

RFR/K 55 Prospect Owner LLC v Glazer

2023 NY Slip Op 32558(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 652438/2021

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

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RFR/K 55 PROSPECT OWNER LLC, Plaintiff, INDEX NO. 652438/2021
MOTION SEQ. NO. 001; 002

- v -

DANIEL GLAZER, Defendant.

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, 32, 33, 34 were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31 were read on this motion to/for DISMISSAL

Plaintiff is the landlord of the building located at 55 Prospect Street, Brooklyn, New York 11201 (“premises”). The complaint sets forth that 55 Prospect Owner LLC, plaintiff’s predecessor-in-interest, as then landlord, leased portions of the building to Shadowbox Dumbo LLC, as a commercial tenant in December 2015, and defendant unconditionally guaranteed tenant’s obligations under the commercial lease on January 11, 2016 (NYSCEF Doc. No. 2, *complaint*, ¶ 8). Plaintiff claims that tenant substantially defaulted on its obligations to pay fixed rent and additional rent since September 2018, and 55 Prospect Owner LLC commenced a summary non-payment proceeding against tenant in May 2019, culminating in a stipulation of settlement dated January 3, 2020, in the judgment amount of \$244,652.21 as against tenant. Plaintiff claims that on January 6, 2020, a money judgment against tenant in the amount of \$244,652.21 was entered and a warrant of eviction was issued. Tenant paid \$20,000.00 on January 10, 2020, towards the amount owed (*id.*, at ¶ 13-18). According to plaintiff, tenant abandoned the premises pursuant to a 2021 bankruptcy case entitled *In re Shadowbox Holdings LLC*, Case No. 20-12515-MG (Bankr. SDNY, 2021) (“bankruptcy case”). Plaintiff claims that defendant did not provide both a Surrender Notice and Surrender Declaration, in contravention of paragraph 1 of the Guaranty, and that an unpaid balance of \$224,176.06, plus interest, remains outstanding for the period between September 2018 and February 20, 2020 (*id.*, at ¶ 19-24). As such, plaintiff asserts several causes of action based on breaches of the guaranty and seeks reasonable attorneys’ fees and expenses in an amount to be determined at trial.

In his answer, defendant denies plaintiff’s allegations and asserts several affirmative defenses: failure to state a cause of action (first affirmative defense); that the relief sought in the complaint is barred pursuant to the Administrative Code of the City of NY §22-1005 and related legislation/executive order (second affirmative defense); that all damages and claims sought were discharged in bankruptcy (third affirmative defense); and that plaintiff lacks capacity to sue

because it lacks privity of contract to enforce the subject guaranty (fourth affirmative defense) (NYSCEF Doc. No. 10, *answer*).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment and to dismiss defendant's affirmative defenses (Mot. Seq. 001). Plaintiff argues that it is entitled to summary judgment against defendant because defendant has defaulted on his obligation to pay \$224,176.06 by February 2020, in accordance with the stipulation of settlement. Plaintiff further claims that, while the judgment remains unsatisfied, tenant remained in possession of the premises without paying rent until January 2021 (NYSCEF Doc. No. 20, *memo of law*, pg. 7). As to defendant's affirmative defenses, plaintiff argues that the Administrative Code of City of NY § 22-1005 only provides a safe harbor for rent obligations that came due during the period between March 7, 2020, and June 30, 2021, and does not apply to any amounts of rent that were due, as in this case, on or prior to February 2020. Moreover, plaintiff contends that there are no executive orders or laws that excuse any obligations under a lease or guaranty that, as is the case here, fully vested and accrued as of February 2020. (*id.*, at pg. 9).

Defendant opposes plaintiff's motion (Mot. Seq. 001), and he separately moves for an order denying summary judgment in favor of defendant and for an order granting a dismissal of this action with prejudice (Mot. Seq. 002) (NYSCEF Doc. No. 31, *notice of motion*).¹ Defendant avers in his affidavit that, as of September 9, 2019, he was no longer employed by tenant because he had sold his interest in same to a third-party group of investors who indemnified him from all claims. Defendant sets forth in the affidavit that he was not party to the stipulation of settlement, and plaintiff fails to provide information as to the circumstances or status of the settlement and corresponding payments from its execution to the time of the mandatory COVID-19 shutdown, which is the main reason for default under the lease. As such, defendant claims that Administrative Code of City of NY § 22-1005 stops the enforcement of a personal guaranty where COVID-19 closure is the reason for default. Defendant, furthermore, avers that pursuant to the "Surrender Declaration to Guaranty" dated January 11, 2016, tenant surrendered the premises back to plaintiff. (NYSCEF Doc. No. 25, *affidavit in opposition*).

In reply, plaintiff argues that defendant's opposition does not raise an issue of fact about whether he is liable to plaintiff for the accrued and unpaid rent due pursuant to the lease prior to February 2020 because the amounts demanded are for periods outside of the statutory coverage of Administrative Code of City of NY § 22-1005. (NYSCEF Doc. No. 26, *reply affidavit of Lavin*). Regarding defendant's argument that he sold his interest in tenant to a third-party and was indemnified by same, plaintiff maintains that the indemnification agreement was executed by defendant in his capacity as the "Manager" of tenant, as well as, as the Indemnitee, and also did not satisfy any of the conditions upon which he may be released from his obligations under the guaranty. Plaintiff maintains that tenant returned possession of the premises to landlord in January 2021, and that New York courts have held that COVID-19 is not a basis for a commercial tenant in possession to withhold rent under any circumstances (NYSCEF Doc. No. 28, *reply*).

The motions are hereby consolidated for disposition.

¹ Defendant, appearing *pro se*, does not indicate the section of CPLR under which he is seeking relief.

It is well-settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) 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 or show that “facts essential to justify opposition may exist but cannot [now] be stated.” (CPLR 3212[f]; see *Zuckerman*, 49 NY2d at 562).

In order to establish a *prima facie* case on a breach of contract claim, plaintiff must show proof of a contract, plaintiff’s performance under the contract, defendant’s breach thereof, and damages as a result (see *Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019].) Where the plain language of the contract establishes obligations on the other party that have not been met, summary judgment is warranted (see *Bartfield v RMTS Assoc.*, 283 AD2d 240, 241 [1st Dept 2001].)

Addressing Mot. Seq. 001, this court finds that plaintiff has established its *prima facie* entitlement to summary judgment with respect to the breach of guaranty claim. It is undisputed that there is an agreement between the parties, and defendant unconditionally guaranteed tenant’s obligations under the lease. Plaintiff performed by allowing tenant to occupy the premises. Defendant, in turn, failed to make payments when tenant defaulted on its obligations to pay rent under the lease, thereby damaging plaintiff (NYSCEF Doc. No. 12, *Froom affidavit*). Therefore, plaintiff has established its *prima facie* entitlement to summary judgment on its breach of guaranty claim.

Although the burden shifts to defendant to raise an issue of fact, he fails to meet his burden. Defendant’s arguments that the COVID-19 pandemic and Administrative Code § 22-1005 bar recovery of the amount sought, that he is no longer employed by tenant, and that a third-party group of investors indemnified him from all claims, are rejected. New York courts have held in the *Gap* case and its progeny that COVID-19 is not a reason to withhold payment of commercial rent (see *902 Assoc. v Union Sq. 902 Suites, LLC*, 214 AD3d 581, 582 [1st Dept 2023]; *Fives 160th, LLC v Zhao*, 204 AD3d 439, 439-440 [1st Dept 2022].) Administrative Code § 22-1005 bars enforceability against a natural person of that person’s guarantee of commercial-lease obligations if two conditions are satisfied: (i) the tenant’s operations were halted or restricted under March 2020 COVID-related executive orders; and (ii) the “default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020, and June 30, 2021, inclusive.” (Administrative Code § 22-1005 [2].) Here, the amount demanded represents unpaid fixed rent and additional rent due pursuant to the lease for which a money judgment was entered against tenant in January 2020, which is before the statutory protection period (see *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 538 [1st Dept 2022].) Tenant’s Surrender Declaration, likewise, does not satisfy the conditions under which the guarantor could potentially be released from its obligations under the guaranty agreement, namely, (i) a Surrender Declaration and Surrender Notice are provided, (ii) all the rent is paid to the surrender date, and (iii) actual physical possession of the premises is delivered to plaintiff (NYSCEF Doc. No. 4, *Limited Guaranty*, ¶1). Defendant has not demonstrated that he ever provided a surrender

agreement to plaintiff. Further, to the extent defendant relies on the indemnification agreement (Exhibit B attached to his opposition) which he signed on behalf of Shadowbox Holdings LLC, in his capacity as manager, and signed on behalf of himself as the indemnitee, purporting to circumvent his payment obligations under the guaranty, the argument is meritless. Moreover, plaintiff is not a party to the indemnification agreement, and defendant fails to show that plaintiff's right to seek payment of the money judgment is limited by same. Hence, the court is not convinced by defendant's arguments that the indemnification agreement bars recovery in this action and that there was a valid surrender of the premises that absolves him of liability. Accordingly, plaintiff's motion for summary judgment on the breach of guaranty is granted.

Addressing now that portion of plaintiff's motion seeking to dismiss defendant's affirmative defenses, the court finds that plaintiff has established its *prima facie* entitlement to dismissal of all affirmative defenses. As established above, the defenses raised in opposition to the motion are without merit and, to the extent defendant fails to address the remainder of the affirmative defenses in opposition to the motion, they are deemed abandoned (see *General Elec. Capital Corp. v Miron Lbr. Co. Inc.*, 2011 NY Slip Op 31919[U] **6 [Sup Ct, NY County 2011]). Therefore, this court grants plaintiff's motion for summary judgment seeking to dismiss defendant's affirmative defenses.

In view of the foregoing, the court finds that plaintiff has established its *prima facie* entitlement to attorney fees and disbursement. "Under the [general] rule, attorney's fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Sage Sys., Inc. v Liss*, 39 NY3d 27, 30–31 [2022], quoting *Hooper Assoc. v AGS Computers.*, 74 NY2d 487, 491 [1989]). Here, the guaranty agreement provides for plaintiff's recovery of attorney's fees and disbursement. (NYSCEF Doc. No. 4, *Limited Guaranty*, ¶1). Thus, the issue with respect to attorney's fees shall be referred to a special referee for determination.

Turning next to Mot. Seq. 002, although defendant filed a motion for "an [o]rder denying summary judgment in favor of [d]efendant and for an [o]rder granting a dismissal of the proceedings heretofore with prejudice," he fails to make any arguments or attach supporting documents. In any event, it is denied as moot. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment (Mot. Seq. 001) is granted in its entirety; and it is further

ORDERED that the Clerk of Court is directed to enter judgment in favor of plaintiff against defendant in the amount of \$224,176.06, plus interest from November 30, 2019, together with costs and disbursements as calculated by the Clerk of the Court²; and it is further

ORDERED that the portion of plaintiff's motion for summary judgment seeking attorney fees (Mot. Seq. 001) is granted and shall be determined by a special referee; and it is further

² The first, second, and third causes of action essentially seek the same remedy for breach of guaranty.

ORDERED that defendant’s motion seeking dismissal of summary judgment (Mot. Seq. 001) is denied as moot; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this order, with notice of entry, on defendant, as well as, on the Clerk of the Court (60 Centre Street, Room 141 B), who shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff 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).

This constitutes the decision and order of this court.

July 14, 2023


HON. VERNA L. SAUNDERS, JSC

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	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	