

Ames Assoc. v Knapp
2022 NY Slip Op 33169(U)
September 19, 2022
Supreme Court, New York County
Docket Number: Index No. 653719/2021
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON

PART

42

Justice

-----X

AMES ASSOCIATES,

Plaintiff,

- v -

INDEX NO. 653719/2021MOTION DATE 05/11/2022MOTION SEQ. NO. 001HELAINE KNAPP, JENNIFER SWARTLEY and
STEPHEN SWARTLEY

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for

DISMISS

In this breach of contract action to collect \$220,000.00 in unpaid rent, additional rent and attorney's fees, the defendants, guarantors on a commercial lease for premises at 80 Fifth Avenue in Manhattan, move pre-answer to dismiss the second amended complaint pursuant to CPLR 3211(a)(1), a defense based on documentary evidence and CPLR 3211(a)(7), failure to state a cause of action. In a prior action, a default judgment in the sum of \$275,844.15 was entered by the plaintiff against the commercial tenant, Row NYC, on October 27, 2021 (*Ames v ROW NYC LLC*, Supreme Court, NY County, Index No. 650366/2021). When the judgment was not satisfied, the plaintiff commenced this action on June 10, 2021. The plaintiff's second amended complaint, to which this motion is addressed, alleges two causes of action for breach of contract, one for rent and additional rent and one for contractual attorney's fees. The plaintiff opposes the motion. The motion is denied.

Essentially, the defendant guarantors allege that they are shielded from liability by NYC Administrative Code § 22-1005, which prohibited landlords from seeking to recover monies from personal guarantors on a commercial lease from March 7, 2020 to June 30, 2021, where the tenant ceased operations or closed to the public as a result of COVID-19-related executive orders, and that the tenant vacated prior to the end of that period, leaving nothing owed. The defendants further argue that the guaranty agreement does not include any obligation to pay the

tenant's attorney's fees. In response, the plaintiff argues that the tenant first defaulted on March 1, 2020, prior to enactment of the statute, and the lease, with an extension, remained in effect until September 30, 2021, that the tenant's early surrender of the property does not alone relieve it of liability under the lease any time prior to September 30, 2021, and that it is not seeking any payment from the defendants for March 7, 2020 to June 30, 2021. In regard to attorney's fees, the plaintiff argues that the lease expressly defines any attorney's fees incurred upon the tenants' default to be "additional rent" which the defendants expressly agreed to pay.

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXi Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) (quoting Fontanetta v John Doe 1, supra).

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

The defendants have not demonstrated entitlement to dismissal on either ground. Neither the lease nor the guaranty agreement constitutes the type of documentary evidence that resolves all factual issues in favor of the defendants as required for dismissal pursuant to CPLR

3211(a)(1). Indeed, the terms of the agreements support the plaintiff's position on this motion. As for CPLR 3211(a)(7), construed liberally, the second amended complaint sufficiently alleges two cause of action for breach of contract. That is, it sufficiently alleges (1) the existence of a contract, (2) the plaintiff's performance under that contract; (3) the tenant's and defendants' breach of that contract and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). It is well-settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff'd 88 NY2d 716 (1996). Furthermore, "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991). The terms of the subject guaranty agreement, dated September 16, 2013, are clear, unambiguous, absolute and unconditional and the defendants have not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiff in regard to the agreement. There is no dispute that upon the corporate tenant's default, the individual defendants were required to but failed to perform under the guaranty. See 4 USS, LLC v DSW MS, LLC, 120 AD3d 1049 (1st Dept. 2014). Moreover, since the plaintiff is not seeking payment from these defendants for any period covered by NYC Administrative Code § 22-1005, the essence of the defendants' argument in support of their motion fails.

As correctly argued by the plaintiff, Paragraph 19 of the tenant's lease defines any attorney's fees incurred upon the tenant's default to be "additional rent" and the guaranty agreement expressly provides that the defendant guarantors agree to pay to the plaintiff "all rent and additional rent that has accrued or may accrue under the terms of the lease (hereinafter referred to as accrued rent)" to the latest date the tenant surrenders the premises, delivers the keys *and* pays all rent due to the landlord. Even assuming the tenant surrendered the premises and the keys, since "all rent due" has not been paid, the liability of the defendants continues.

The parties are encouraged to explore settlement.

Accordingly, and upon the foregoing papers, it is

ORDERED that the defendants' motion to dismiss the second amended complaint pursuant to CPLR 3211(a)(1) and (a)(7) is denied, and it is further

ORDERED that the defendants shall file an answer to the second amended complaint within 30 days of the date of this order, and it is further

ORDERED that the parties shall appear for a preliminary conference on December 1, 2022, at 12:30 pm. to be conducted by Microsoft Teams.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

9/19/2022

DATE

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

☐

GRANTED

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DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

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REFERENCE