

2451 First Ave. LLC v Shalem
2022 NY Slip Op 34045(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 654051/2019
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 33M

Justice

-----X

2451 FIRST AVENUE LLC

Plaintiff,

- v -

NOAH SHALEM,

Defendant.

-----X

INDEX NO. 654051/2019

MOTION DATE 08/10/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, and after oral argument, which was held on November 15, 2022 where Martin I. Gold, Esq. appeared for Plaintiff 2451 First Avenue LLC (“Landlord”) and Thomas J. Tyrrell Jr., Esq. appeared for Defendant Noah Shalem (“Guarantor”), Landlord’s motion seeking dismissal of Guarantor’s counterclaim and summary judgment pursuant to CPLR § 3212 is granted.

I. Factual and Procedural Background

Landlord filed its Complaint on July 16, 2019 seeking to enforce a guaranty and to recover attorneys’ fees (NYSCEF Doc. 1). Landlord alleges that a lease was executed between Landlord and non-party tenant NYC Auto Body, Inc. (“Tenant”) on August 18, 2011 for the premises known as 2451 First Avenue, front garage and lot, New York, NY, with a term ending on August 31, 2016 (the “Lease”) (*id.* at ¶ 3). The Lease was extended for two years to August 31, 2018 (*id.* at ¶ 4). Guarantor executed a guaranty of the Lease dated August 11, 2011 wherein Guarantor guaranteed the full performance and observance of all obligations to be performed by Tenant until the date of Tenant’s actual surrender of the demised premises (*id.* at ¶ 5).

After litigation between Landlord and Tenant in the Civil Court of the City of New York, a judgment was issued in favor of Landlord against Tenant in the amount of \$172,530.68 for rent and attorneys' fees, as well as a warrant of eviction (the "Prior Judgment") (*id.* at ¶¶ 6-7). Tenant was evicted on July 2, 2019. However, it is alleged that Guarantor has not paid any of the sums owed by Tenant (*id.* at ¶¶ 8-12).

On September 9, 2019, Guarantor filed its Answer with counterclaims (NYSCEF Doc. 3). Guarantor asserted seven boilerplate affirmative defenses that are a mere sentence long, as well as a counterclaim for attorneys' fees alleging that that Guarantor did not guarantee the Lease (*id.*). Landlord filed its note of issue on June 28, 2022 (NYSCEF Doc. 13). On August 8, 2022, Landlord filed the instant motion for summary judgment (NYSCEF Doc. 14).

II. Discussion

A. Standard

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is 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. *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]).

To show prima facie entitled to summary judgment on a breach of contract claim, Plaintiff must prove the existence of a contract, Plaintiff's performance, Defendant's breach, and damages (see *Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]). "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." (*L. Raphael NYC C1 Corp. v Solow Building Company, L.L.C.*, 206 AD3d 590, 592-593 [1st Dept 2022], quoting *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

B. Landlord's Prima Facie Burden

Landlord has satisfied its prima facie burden by showing the existence of an absolute and unconditional guaranty, an underlying debt, and the guarantor's failure to perform under the guaranty. First, the existence of the Lease is undisputed and, indeed, a judgment was obtained on that Lease in the Civil Court (NYSCEF Doc. 20). Second, the Landlord provided the Guaranty which was executed by Guarantor which unequivocally states:

"Guarantor guarantees to Landlord....the full payment of all rent, whether base rent or additional rent including legal fees payable pursuant to the terms of the Lease and Riders thereto, up to and including the sooner of the date upon which Landlord obtains legal possession of the Premises through legal action or the Tenant surrenders possession to Landlord, without requiring any notice to Guarantor of nonpayment, or proof, or notice of demand or notice of default or nonperformance to hold the undersigned responsible under this Guaranty, all of which the undersigned hereby expressly waives." (*id.*).

The Guaranty further provides that: "the Guarantor further agrees this Guaranty shall remain and continue in full force and effect as to any renewal, change, amendment, modification, assignment or extension of the Lease." (*id.*). While the Lease was originally set to expire on August 31, 2016, by letter dated September 5, 2016, Guarantor exercised the option to extend the Lease until February 5, 2016 (NYSCEF Doc. 30). Therefore, by operation of the extension of the Lease and the language of the Guaranty, Guarantor's obligations were also extended. It is further

incontrovertible that there exists an underlying debt Tenant owes to Landlord in the amount of \$172,530.68 for rent and attorneys' fees in the form of a judgment issued by New York City Civil Court for amounts owed under the very Lease that Guarantor guaranteed (NYSCEF Doc. 20). Therefore, Landlord has met its prima facie burden, and summary judgment is appropriate unless Guarantor can establish the existence of a material issue of fact requiring trial.

C. Guarantor Fails to Establish the Existence of a Material Issue of Fact

Guarantor opposes the motion for summary judgment by arguing (via sworn affidavit) that the Lease was never extended (NYSCEF Doc. 24). However, Guarantor's sworn testimony is contradicted by a letter executed by Guarantor wherein Guarantor requested a lease extension (NYSCEF Doc. 30). Indeed, at oral argument, Guarantor's own counsel admitted to not knowing about the existence of this letter and did not address its impact on Guarantor's opposition. Further, the Civil Court, in issuing its judgment, stated that the Lease term extended into August of 2018 (*id.*). Therefore, Guarantor has not established the existence of a material issue of fact and summary judgment is appropriate. Moreover, as Guarantor's sole counterclaim asserts that Guarantor is entitled to attorneys' fees in defending this action because the Lease was never extended, and this assertion is flatly contradicted by both the Prior Judgment and letter extending the Lease, Guarantor's counterclaim is dismissed as meritless. Landlord's motion is granted.

Accordingly, it is hereby,

ORDERED that Plaintiff 2451 First Avenue LLC motion for summary judgment against Defendant Noah Shalem is granted, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff 2451 First Avenue LLC is entitled to a money judgment against Defendant Noah Shalem on Plaintiff 2451 First Avenue LLC's first cause of action for breach of

guaranty in the amount of \$153,118.34, plus statutory interest and costs and disbursements, from July 2, 2019 until entry of judgment, as calculated by the Clerk of the Court; and it is further

ORDERED that Defendant Noah Shalem's counterclaim seeking attorneys' fees is dismissed; and it is further

ORDERED that Plaintiff 2451 First Avenue LLC is granted summary judgment on its second cause of action seeking attorneys' fees against Defendant Noah Shalem, and the amount of attorneys' fees to be awarded is referred to a Judicial Hearing Officer of Special Referee to determine at the earliest possible date available on the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above¹; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part,

¹ Plaintiff provided no affirmation of services, hourly rates, or hours spent on this case to allow this Court to calculate or award Plaintiff reasonable attorneys' fees. While Plaintiff alleges in its Complaint it is damaged in the sum of \$56,786.72 in incurred attorneys' fees, Plaintiff has provided no such evidence indicating that this amount is reasonable given the seemingly straightforward nature of this action. As such, Plaintiff may submit such proofs at a hearing in order to obtain the attorneys' fees it seeks.

subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that within fifteen (15) days of entry, counsel for Plaintiff 2451 First Avenue LLC shall serve a copy of this Decision and Order upon all parties to this action and the Clerk of the Court, with notice of entry; and it is further

ORDERED that such service upon the Clerk of the Court 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 of the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

11/28/2022
DATE

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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<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