

**Rector, Church-Wardens & Vestrymen of Trinity
Church in the City of N.Y. v Varick Parking, LLC**

2022 NY Slip Op 31765(U)

June 3, 2022

Supreme Court, New York County

Docket Number: Index No. 155609/2021

Judge: Mary V. Rosado

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33

Justice

-----X

THE RECTOR, CHURCH-WARDENS AND VESTRYMEN
OF TRINITY CHURCH IN THE CITY OF NEW YORK,

Plaintiff,

- v -

VARICK PARKING, LLC, RAFAEL LLOPIZ,

Defendant.

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INDEX NO. 155609/2021

MOTION DATE 08/17/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, Plaintiff moves for the following relief: (1) summary judgment in favor of Plaintiff and against Defendant Rafael Llopiz (“Guarantor”), on its second cause of action pursuant to CPLR § 3212, and a money judgment against the Guarantor for rent due and owing under the lease through the date of this motion, and attorneys’ fees and interest; (2) dismissal of the Guarantor’s affirmative defenses pursuant to CPLR § 3211(b); and (3) default judgment against Defendant Varick Parking, LLC (“Tenant”) based on Tenant’s failure to appear and/or answer the complaint pursuant to CPLR 3215: (i) on its first cause of action for breach of contract for rent arrears accrued prior to the termination of the lease, and attorneys’ fees, interest, costs and disbursements; (ii) on its third cause of action for breach of contract for holding over the premises after the termination date of the lease through the date of this motion,

plus interest; and (iii) on its fourth cause of action for ejectment against the Tenant and directing Plaintiff to have immediate possession of the premises.¹

Guarantor filed a verified answer with a cross-claim on July 23, 2021, containing eight affirmative defenses: (1) the complaint fails to state a claim for which relief can be granted; (2) the alleged Guaranty is barred by the New York Statute of Frauds and/or the General Obligations Law; (3) the alleged Guaranty is void for lack of consideration; (4) the alleged Guaranty is unenforceable; (5) Plaintiff is barred from seeking the requested relief by the doctrine of unclean hands; (6) Plaintiff is estopped from seeking the requested relief; (7) the complaint is barred, in whole or in part, to the extent Plaintiff has engaged in bad faith; and (8) the complaint is barred by documentary evidence (NYSCEF Doc. No. 9, ¶ 90-97). Guarantor, in his cross-claim against the Tenant, denied that Guarantor, in whole or in part, caused any damage for which Plaintiff is entitled to recover against the Guarantor for any of the claims in Plaintiff's complaint, by the culpable conduct of the Tenant, and that Guarantor is entitled to indemnification in any award of any judgment that may be recovered against the Tenant, including any costs and expenses of defending the cross-claim (NYSCEF Doc. No. 9, ¶ 98-99).

Tenant filed a cross-motion to compel acceptance of its late answer, along with a memorandum of law in opposition to Plaintiff's motion for default judgment and in-support of its cross-motion, which was e-filed on December 16, 2021.

On April 19, 2022, the Court heard oral argument on this motion and cross-motion², from Joseph Kamelhar, Esq. for the Plaintiff and Richard Weingarten, Esq. for the Defendants.³

¹ Plaintiff did not move for summary judgment on its fifth cause of action for monetary damages once Plaintiff obtained possession of the premises.

² This matter was transferred to Part 33 in mid-February 2022.

³ Defendant Rafael Llopiz (Guarantor) consented to withdraw his counsel and substitute in the same counsel of record for Defendant Varick Parking, LLC (Tenant); Richard Weingarten, Esq. is counsel of record for both named defendants (NYSCEF Doc. No. 38).

Summary Judgment against Defendant, Rafael Llopiz, Guarantor

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist (See e.g., Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64, 70 [1st Dept 2002]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g., Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 [1st Dept 2003]. Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see Banco Popular North Am. v Victory Taxi Mgt., Inc., 1 NY3d 381 [2004]; Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

To sustain a cause of action for breach of contract, Plaintiff must prove the existence of a contract, Plaintiff's performance, Defendant's breach, and damages (see Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]; see A/R Retail LLC v Hugo Boss Retail, Inc., 2021 NY Slip Op 21139 [Sup Ct, NY County 2021]; Markov v Katt, 176 AD3d 401, 402 [1st Dept 2019]).

Furthermore, the Appellate Division, Second Department, recently summarized the general rules which govern the enforcement of "good guy guarantees" as follows:

"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, 492 [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]).

Plaintiff, Landlord, seeks summary judgment on its breach of contract claim against Guarantor based on the absolute, unconditional, and irrevocable guaranty the Guarantor executed in favor of Plaintiff for the performance of Tenant’s obligations under the lease. Guarantor and the Plaintiff executed a Guaranty of Lease on February 12, 2016 (NYSCEF Doc. No. 16). Tenant and Plaintiff executed an Agreement of Lease on February 17, 2016 (NYSCEF Doc. No. 15). It is undisputed that the Tenant, a parking lot operator, failed to pay rent since April of 2020. Plaintiff has set forth evidence, a ledger and affidavit by Sujohn Sarkar, illustrating that Tenant has not paid the Plaintiff rent for the premises since April of 2020 (NYSCEF Doc. Nos. 17, 44, 49). As of the date of oral argument before the Court on April 19, 2022, the Tenant has not surrendered the premises to the Plaintiff.

Pursuant to the terms of the Guaranty of Lease, Section 2.1 Good Guy Guaranty, the Guarantor is “fully liable for Tenant’s obligations accruing under the Lease” relating to “Fixed Rent”, “Escalation Rent under Article 3 of the Lease”, and “Landlord’s attorneys’ fees resulting from the default by Tenant under the Lease” (NYSCEF Doc. No. 16). In addition, the terms of the Guaranty of Lease, Section 2.2 Obligations Unconditional, state that the “obligations of Guarantor under this Guaranty shall be absolute and unconditional” (NYSCEF Doc. No. 16). Under the terms of the Guaranty of Lease, the Guarantor is jointly and severally liable for unpaid rent, escalation rent, and attorneys’ fees. The Guarantor has not paid the Plaintiff for any amount owed under the terms of the Guaranty of Lease. Therefore, for the above-mentioned reasons, the

Guarantor is jointly and severally liable for the unpaid fixed rent, escalation rent, and attorneys' fees resulting from Tenant's default.

Guarantor filed a verified answer on July 23, 2021, in which Guarantor lists eight affirmative defenses: each affirmative defense is one sentence in length with no factual support. The Court finds all of the Guarantor's affirmative defenses to be mere conclusions of law and insufficiently pled.

Based on the above, the Court finds that Plaintiff met its prima facie burden entitling it to summary judgment against the Guarantor, and the Guarantor's affirmative defenses are insufficient. Thus, the Court grants summary judgment in favor of Plaintiff, and dismisses the Guarantor's affirmative defenses.

Default Judgment against Defendant Varick Parking, LLC (Tenant)

This Court will consider the cross-motion in the instant action as a motion to vacate the default judgment. A defendant must demonstrate a reasonable excuse for their default in answering the complaint and a potentially meritorious defense to the same in order to vacate an order and judgment (see Embreaer Fin. Ltd. v Servicios Aereos Profesionales, S.A., 42 AD3d 380, 381 [1st Dept 2007], citing, inter alia, Tat Sang Kwong v Budge-Wood Laundry Serv., Inc., 97 AD2d 691 [1st Dept 1983]; World O World Corp. v Anoufrieva, 163 AD3d 610, 611 [2d Dept 2018]). "Whether a proffered excuse is 'reasonable' is a 'sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits'" (Fried v Jacob Holding, Inc., 110 AD3d 56, 60 [2d Dept 2013], quoting Harcztark v Drive Variety, Inc., 21 AD3d 876 [2d Dept 2005]).

Tenant has not demonstrated a reasonable excuse for their default in answering the complaint. The instant action was commenced on June 10, 2021, and Tenant was served by service upon the Secretary of State on June 16, 2021 (NYSCEF Doc. Nos. 1, 8, 23). Plaintiff further served another copy of the verified complaint by mail through United States Postal Service to the Tenant on July 8, 2021, at two different mailing addresses – one mailing address was the rented premises (114-122 Varick Street, New York, New York, 10013), and the second mailing address was the limited liability company mailing address for Tenant (270 Madison Avenue, New York, New York 10016) (NYSCEF Doc. Nos. 15, 25). Tenant was required to answer or appear no later than July 16, 2021, pursuant to CPLR § 3012 and LLCL § 303. The Tenant failed to answer the complaint on or before July 16, 2021, and only filed a cross-motion on December 16, 2021, long after the Plaintiff filed the motion in part for default judgment on August 17, 2021.

Additionally, the Affirmation of Spencer Stiefel in support of Tenant's motion to compel acceptance of the late answer notably mentions that once he had a copy of the complaint in his possession, Spencer Stiefel initially and mistakenly, believed it related to a previous action filed by the Plaintiff, which was discontinued (NYSCEF Doc. No 40 ¶ 4-5). The prior discontinued action (Index No. was 650655/2021) only had one Defendant – Varick Parking, LLC (Tenant), whereas the instant action (Index No. is 155609/2021) has two Defendants – Varick Parking, LLC (Tenant) and Rafael Llopiz (Guarantor). The Court finds the two actions to be notably different, as both actions have different index numbers and a different number of defendants. Tenant has no reasonable explanation for its failure to respond to the complaint within the appropriate required time. Thus, Tenant has not demonstrated a reasonable excuse for its default

in answering the complaint. The Court need not reach the second prong of the test, as there is no judgment of default.

Ejectment

To establish its prima facie burden entitling it to judgment as a matter of law on the cause of action for common law ejectment, Plaintiff must establish “that (1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate” (RPAI Pelham Manor, LLC v Two Twenty Four Enterprises, LLC, 144 AD3d 1125, 1126 [2d Dept 2016]).

Plaintiff is the owner of the premises, 114-122 Varick Street, New York, New York, 10013, as evidenced in the Affidavit by Kevin T. Kirchoff, the Chief Financial Officer for the Rector, Church-Wardens and Vestrymen of Trinity Church in the City of New York (NYSCEF Doc. No. 12).

Plaintiff has a present right to possession due to the Plaintiff terminating the lease pursuant to the terms of the Agreement of Lease. Under the Agreement of Lease, Section 18.1(A), an event of default is “if Tenant shall fail more than two (2) times in any period of twelve consecutive months to make a payment when due of any Rental, and Landlord shall have given Tenant five (5) Business Days’ notice of such default after the first two (2) such occurrences, whether or not Tenant shall have cured such default in the first two instances (provided that the failure of Tenant to cure such default within the stipulated cure period shall not prevent Landlord from commencing a proceeding for non-payment of rent)” (NYSCEF Doc. No. 15). Plaintiff served the Tenant with three separate default notices in November of 2020, December of 2020, and April of 2021, pursuant to Section 18.1(A) of the Agreement of Lease

(NYSCEF Doc. Nos. 19, 20, 21, 22). According to Plaintiff's ledgers, the Tenant failed to pay the Plaintiff rent for the premises since April of 2020 (NYSCEF Doc. Nos. 17, 49).

In addition, the Agreement of Lease, Section 18.2, states that "[i]f an Event of Default shall occur, Landlord may, at any time thereafter, at Landlord's option, give written notice to Tenant stating that this Lease and the Term shall expire and terminate on the date specified in such notice, which date shall not be less than five (5) days after the giving of such notice, whereupon this Lease and the Term and all rights of Tenant under this Lease shall automatically expire and terminate as if the date specified in the notice given pursuant to this Section 18.2 were the Fixed Expiration Date and Tenant immediately shall quit and surrender the Premises, but Tenant shall remain liable for damages as provided herein or pursuant to law" (NYSCEF Doc. No. 15). Plaintiff served the Tenant with a five-day notice of termination, dated May 17, 2021, along with a COVID-19 Hardship Declaration pursuant to the Agreement of Lease Section 18.2 (NYSCEF Doc. No. 22). The notice of termination gave the Tenant notice, pursuant to Section 18.2 of the Agreement of Lease, that Plaintiff/Landlord canceled and terminated the lease effective as of June 1, 2021, due to Tenant's failure to pay rent to Plaintiff for more than two times within a twelve consecutive month period. Therefore, for the above-mentioned reasons, Plaintiff has a present right to possession due to the Plaintiff terminating the lease with the Tenant on June 1, 2021.

Tenant is in present possession of the premises without Plaintiff's permission or consent. As of the date of oral arguments before the Court on April 19, 2022, counsel for the Plaintiff informed this Court that the Tenant has not surrendered the premises to the Plaintiff. Counsel for Tenant was present and did not contest this statement. Thus, based on the above reasons, the

Court finds that Plaintiff has met its prima facie burden, entitling Plaintiff to a judgment for ejectment against the Tenant.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment against Defendant Rafael Llopiz (Guarantor), is granted to the extent set forth below; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the Plaintiff and against Defendant Rafael Llopiz (Guarantor) jointly and severally, on the second cause of action for rent due and owing under the lease through March of 2022, in the sum of \$1,903,401.26⁴, plus interest to be taxed by the Clerk of the Court⁵; and it is further

ORDERED that Plaintiff's motion to dismiss the affirmative defenses by Defendant Rafael Llopiz (Guarantor), is granted; and it is further

ORDERED that Plaintiff's motion to enter default judgment against Defendant Varick Parking, LLC (Tenant), is granted to the extent set forth below; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the Plaintiff and against Defendant Varick Parking, LLC (Tenant) jointly and severally, on the first cause of action for breach of contract relating to rent arrears accrued through the termination of the lease, June 1, 2021, in the sum of \$729,715.16⁶, plus interest, costs and disbursements to be taxed by the Clerk of the Court upon submission of an appropriate bill of costs⁷; and it is further

⁴ The amount reflects tenant's payment of \$28,250 on January 1, 2022, and does not include real estate taxes for February 2022 and March 2022, as the total amount is unknown.

⁵ Plaintiff requests attorneys' fees as part of the second cause of action, but counsel does not provide an affirmation of legal services with a request for a specific sum nor proof for the requested sum (invoices or billing statements, etc.).

⁶ The amount reflects Tenant's payment of \$28,250 on January 1, 2022.

⁷ Plaintiff also requests attorneys' fees as part of the first cause of action, but counsel does not provide an affirmation of legal services with a request for a specific sum nor proof for the requested sum (invoices or billing statements, etc.).

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the Plaintiff and against Defendant Varick Parking, LLC (Tenant), on the third cause of action for breach of contract relating to holding over the premises after the termination date of the lease, from June 1, 2021 through March of 2022, in the sum of \$1,173,686.10⁸, jointly and severally, plus interest to be taxed by the Clerk of the Court; and it is further

ADJUDGED and DECLARED that Plaintiff is entitled to ejectment and issuance of a writ of ejectment⁹ on its fourth cause of action; and it is further

ORDERED that Plaintiff is entitled to possession of 114-122 Varick Street, New York, New York, 10013, as against Defendant Varick Parking, LLC (Tenant), and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and payment of proper fees, is directed to place Plaintiff in possession accordingly; and it is further

ORDERED that the Sheriff is directed to evict, eject, or remove Defendant Varick Parking, LLC (Tenant), from the subject premises and put Plaintiff in possession; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this Order with notice of entry upon the Defendants.

This constitutes the decision and order of the Court

6/3/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

⁸ The amount does not include real estate taxes for February 2022 and March 2022, as the total amount is unknown.
⁹ The moratorium on evictions imposed by COVID-19 Emergency Protect Our Small Businesses Act (CEPOSBA) ended on January 15, 2022.