

Yarrow Two LLC v Khatibi

2023 NY Slip Op 33293(U)

September 20, 2023

Supreme Court, New York County

Docket Number: Index No. 650081/2023

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 41

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YARROW TWO LLC,

Plaintiff

Index No. 650081/2023

-against-

DECISION AND ORDER

KIAN KHATIBI,

Defendant

-----X

LUCY BILLINGS, J.S.C.:

Plaintiff landlord Yarrow Two LLC moves for summary judgment in lieu of a complaint to enforce a guaranty, "an instrument for the payment of money only," against defendant guarantor Khatibi. C.P.L.R. § 3213. Khatibi executed the guaranty August 1, 2019, on behalf of nonparty Hopkins Hawley LLC, a commercial tenant of premises owned by Yarrow Two. Khatibi is Hopkins Hawley LLC's managing member. Yarrow Two claims that Khatibi has failed to make payment pursuant to the guaranty despite Yarrow Two's demand.

Yarrow Two, to meet its prima facie burden upon its motion for summary judgment in lieu of a complaint, must demonstrate the guaranty, the underlying debt, the guarantor's failure to perform under the guaranty, and the absence of any requirement in the guaranty for plaintiff's additional performance as a condition precedent to payment. Cooperatieve Centrale Raiffeisen-

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Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v. Navarro,
25 N.Y.3d 485, 492 (2015); BBM3, LLC v. Vosotas, 216 A.D.3d 403,
403-404 (1st Dep't 2023).

The guaranty provides that:

3. A. . . . Guarantor [Khatibi] hereby absolutely, jointly and severally . . . , unconditionally and irrevocably guarantees the full and punctual payment, performance and fulfillment, in accordance with the Lease, when due of all of the Obligations and hereby covenants and agrees that if Tenant [Hopkins Hawley] shall fail to pay, perform or fulfill any of the Obligations, Guarantor will promptly pay, perform or fulfill the same. Guarantor hereby agrees to reimburse Owner [Yarrow Two] for all costs and expenses, including reasonable out-of-pocket attorneys' fees (collectively, 'Enforcement Costs') which Owner incurs in connection with or incidental to the enforcement of any of Guarantor's obligations under this Guaranty. Any amounts due hereunder shall be payable by Guarantor to Owner within five (5) business days after demand therefor by wire transfer of immediately available funds to such account as Owner may from time to time direct.

. . . .

12. Guarantor shall not set up or claim any defense, counterclaim, setoff or other objection of any kind to any demand or claim, or to any action or proceeding, at law, in equity or otherwise, made or brought at any time hereunder by Owner except for those of the foregoing which would otherwise be deemed waived if not asserted by Guarantor. Any other claim Guarantor might have against Owner shall be separately prosecuted.

Aff. of Dan Mogolesko Ex. A, NYSCEF Doc. 4.

Dan Mogolesko, Senior Vice President of Yarrow Two's managing agent, authenticates the guaranty and Hopkins Hawley's lease with Yarrow Two and attests that that Hopkins Hawley failed to pay the annual fixed rent and additional rent due pursuant to

yarrow2923

the lease for July 1, 2021, through December 13, 2022. He further attests that on December 15, 2022, Yarrow Two served Khatibi with a demand to pay Hopkins Hawley's guaranteed arrears within five days pursuant to the guaranty's terms and that Khatibi failed to pay those guaranteed arrears. Mogolesko's affidavit and the documentary evidence establish Yarrow Two's prima facie claim pursuant to C.P.L.R. § 3213 that Khatibi is liable under the guaranty.

Khatibi does not contest any of Mogolesko's allegations. Instead, Khatibi seeks to interpose affirmative defenses and counterclaims, alleging frustration of the lease's purpose, performance barred by a force majeure, and plaintiff's breach of the implied covenant of good faith and fair dealing and commercial tenant harassment, and seeking attorneys' fees. Khatibi's affirmative defenses and counterclaims are claims that belong to the tenant Hopkins Hawley, not the guarantor Khatibi, who voluntarily waived his rights to interpose defenses and counterclaims in this action in ¶ 12 of the guaranty. Such waivers are valid. Benefit St. Partners Operating Partnership, L.P. v. 96 Wythe Acquisition LLC, 191 A.D.3d 520, 520 (1st Dep't 2021); Fortress Credit Corp. v. Hudson Yards, LLC, 78 A.D.3d 577, 577 (1st Dep't 2010).

Finally, because the Guaranty Law, N.Y.C. Admin. Code § 22-1005, bars recovery for defaults of personal guaranties for
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commercial rent from March 7, 2020, through June 30, 2021, Yarrow Two seeks to enforce Khatibi's obligations under the guaranty for unpaid rent accruing after June 30, 2021, only. Therefore the court grants plaintiff's motion for summary judgment on defendant's liability for unpaid rent, additional rent, and attorneys' fees due after June 30, 2021, under the guaranty, without prejudice to any claims by Hopkins Hawley against plaintiff. C.P.L.R. § 3213.

Upon the parties' stipulation on the record June 15, 2023, the court refers the issues of the amount defendant owes for unpaid rent, additional rent, and attorneys' fees due after June 30, 2021, under the guaranty to the Special Referee Clerk for placement on the calendar of the Special Referees' Part. C.P.L.R. § 4317(b). At the initial appearance the Special Referee Clerk shall assign the issues to a Judicial Hearing Officer (JHO) or Special Referee for a hearing and determination. C.P.L.R. § 4317(b). Within 15 days after entry of this order, plaintiff shall serve the order on defendant and shall submit to the Special Referee Clerk a completed Information Sheet accessible at the "References" link on the court's website. The Special Referee Clerk then shall advise the parties of the date to appear on the Special Referees' Part calendar. The parties shall appear on that date with all witnesses and other evidence the parties seek to introduce and shall be ready to proceed with

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the assessment of rent, additional rent, and attorneys' fees owed. Unless the assigned JHO or Special Referee orders otherwise, the assessment shall proceed from day to day.

DATED: September 20, 2023

LUCY BILLINGS, J.S.C.