectively the “Guarantors”) executed a Good Guy Guaranty (Guaranty). Pursuant to the Guaranty, Apperman and Gammal guaranteed to Plaintiff:

... the full and prompt payment of all Minimum Rent, Additional Rent and all other charges and sums due and payable by Tenant under the Lease (including, without limitation, Landlord's reasonable attorneys' fees and disbursements) (collectively, the "Obligations") through and including the date that Tenant and its assigns and sublessees (and any other occupants), if any, shall have completely performed all of the following (i) vacated and surrendered the entire Demised Premises to Landlord pursuant to the terms of the Lease; (ii) delivered the keys to the Demised Premises to Landlord; and (iii) paid to Landlord all Obligations to and including the date which is the later of (x) the actual receipt by Landlord of the Obligations, (y) the surrender of the Demised Premises of (z) receipt by Landlord of the keys to the Demised Premises.

Pursuant to the Lease, CSCO was obligated to pay to plaintiff, among other things, (i) Minimum Rent of \$21,949.58 per month for the period from January 1, 2020 through December 31, 2020, \$22,608.07 per month for the period from January 1, 2021 through December 31, 2021 and Minimum Rent of \$23,286.31 per month for the period from January 1, 2022 through December 31, 2022, (ii) monthly sprinkler charges of \$100.00, (iii) monthly water charges of \$100.00, (iv) electric charges for the Subject Premises and (v) a portion of the building's real estate taxes.

In June 2020, plaintiff and CSCO entered into a Rent Deferral Agreement (the "Rent Deferral Agreement"), pursuant to which plaintiff agreed to defer \$43,899.16 of Minimum Rent, to be applied in four equal credits of \$10,974.79 for the months of July, August, September and

October 2020. The Deferred Rent was to be repaid in twelve equal monthly installments of \$3,658.27 each, commencing on January 1, 2021 and ending on December 1, 2021.

Thereafter, CSCO made partial and late monthly payments of its rent and Deferred Rent. Plaintiff moves for a judgment for arrears of \$186,327.75, it asserts is due by CSCO under the Lease and by Apperman and Gammal pursuant to the Guaranty.

CSCO vacated the Subject Premises on or about March 31, 2022.

Plaintiff's first cause of action seeks \$120,045.28 in Minimum Rent and Additional Rent owed by CSCO under the Lease through October 31, 2021 (the month in which the complaint was filed) and Plaintiff's fourth cause of action seeks the same amount from Apperman and Gammal pursuant to the Guaranty.

Plaintiff's second cause of action seeks unpaid rent from CSCO that came due after October 31, 2021, and Plaintiff's fifth cause of action seeks the same amount from Apperman and Gammal pursuant to the Guaranty.

Plaintiff's third and sixth causes of action seek the costs and attorneys' fees plaintiff incurred in this action.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]). “On a motion for summary judgment, the court’s function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact” (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] [“The court’s role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues”], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiff Has Established the Right to Summary Judgment and Defendants Have Failed to Show There Is A Material Question of Fact Requiring A Trial

It is blackletter law in New York that Courts will enforce contracts according to their plain meaning. If a contract is clear and unambiguous, it must be enforced according to its terms and parol evidence may not be used to vary the unequivocal language of the contract. *Wallace v 600 Partners Co.*, 86 N.Y.2d 543, 547-8 (1995); *Breed v Ins. Co. of N. America*, 46 N.Y.2d 351, 355 (1978).

As the Court of Appeals held in *Vermont Teddy Bear Co., Inc. v 538 Madison Realty Company*, 1 N.Y.3d 470 (2004):

We have also emphasized this rule’s special import in the context of real property transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm’s length. In such circumstances, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to

specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.

Id. at 475.

Additionally, a Court can interpret unambiguous lease provisions as a matter of law on a motion for summary judgment. *See 401 W 14th Street Fee LLC v Mer Du Nord Nordzee, LLC*, 34 AD3d 294(1st Dept. 2005); *Horowitz v 1025 Fifth Avenue Inc.*, 34 AD3d 248 (1st Dept 2006).

Finally, it is well established that on a motion for summary judgment to enforce a written guaranty, the moving party needs to establish (1) the guaranty, (2) a default on the underlying debt and (3) the guarantors failure to perform under the guaranty. *City of New York v Clarose Cinema Corp.*, 256 AD2d 69 (1st Dept. 1998); *HL Realty LLC v Edwards*, 131 AD3d 573 (2nd Dept. 2015). Where a movant meets these *prima facie* elements, summary judgment against a guarantor is warranted. *See SpringPrince LLC v Elie Tahiri, Ltd.*, 173 AD3d 544 (1st Dept. 2019); *501 Fifth Ave. Co., LLC v Aslam*, 136 AD3d 535 (1st Dept. 2016).

Defendants argue that the Guarantors only guaranteed CSCO's obligations through the end of the initial lease term on December 31, 2019, and not the obligations that arose during the term covered by the Extension Agreement and Modification of Lease, i.e. from January 1, 2020 through December 31, 2024.

The Court rejects this argument.

The Lease is dated November 6, 2014 and its expiration date was December 31, 2019. In March 2019, plaintiff and CSCO discussed an extension of the Lease. As part of those discussions, CSCO advised plaintiff that it wanted to replace the original guarantor of the Lease, Salamon Murciano, with the Guarantors. As part of the lease extension, plaintiff agreed to this.

On March 6, 2019, plaintiff, as landlord, and CSCO, as tenant, entered into an Extension Agreement and Modification of Lease which, among other things, extended the term of the Lease through December 31, 2024. The Lease Extension provided that the parties desired to "modify the Lease upon the terms and conditions hereinafter provided" and that the "Lease is hereby ratified and confirmed in all respects."

In addition, paragraph 11 of the Lease Extension stated that: "As consideration for entering into this Consent (i) Landlord hereby releases Salamon Murciano from any and all liability under the Original Good Guy Guaranty with respect to matters arising from and after the date hereof, (ii) David Apperman and Albert Gammal are executing and delivering to Landlord that certain Good Guy Guaranty in the form attached hereto as Exhibit 'A'".

In connection therewith, on March 18, 2019, the Guarantors executed the Guaranty. Pursuant to the Guaranty, the Guarantors guaranteed to plaintiff "the full and prompt payment of all Minimum Rent, Additional Rent and all other charges and sums due and payable by Tenant under the Lease [until certain contingencies occurred]".

When the Guarantors executed the Guaranty, the Lease had already been modified and extended through the Expiration Date. Any reference in the Guaranty to the "Lease" was to the Lease, as amended by the Lease Extension. In addition, the Guaranty provided that:

The undersigned further covenants and agrees that this Guaranty shall not be affected or impaired by and shall remain and continue in full force and effect as to any renewal, modification or extension of the Lease and as to any assignment of subletting and shall cover, apply to and incorporate all of the terms, covenants and conditions of all such renewals, modifications, extensions, assignments and sublettings without the need of any notice to or consent of the undersigned.

After the onset of the COVID-19 Pandemic, CSCO requested that plaintiff defer its unpaid rent. Therefore, on June 18, 2020, plaintiff and CSCO entered into the Rent Deferral

Agreement pursuant to which plaintiff agreed to defer certain rent, to be repaid over the following year.

The Rent Deferral Agreement provided in paragraph 4 that: "the Good Guy Guaranty by David Apperman and Albert Gammal dated March 18, 2019 shall remain in full force and effect and shall further be deemed modified so that the term 'Lease' as defined in said Good Guy Guaranty shall mean the Lease as modified by this Modification of Lease. As so modified, the Good Guy Guaranty is ratified and confirmed." The Guarantors personally signed the Rent Deferral Agreement agreeing and accepting paragraph 4 of the Rent Deferral Agreement.

The Rent Deferral Agreement was executed after the initial Lease term expired on December 31, 2019, and six months into the term extended by the Lease Extension. The Rent Deferral Agreement acknowledged that the Lease was previously modified and extended. Defendants' argument that the Guaranty did not extend into the Lease Extension term would render paragraph 4 of the Rent Deferral meaningless. This goes against the principles of contract interpretation.

[A] contract must be read as a whole in order to determine its purpose and intent, and ... single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part" (*Matter of Friedman*, 64 A.D.2d 70, 81, 407 N.Y.S.2d 999 [internal quotation marks and citation omitted]; see *Aimco Chelsea Land v. Bassey*, 6 A.D.3d 367, 368, 773 N.Y.S.2d 908). Furthermore, "[i]n interpreting the provisions of a lease, the court should refrain from rewriting the lease under the guise of construction, should not construe the language of the lease in such a way as would distort its meaning, and should not construe the language in a manner that would render one or more of its provisions meaningless" (*Poughkeepsie Sav. Bank v. G.M.S.Y. Assoc.*, 238 A.D.2d 327, 327, 656 N.Y.S.2d 917 [citations omitted]).

J.W. Mays, Inc. v. Snyder Fulton St., LLC, 69 A.D.3d 572, 573 (2010).

Courts have held that where a guaranty provides that it continues as to any renewal, modification or extension, it is enforceable if a lease is extended before the initial lease term

expires. *Karma Properties LLC v. Lilok, Inc.*, 184 A.D.3d 515 (1st Dept. 2020); *250 West 78 LLC v. Pildes*, 129 A.D.3d 405 (1st Dept. 2015).

This is further confirmed by the Rent Deferral Agreement, which was signed six months into the term extended by the Lease Extension, and wherein the Guarantors acknowledged that their guaranty covered the Lease term, as extended by the Lease Extension.

For these reasons, the court finds that the Guaranty extended to the term covered by the Lease Extension and CSCO's obligations through the Expiration Date. Therefore, the Guarantors and CSCO are liable for the arrears.

The only other issue raised by defendants pertains to the security deposit. Pursuant to the Lease and Lease Extension, CSCO provided plaintiff with a security deposit totaling \$148,226.70. In November 2020, December 2020 and January 2021, plaintiff drew down on a portion of the security deposit totaling \$55,465.24. These amounts were applied to rent due for the months of June 2020, July 2020, November 2020 and December 2020, and are listed on the Ledger. Plaintiff acknowledges it is still holding \$92,761.46 of CSCO's security deposit. As such the remaining arrears that plaintiff is entitled to after crediting the security deposit is \$93,566.29 (\$186,327.75 - \$92,761.46).

Dismissal of The Affirmative Defenses

Defendants assert eleven affirmative defenses including: failure to state a cause of action; waiver or estoppel; accord and satisfaction; unclean hands; statute of frauds; that plaintiffs damages are caused by the acts or omissions of others; failure to mitigate damages; and improper service.

Defendants do not assert opposition to that portion of the summary judgment motion that seeks dismissal of the affirmative defenses.

Defendants' second, third, fourth and fifth affirmative defenses are a laundry list of boilerplate defenses, including waiver, accord and satisfaction, unclean hands and the statute of frauds. Defendants' sixth affirmative defense claims that plaintiff's damages were caused by the acts or omissions of others, its ninth affirmative defense claims that there was no wrongdoing on defendants' part and its tenth affirmative defense claims good faith conduct. These defenses are meritless and consist of bare legal conclusions, are not pled with any specificity and are insufficient to raise a defense to the summary judgment motion. CPLR 3013; *Eklund v. Pinkey*, 27 AD3d 878 (3d Dept 2006).

Defendants' seventh affirmative defense claims that plaintiff could have taken reasonable measures to avoid or reduce its losses and its eighth affirmative defense claims that plaintiff failed to mitigate its damages. These defenses are meritless since it is black letter law that a commercial landlord has no duty to attempt to mitigate its damages. *Holy Properties v Kenneth Cole Productions, Inc.*, 87 NY2d 130 (1995); *Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 187 AD3d 46 (1st Dept. 2020).

Defendants' eleventh affirmative defense claims that defendants were not properly served with the Summons and Complaint. However, pursuant to CPLR 3211(e), defendants were required to move to dismiss the action within sixty days of asserting this defense. The Answer was filed on November 22, 2021. Therefore, Defendants were required to file a motion to dismiss by January 22, 2022. They failed to do so. As such, Defendants' eleventh affirmative defense is waived as a matter of law. *See U.S Bank National Association v Donovan*, 189 AD3d 918 (2nd Dept. 2020).

The motion to dismiss the first affirmative defense for failure to state a cause of action is denied, as such a defense may be raised at any time and is not subject to a motion to strike

Riland v. Frederick S. Todman & Co., 56 A.D.2d 350, 353 (1977). However, as discussed above, the defense does not bar summary judgment as the complaint adequately sets forth causes of action for breach of contract and guaranty.

Defendants are Liable for Plaintiff's Attorneys' Fees

Pursuant to Article 19 of the Lease:

If Owner, in connection with the foregoing, or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any such action or proceeding, and prevails in any such action or proceeding, then Tenant will reimburse Owner for such sums so paid or obligations incurred with interest and costs.

Pursuant to the Guaranty, Apperman and Gamal guaranteed "the full and prompt payment of all Minimum Rent, Additional Rent and other charges and all other charges and sums due and payable by Tenant under the Lease, (including, without limitation, Landlord's reasonable attorneys' fees and disbursements) ..." .

As a result of the foregoing, and the fact that plaintiff is the prevailing party in this action, defendants are liable to plaintiff for the attorneys' fees it incurred in this action. Thus plaintiff's motion for summary judgment as to liability on the third and sixth causes of action is granted.

However, as plaintiff did not seek a specific amount or provide supporting documentation as to the amount, plaintiff must move for a specific amount with supporting documentation in a separate motion. Defendants will have an opportunity to oppose, and once the court has reviewed said papers, the court will be able to make a determination as to whether the matter can be determined on papers or requires a hearing.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that the plaintiff's motion for partial summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$93,566.29, together with interest at the statutory rate, as calculated by the Clerk from October 18, 2021, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants second through eleventh affirmative defenses are dismissed; and it is further

ORDERED that plaintiff is awarded partial summary judgment as to liability on its third and sixth causes of action for attorneys' fees; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

<u>5/23/2022</u>						202205231251025BKRAUSC099903737546F1BA812A024D476DBE	
DATE				SABRINA KRAUS, J.S.C.			
CHECK ONE:	☐	CASE DISPOSED	☒	NON-FINAL DISPOSITION	☐	OTHER	
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APPLICATION:	☐	SETTLE ORDER	☐	SUBMIT ORDER	☐	REFERENCE	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	FIDUCIARY APPOINTMENT	☐	REFERENCE	