

<b>Arsenal Co. LLC v Siuni</b>
2022 NY Slip Op 33533(U)
October 17, 2022
Supreme Court, New York County
Docket Number: Index No. 155302/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

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THE ARSENAL COMPANY LLC,
Plaintiff,

- v -

KOURASH SIUNI,
Defendant.

INDEX NO. 155302/2018
MOTION DATE 09/15/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and for the reasons hereinbelow, plaintiff's motion for summary judgment is granted and defendant's cross-motion to dismiss is denied.

Background

On July 30, 2001, plaintiff The Arsenal Company LLC ("Landlord"), as landlord, entered into a commercial lease (the "Lease") with non-party Fashions Collection of 7th Avenue Inc. ("Fashions"), as tenant, for a commercial space at 463 Seventh Avenue, New York, New York (the "Premises"). NYSCEF Doc. No. 14. The Lease was to commence on February 1, 2002, and end on February 28, 2010. Id.

On October 8, 2001, as an inducement to sign the Lease, defendant Kourash Siuni ("Guarantor") signed a personal guaranty in which he agreed to "unconditionally and irrevocably guarantee the full and prompt payment by Tenant of all amounts due under such Lease as the same may be renewed, extended, amended or modified." NYSCEF Doc. No. 15.

On January 20, 2009, Landlord and Fashions executed a modification agreement extending the Lease until December 31, 2020. NYSCEF Doc. No. 16.

On February 12, 2009, Landlord signed an Assignment and Assumption Agreement, dated February 9, 2009, in which Fashions "assigned, transferred, and set over" the Lease to non-party Majestic Fashions of NY Inc. ("Majestic"). NYSCEF Doc. No. 17. As an inducement to Landlord, Fashions agreed "to remain liable to the Landlord for the prompt performance of the covenants and conditions of the" Lease. Id.

Also on February 12, 2009, Landlord signed an Assignment and Assumption Agreement, dated February 10, 2009, in which Majestic "assigned, transferred, and set over" the Lease to non-party Ice Cube Apparel Inc. ("Ice"). Id. As an inducement to Landlord, Fashions agreed "to remain

liable to the Landlord for the prompt performance of the covenants and conditions of the” Lease. Id.

On August 28, 2017, Landlord commenced a non-payment proceeding against Ice in an action captioned The Arsenal Company LLC v. Ice Cube Apparel Inc., Civil Court, New York County, Index No. 73439/17 (the “L&T Action”). NYSCEF Doc. No. 18.

In a so-ordered Stipulation of Settlement of the L&T Action dated March 12, 2018, Ice consented to a judgment of \$266,406.71, representing “rent and additional rent due through May 2018 plus legal fees.” NYSCEF Doc. No. 19.

On June 4, 2018, Ice vacated and surrendered possession of the Premises. NYSCEF Doc. No. 38.

According to Landlord, Ice has not paid any of the judgment to which it stipulated, and that sum remains due and owing. NYSCEF Doc. No. 21 ¶ 17.

On June 6, 2018, Landlord commenced the instant action against Guarantor, asserting two causes of action: (1) breach of guaranty; and (2) attorneys’ fees. NYSCEF Doc. No. 21.

On July 6, 2018, Guarantor answered with general denials and five affirmative defenses: (1) failure to state a cause of action; (2) laches; (3) failure to name a necessary party; (4) statute of limitations; and (5) statute of frauds. NYSCEF Doc. No. 22.

On April 30, 2020, plaintiff filed a Note of Issue, pursuant to a stipulation that this Court so-ordered on March 3, 2020. NYSCEF Doc. Nos 10 and 8.

On July 5, 2022, Landlord moved to strike Guarantor’s affirmative defenses and, pursuant to CPLR 3212, for summary judgment. NYSCEF Doc. No. 11.

In brief, Landlord argues that Guarantor breached the Guaranty as the judgment from the L&T Action’s stipulation is still due and owing.

On July 20, 2022, Guarantor cross-moved, pursuant to CPLR 3211, to dismiss plaintiff’s complaint. NYSCEF Doc. No. 24.

Guarantor argues that the instant action should be dismissed because: (1) plaintiff improperly filed a dispositive motion more than 120 days after filing a Note of Issue without leave of the court for good cause shown, as CPLR 3212(a) requires; (2) plaintiff failed initially to file a statement of material facts along with its motion for summary judgment, as 22 NYCRR 202.8(g) requires; and because the “Guaranty, pursuant to its terms, does not apply to assignments.”

### Discussion

In order to obtain summary judgment, the “movant must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form

sufficient to require a trial of material questions of fact on which the opposing claim rests' [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

Dismissal pursuant to CPLR 3211(a)(1) is warranted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 87-88 (1994).

As an initial matter, defendant argues that plaintiff should not be able to submit its motion for summary judgment as it moved more than 120 days after filing its Note of Issue and never sought, pursuant to CPLR 3212(a), this Court's leave for good cause shown.

In reply, plaintiff asks this Court to consider the fact that the Note of Issue was filed "during the height of the Covid-19 pandemic and neither [plaintiff's counsel] nor counsel for [d]efendant at that time were clear on how this case or court matters generally were to proceed" and, citing correspondence between counsels, that "this was not a normal time nor a standard note of issue filing."

Plaintiff is correct that the Note of Issue *was* filed at a time of great uncertainty. Accordingly, this Court grants plaintiff leave, nunc pro tunc, for good cause shown to file the instant motion more than 120 days after the filing of the Note of Issue. CPLR 2001. This Court does, however, note that the time between filings was quite long and, therefore, if successful in this action plaintiff should not be able to collect interest for the period 120 days after the filing of the Note of Issue on April 30, 2020 (August 29, 2020) until the filing of the instant motion (July 5, 2022). CPLR 5001.

Next, defendant argues the instant motion should be dismissed because plaintiff failed, initially, to annex a concise, numbered statement describing undisputed material facts as required by 22 NYCRR 202.8g(a) ("Upon any motion for summary judgment ... there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried."). As plaintiff rectified that mistake promptly (NYSCEF Doc. No.31) and as there appears to be no prejudice to defendant from plaintiff's lapse, however, this Court, in its discretion and in the interest of justice, waives compliance and trusts Landlord's counsel will not repeat this oversight. CPLR 2001; 22 NYCRR 202.1(b).

Finally, defendant argues for dismissal on the grounds that the Guaranty, by its terms, only applied to "any renewal, extension, amendment or modification of the Lease" and so did not extend to assignments.

Defendant's argument is unpersuasive, however, as the Lease is clear that in the event of an assignment "the assignee shall assume all of the obligations of the lease jointly with the Tenant" and the assignments are similarly clear that the Tenant induced Landlord into signing by "remain[ing] liable to Landlord for the prompt performance of the covenants and conditions of the lease aforesaid." Here Guarantor guaranteed Tenant's obligations pursuant to the Lease, the

assignments did not relieve Tenant of those obligations, and there is no question that the Lease’s assignees left the Premises while money was due and owing.

This Court notes in passing that plaintiff has submitted an affidavit from its principal, James Buslik, making clear that there “was no intent on Plaintiff’s part when consenting to the Assignments to release Fashions from the obligations of the tenant under the lease or to release Defendant from his obligations under the Guaranty.” NYSCEF Doc. No. 35.

Thus, Guarantor was not relieved of his obligation, even though the Lease was assigned, and defendant’s motion to dismiss is denied.

Finally, plaintiff has sufficiently made out a prima facie case for breach of guaranty by providing, inter alia: a copy of the pleadings (NYSCEF Doc. No. 18); an affidavit of David Levy, who has personal knowledge of the facts and is a principal member of plaintiff’s managing agent, non-party Adams & Co. Real Estate LLC (NYSCEF Doc. No. 12); the Lease, Guaranty, and various modifications and assignments (NYSCEF Doc. Nos. 14-17); and the stipulation and judgment from the L&T Action (NYSCEF Doc. Nos. 19-20). CPLR 3212(b).

This Court has considered defendant’s other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

The motion of plaintiff, The Arsenal Company LLC, for summary judgment against defendant, Kourashi Siuni, on its first cause of action is granted and the Clerk is hereby directed to enter a judgment in the amount of \$266,406.71 plus statutory interest from March 13, 2018 (the date of the related Landlord and Tenant Judgment) through August 29, 2020 (120 days from the day plaintiff filed its Note of Issue) and then from July 5, 2022. Accordingly, defendant’s cross-motion to dismiss is denied.

It is further ordered that plaintiff’s second cause of action seeking attorneys’ fees is hereby severed, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and any necessary fees. Plaintiff must file such Note of Issue within 30 days from the date of this Decision and Order, and plaintiff’s failure to do so timely shall result in automatic disposal of this action. Plaintiff is further directed, within 15 days of filing the Note of Issue, to contact chambers to schedule the inquest date.

10/17/2022

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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