

**Enki Props. LLC v Mustafa**

2023 NY Slip Op 33025(U)

August 30, 2023

Supreme Court, New York County

Docket Number: Index No. 157247/2021

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. 157247/2021

ENKI PROPERTIES LLC,

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON  
MOTION**

NAZIH K. MUSTAFA,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30

were read on this motion to/for

SUMMARY JUDGMENT

This action concerns the alleged breach of two commercial guaranties by defendant, who guaranteed payment under two now expired commercial leases. Plaintiff, as landlord, entered into a commercial lease with MDNMA, Inc. d/b/a 6th Avenue Gifts (“MDNMA”) dated August 7, 2018, wherein MDNMA agreed to rent from plaintiff the store and basement located at 1024 6th Avenue, New York New York, to be used as a retail store (“1’024 Sixth Avenue’ or ‘MDNMA’ premises”), and defendant guaranteed MDNMA’s payment obligations under the lease. The original term of the lease was from August 1, 2018, through January 7, 2022, but plaintiff alleges that same was terminated as of March 10, 2021, via a Notice to Terminate dated March 3, 2021 (NYSCEF Doc. No. 1, *summons and complaint*, ¶6-7). In addition to the fixed minimum rent, the lease required payment of additional rent items such as garbage collection, electricity, real estate taxes, legal fees, etc. Plaintiff sets forth that MDNMA still remains in the 1024 Sixth Avenue premises after the lease termination date, without plaintiff’s consent. As such, plaintiff is seeking the sum of \$132,300.00 for the period of July 1, 2021, to August 31, 2021, as rental arrears and ongoing use and occupancy amounts, plus additional damages which continue to accrue (first cause of action).

Plaintiff further sets forth that its predecessor in interest, Enki Properties N.V. Ltd., entered into another commercial lease with MSSMINJA, Inc. d/b/a Gifts on Sixth (“MSSMINJA”) on August 7, 2018, for use of its commercial space (“‘1032 Sixth Avenue’ or ‘MSSMINJA’ premises”) located at 1032 Sixth Avenue, New York, New York, as a retail store, from August 1, 2018, through January 7, 2022, and defendant guaranteed MSSMINJA’s payment obligations under the lease. Plaintiff alleges that the lease was terminated as of February 16, 2021 (“MSSMINJA Lease Termination Date”) via a Notice to Terminate dated February 9, 2021, but MSSMINJA continues to remain in possession of the 1032 Sixth Avenue premises as a holdover tenant. Plaintiff avers that it has duly requested payment of the amount due, but defendant has not made any payments. As such, plaintiff is seeking rent and additional rent owed by MSSMINJA in the amount of \$283,228.00 for the period starting April 1, 2020, through the MSSMINJA lease termination date, and holdover use and occupancy in the sum of

\$165,360.00 for the period of July 1, 2021, to August 31, 2021, plus additional damages which continue to accrue (second cause of action). Plaintiff also seeks reimbursement of legal costs, and costs and disbursement for enforcing its rights under the respective leases (third cause of action).

In his answer, defendant denies plaintiff's allegations and asserts the following affirmative defenses: rent abatement based on frustration of purpose (first affirmative defense); reduction of rent based on impossibility of performance (second affirmative defense); forbearance based on COVID-19 hardship (third affirmative defense); harassment and obstruction of justice (fourth affirmative defense); estoppel (fifth affirmative defense); lack of jurisdiction (sixth affirmative defense); waiver (seventh affirmative defense); laches (eighth affirmative defense); unclean hands (ninth affirmative defense); failure to mitigate damages (eleventh affirmative defense); excuse (twelfth affirmative defense); duress (thirteenth affirmative defense); bad faith and harassment (fourteenth affirmative defense); misrepresentation (fifteenth affirmative defense); and, documentary evidence (sixteenth affirmative defense).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment in its favor and against defendant for breach of the MDNMA and MSSMINJA guaranties (first and second causes of action), and dismissal of defendant's affirmative defenses; a money judgment in favor of plaintiff against defendant in the sum of \$198,450.00 for holdover use and occupancy of the MDNMA premises for the period of July 1, 2021 through September 30, 2021, plus holdover use and occupancy as it continues to accrue at the monthly rate of \$66,150.00; money judgment in favor of plaintiff against defendant in the sum of \$248,040.00 for holdover use and occupancy of the MSSMINJA premises for the period of July 1, 2021 through September 30, 2021, plus holdover use and occupancy as it continues to accrue at the monthly rate of \$82,680.00; and legal fees and expenses incurred herein (NYSCEF Doc. No. 6, *notice of motion*).

Plaintiff attaches a statement of material facts iterating the facts above. Plaintiff also argues that it is entitled to summary judgment because the affidavit of Solomon H. Mendel, its managing agent, and the accompanying documents demonstrate that defendant entered into the written guaranties promising to be liable for all of MDNMA's and MSSMINJA's financial obligations under their respective leases, as well as, legal fees. Plaintiff further contends that defendant's affirmative defenses are conclusory and lack factual basis, and therefore should be dismissed (NYSCEF Doc. No. 24, *memo*, pg. 3-4). Plaintiff articulates that the COVID-19 related affirmative defenses also fail because the Appellate Division, First Department has rejected these defenses in cases involving retail stores. Plaintiff also posits that defendant is barred from raising defenses and counterclaims because he unconditionally guaranteed performance of both the MDNMA and the MSSMINJA leases (*id.*, at pg. 6-11).

Defendant opposes plaintiff's motion and files a cross-motion to dismiss the complaint pursuant to CPLR 3211(a)(1) based upon documentary evidence; CPLR 3211(a)(2) for lack of jurisdiction; CPLR 3211(a)(4) on the grounds that another matter is pending in New York Civil Court captioned *Enki Properties LLC v MDNMA* (LT-304671-21/NY); and alternatively, to dismiss the complaint under CPLR 602(b) and consolidate it with the pending action (NYSCEF Doc. No. 27, *notice of cross-motion to dismiss complaint*). Defendant proffers in his affidavit

that he lives in Pennsylvania and has never been a tenant of plaintiff at the MDNMA premises. He also asserts that he signed a purported guaranty for the lease under some pretext, as he was not made fully aware of his obligations as a guarantor and thus should not be held liable for the financial obligations of tenant. Defendant further articulates that plaintiff has already filed an action against MDNMA, Inc. in the Civil Court and he has filed a hardship declaration (NYSCEF Doc. No. 29, *def's affidavit in opposition and in support of cross-motion*). Defendant, through his attorney's affirmation, argues that by pursuing this action in this court, despite his filing of a COVID-19 hardship declaration, plaintiff's instant action constitutes harassment as described in the Administrative Code of City of NY § 22-902(a), which prohibits landlords from harassing commercial tenants adversely impacted by the COVID-19 pandemic (NYSCEF Doc. No. 28, *def's attorney affirmation*, pg. 3). Defendant further asserts that in the interest of swift and convenient judicial resolution, the Civil Court matter and the instant action should be consolidated and decided together. Lastly, defendant contends that the COVID-19 pandemic absolves defendant of his contractual obligations under the doctrine of impossibility of performance and frustration of purpose (*id.*, at pg 5).

In reply, plaintiff maintains that because defendant did not attach a counter statement of material facts, the facts asserted therein are deemed admitted (NYSCEF Doc. No. 30, *reply*, ¶9). Concerning defendant's claim that the current action constitutes tenant harassment, plaintiff argues that it cannot engage in tenant harassment where no tenant is party to this action, as this action is against defendant, who is the guarantor to the leases. Plaintiff posits that the hardship declaration filed by defendant has no effect on the action herein for enforcement of the guaranties, and should be disregarded because the hardship declaration is not suited for use in a non-eviction action, and that defendant's signing of the hardship declaration itself is faulty in that defendant is not the owner, chief executive, officer, president, or an officer of a business that is a tenant under the leases (*id.*, at ¶25-26).

Plaintiff further asserts that defendant, a guarantor, cannot assert the defenses of impossibility and frustration of purpose. Plaintiff similarly challenges defendant's claim that he should not be held liable for his obligations under the guaranties because he purportedly signed them under "pretext." The argument, claims plaintiff, is meritless because plaintiff does not claim "he is unable to read, or that the documents were written in a language that he does not speak, or that [d]efendant could not see" and that he "fails to identify any misrepresentations whatsoever made to him by [p]laintiff" (*id.*, at ¶41-57). Plaintiff lastly argues that defendant's cross-motion to dismiss and/or consolidate the instant action with the summary proceeding pending in Civil Court should be denied for three reasons: a summary proceeding in the Civil Court is the preferred forum for landlord-tenant disputes, and should generally not be consolidated with a Supreme Court action; the instant action and the summary proceeding in the Civil Court do not share common questions of law and fact as required for consolidation; and defendant has not shown that there is another action pending between the "same parties" (*id.*, at ¶58-67).

It is well-settled that the proponent of a summary judgment motion 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).

A landlord seeking summary judgment against a guarantor satisfies its *prima facie* evidentiary burden by proving the existence of a guaranty agreement with an absolute and unconditional guaranty, a debt owed by tenant to landlord, and guarantor’s failure to pay under the agreement (*see L. Raphael NYC CI Corp. v Solow Bldg. Co., LLC*, 206 AD3d 590, 592-593 [1st Dept 2022]).

When considering a defendant’s motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].)

As an initial matter, the court is required to address the jurisdictional question raised. Defendant’s contention that this court lacks jurisdiction of the subject matter, pursuant to CPLR 3211(a)(2), is unavailing insofar as he fails to advance any viable arguments in furtherance of this claim. It is well-settled that “New York’s Supreme Court is a court of original, unlimited and unqualified jurisdiction” thus, “it is competent to entertain all causes of action” (*HSBC Guyerzeller Bank AG v Chascona N.V.*, 42 AD3d 381, 384 [1st Dept 2007].) Furthermore, plaintiff may commence an action in any county of New York, pursuant to CPLR 509. Therefore, defendant has failed to demonstrate entitlement to dismissal of this action based on lack of jurisdiction over this matter.

Turning next to plaintiff’s motion for summary judgment, the court finds that it has established its *prima facie* entitlement to summary judgment on its breach of guaranty claims asserted insofar as it has attached both the MDNMA and MSSMINJA guarantees bearing defendant’s signature in which he agreed to be absolutely and unconditionally responsible for the tenants’ financial responsibilities under the respective leases (NYSCEF Docs 13;15, *MDNMA; MSSMINJA guaranties*). Plaintiff further proffers both the MDNMA and MSSMINJA termination notices asserting that tenant breached the terms of the respective leases by failing to pay rent and additional rent (NYSCEF Docs 18;21, *MDNMA; MSSMINJA termination notices*). Addressing now the use and occupancy claims, defendant has made a sufficient showing that both MDNMA and MSSMINJA remain in possession of the respective premises without plaintiff’s consent, have failed to make payments for the use and occupancy, and therefore defendant is liable to plaintiff for tenants’ use and occupancy charges as contemplated under the leases (NYSCEF Doc. Nos. 13, 15, *Guaranty*, ¶3; *see C & N Camera & Elecs. v Farmore Realty*, 178 AD2d 310, 311 [1st Dept 1991]).

As the burden shifts, defendant has failed to establish the existence of a material issue of fact precluding summary judgment on the breach of guaranty claim and tenants ongoing use and occupancy of the respective premises. Defendant’s argument that the COVID-19 defenses such as impossibility of performance and frustration of purpose are sufficient grounds for him not to

perform under the contract is 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].) This court also rejects defendant's contention that the initiation of this action against the defendant during a pandemic constitutes commercial tenant harassment in violation of NYC Admin. Code § 22-902(a), insofar as defendant does not specify the subsection he is moving under and further, that since defendant is not a commercial tenant at the premises, but rather a guarantor, same does not apply (NYSCEF Doc. No. 29, *def's affidavit*, ¶6). Likewise, defendant's argument that he should not be held liable because plaintiff did not explain his legal responsibilities to him as he signed the guaranties is unavailing insofar as it has been held that "absent any evidence of fraud, one who signs a document is bound by its terms" (*Matter of Aoki v Aoki*, 27 NY3d 32, 42 [2016]; see *Blog v Battery Park City Auth.*, 234 AD2d 99, 100 [1st Dept 1996]). Defendant, here, has failed to raise a triable issue of fact that he signed the guaranties because of fraud or other wrongful conduct attributable to plaintiff. 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 and grants plaintiff's motion to the extent it seeks damages against the defendant based on breach of guaranties (first and second causes of action). The court takes judicial notice of a judgment of possession with money judgment in the Civil Court case in favor of plaintiff (NY St Cts Elec Filing [NYSCEF] Doc. No. 44, judgment, in *Enki Properties LLC v MDNMA Inc. dba 6<sup>th</sup> Avenue Gifts.*, NY County Civil Court, Index No. LT-304671-21/NY). And, insofar as the court cannot ascertain the ongoing use and occupancy incurred, same shall be referred to the special referee to hear and determine.

Turning next to defendant's cross-motion to dismiss plaintiff's complaint pursuant to CPLR 3211(4), it has been ably established that a court may dismiss an action "where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*Sprecher v Thibodeau*, 148 AD3d 654, 656 [1st Dept 2017].) Here, defendant has neither demonstrated that the *Enki Properties LLC v MDNMA* matter in the Civil Court is substantially similar to the instant action, that the relief sought is substantially the same nor are the parties the same in both actions. Notably, plaintiff asserts in its reply that, the relief sought in the instant action is a money judgment against defendant as guarantor based on both the MDNMA and MSSMINJA guaranties, whereas the main relief sought in the Civil Court proceeding is a judgment of possession against MDNMA (not MSSMINJA) based on a default under the MDNMA lease (NYSCEF Doc. No. 30, *reply*, ¶65). Hence, defendant's cross-motion to dismiss plaintiff's complaint pursuant to CPLR 3211(4) and to consolidate is denied.

Plaintiff has also 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, both the MDNMA and MSSMINJA guarantees provide 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 also be determined by the special referee. 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 is granted; and it is further

**ORDERED** that judgment is awarded to plaintiff and against defendant, and the Clerk of the Court is directed to enter judgment against defendant in the amount of \$198,450.00 (MDNMA’s holdover use and occupancy for the period of July 1, 2021 through September 30, 2021) and \$249,040.00 (MSSMINJA’s holdover use and occupancy for the period of July 1, 2021 to September 30, 2021), together with interest, costs and disbursements as calculated by the Clerk of the Court; and it is further

**ORDERED** that that branch of the motion seeking attorney’s fees and ongoing use and occupancy shall be referred to a special referee to determine; and it is further

**ORDERED** that defendant’s affirmative defenses are dismissed; and it is further

**ORDERED** that defendant’s cross-motion to dismiss plaintiff’s complaint is denied; 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 decision and order, with notice of entry, upon defendant, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further; 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](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of this court.

August 30, 2023

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<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 checked="" type="checkbox"/> FIDUCIARY APPOINTMENT
		<input checked="" type="checkbox"/> REFERENCE