

**270 Madison Ave. Assoc. LLC v Citizens Parking,  
Inc.**

2022 NY Slip Op 32571(U)

July 15, 2022

Supreme Court, New York County

Docket Number: Index No. 650003/2021

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC. PART 36

*Justice*

-----X INDEX NO. 650003/2021

270 MADISON AVENUE ASSOCIATES LLC and  
INDEPENDENCE 270 MADISON LLC,  
Plaintiffs,

MOTION SEQ. NO. 002

- v -

**DECISION + ORDER ON  
MOTION**

CITIZENS PARKING, INC.,  
Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for

SUMMARY JUDGMENT

In December 2020, plaintiffs, the owners of the real property located at 270 Madison Avenue, New York, New York 10016 (“premises”), commenced this action against defendant, the guarantor of a lease entered into between plaintiffs and non-party Citizens Icon Holdings LLC d/b/a Icon Parking Systems n/k/a Icon Parking Holdings LLC (“Citizens Icon Holdings” or “tenant”). In their complaint, plaintiffs allege that they are entitled to a money judgment against defendant in an amount to be determined by the court, but not less than \$1,130,957.56, representing the arrears under the lease that remain outstanding. (NYSCEF Doc. No. 1, *summons and complaint*).<sup>1</sup>

Defendant interposed an answer, raising several affirmative defenses (NYSCEF Doc. No. 3, *answer*).

Plaintiffs now move, pursuant to CPLR 3212, for an order awarding them summary judgment on liability on their first cause of action and setting the matter down for a hearing to determine damages. Plaintiffs also seek an order, pursuant to CPLR 3212 and/or 3211(b), dismissing all of defendant’s affirmative defenses. (NYSCEF Doc. No. 20, *notice of motion*). Defendant cross-moves, pursuant to CPLR 3211(a) and 3211, granting it summary judgment dismissing the action (NYSCEF Doc. No. 34, *notice of cross-motion*).

By memorandum of law, plaintiffs argue that they have established their *prima facie* entitlement to summary judgment on their cause of action for a breach of the guaranty. Specifically, plaintiffs assert that the tenant breached the terms of the lease by, among other things, failing to pay rent and additional rent when due and that defendant unequivocally guaranteed to plaintiffs the fixed rent and additional rent due under the lease.

Plaintiffs also maintain that, pursuant to ¶ 7 of the guaranty, defendant waived the right to assert defenses. Assuming, *arguendo*, this court were to consider any of the fourteen (14) defenses

<sup>1</sup> Plaintiffs commenced a related action against the tenant, in New York State Supreme Court, New York County, under Index No. 654295/2020, entitled *270 Madison Avenue Associates LLC and Independence 270 Madison LLC v Citizens Icon Holdings LLC d/b/a Icon Parking Systems n/k/a Icon Parking Holdings LLC* (“related action”).

raised in the answer, plaintiffs argue that the defenses are conclusory and should be denied on that additional basis. (NYSCEF Doc. No. 29, *memorandum of law in opposition*).

In opposition to the motion and in support of the cross-motion, defendant contends that plaintiffs make sweeping assertions that they are entitled to a money judgment but fail to provide any support for such demand other than conclusory allegations. For instance, although plaintiffs seek “additional rent” charges, there is no proof to support said charges. Defendant maintains that the cross-motion should be granted because plaintiffs fail to name a necessary party, i.e., the tenant, and that their claims violate, *inter alia*, the intent and spirit of the COVID-19 eviction moratorium insofar as this action is an “end run” around the eviction moratorium. Defendant also contends that it has raised numerous meritorious defenses, each of which preclude summary judgment in plaintiffs’ favor. Defendant further claims it could not have waived its defenses insofar as it never could have contemplated a global pandemic when it executed the guaranty. Specifically, defendant argues that its tenth and twelfth affirmative defenses, premised on frustration of purpose and impracticability, are not susceptible to summary adjudication. Additionally, defendant maintains that it has asserted other viable defenses in this action inasmuch as plaintiffs have failed to prove tenant’s underlying debt; plaintiffs initiated this action despite various governmental protections enacted in response to the devastating impacts of the COVID-19 pandemic; and that tenant was constructively evicted from the premises and, thus, it is yet to be determined whether tenant is entitled to an abatement or other damages which would reduce or eliminate any liability guarantor may have under the guaranty. (NYSCEF Doc. No. 39, *memorandum of law in opposition to motion and in support of cross-motion*).

In opposition to the cross-motion and in further support of the motion, plaintiffs reiterate that they have established their *prima facie* entitlement to summary judgment against defendant. Plaintiffs assert that they only seek summary judgment as to liability and, as such, that it is not required to establish the precise amount of damages owed, which shall be referred to a special referee. Plaintiffs further assert that, pursuant to the explicit terms of the guaranty, tenant need not be a party to this action. Furthermore, the eviction moratorium and the relevant executive orders did not prohibit the commencement of actions seeking money damages. Additionally, the guaranty laws enacted to protect certain guarantors during the pandemic do not apply here. Plaintiffs also argue that not only did defendant waive all affirmative defenses raised, but they are also lacking in merit. (NYSCEF Doc. No. 44, *memorandum of law in reply*).

To prevail on a motion for summary judgment for breach of a written guaranty, plaintiff must show, by admissible evidence, the absolute and unconditional guaranty, the underlying debt, and a failure to make the required payments. (See *ALQ, LLC v Kane*, 197 AD3d 1029, 1029 [1st Dept 2021]; *Reliance Constr. Ltd. v Kennelly*, 70 AD3d 418 [1st Dept 2010]; *Kensington House Co. v Oram*, 293 AD2d 304, 304 [1st Dept 2002].)

Here, this court finds that plaintiffs have established their *prima facie* entitlement to summary judgment against defendant as to liability. Defendant does not dispute that it executed the guaranty. While this court acknowledges that plaintiffs have failed to submit any proof with respect to the outstanding debt, this court nevertheless finds that the affidavit of Gregg Schenker, a member of ABS Partners Real Estate, LLC, agent for plaintiffs, establishes that rent and additional rent remains outstanding. Moreover, in its decision and order dated July 28, 2022, in the related action (Mot. Seqs. 001 & 002), this court already found that plaintiffs established their entitlement to summary judgment on their claims for fixed rent and use and occupancy. However, that branch of the motion

seeking additional rent was referred to a special referee to hear and determine. Insofar as defendant only challenges the computation of plaintiff's additional rent and does not refute that fixed rent, which can be determined from the lease, remains outstanding, or that tenant breached its obligations under the lease, this court grants the motion against defendant as to liability. The issue of additional rent, as well as, computation of damages, shall be referred to a special referee to hear and determine (see *George v Duignan*, 171 AD3d 464 [1st Dept 2019]).

That branch of the motion seeking dismissal of the affirmative defenses is also granted inasmuch as this court finds that defendant waived any defenses in this action. The guaranty expressly provides that:

*"This Guaranty sets forth the entire understanding of Landlord and Guarantor with respect to Guarantor's guaranty of Tenant's obligations under the Lease, and Guarantor absolutely, unconditionally and irrevocably waives any and all right to assert any defense, setoff or counterclaim of any nature whatsoever with respect to this Guaranty or the obligations of Guarantor or any other person or party (including, without limitation, Tenant) relating hereto or to the Lease. Guarantor (and Landlord by acceptance of this Guaranty) hereby waives trial by jury and the right thereto in any action or proceeding of any kind or nature, arising on, under or by reason of or relating to, this Guaranty or any agreement collateral hereto... The laws of the State of New York applicable to contracts made and to be performed wholly within the State of New York shall govern and control the validity, interpretation, performance and enforcement of this Guaranty"* (emphasis added) (NYSCEF Doc. No. 8 ¶ 7, *guaranty*).

It should be noted that, although defendant seeks to raise a defense of frustration of purpose/impracticability to argue that the guaranty could not possibly have contemplated the pandemic at the time of its execution and, thus, that the waiver should not apply here, this court is not persuaded. Similar arguments have proved futile in absolving a tenant from its obligations under a lease (see *Gap, Inc. v 170 Broadway Retail Owner*, 195 AD3d 575 [1st Dept 2021]; *Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020]; *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561 [1st Dept 2021].) This court also rejects that argument premised on constructive eviction insofar as it has already been found to be without merit in the decision and order deciding plaintiffs' motion for summary judgment against the tenant.

Based on the foregoing, the cross-motion is denied as moot. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Therefore, it is hereby

**ORDERED** that plaintiffs' motion is granted against defendant, only as to liability; and it is further

**ORDERED** that this matter shall be referred to a special referee to hear and determine in accordance with this decision and order; and it is further

**ORDERED** that the cross-motion is denied as moot; and it is further

**ORDERED** that counsel for plaintiffs shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a

completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

**ORDERED** that service upon the Clerk of the Court and the Special Referee 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](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of this court.

July 15, 2022

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE