

**Kretschmann v Sturm**

2024 NY Slip Op 32395(U)

July 7, 2024

Supreme Court, New York County

Docket Number: Index No. 654388/2022

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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KLAUS KRETSCHMANN,		INDEX NO. <u>654388/2022</u>
Plaintiff,		MOTION DATE <u>--</u>
- v -		MOTION SEQ. NO. <u>001</u>
KEN STURM,		
Defendant.		<b>DECISION + ORDER ON MOTION</b>

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49  
were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

In motion 001, plaintiff Klaus Kretschmann (Receiver)<sup>1</sup> moves pursuant to CPLR 3213 for summary judgment in lieu of complaint to enforce defendant Ken Sturm's March 7, 2018 guaranty in the amount of \$3,006,434.36, together with interest, attorneys' fees, costs, disbursements, and all other applicable charges.

<sup>1</sup> The court appointed Kretschmann as receiver in the matter of Wilmington Trust, National Association, as Trustee, for the benefit of the Holders of CD 2016-CD2 Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2016-CD2; Wilmington Trust, National Association, as Trustee, for the benefit of the registered holders of JPMDB Commercial Mortgage Securities Trust 2017-05, Commercial Mortgage Pass-Through Certificates, Series 2017-05; Deutsche Bank Trust Company Americas, as Trustee, on behalf of the registered Holders of Citigroup Commercial Mortgage Trust 2017-P7, Commercial Mortgage Pass-Through Certificates, Series 2017-P7; and Wells Fargo Bank, National Association, as Trustee, on behalf of the registered Holders of CD2017-CD3 Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2017-CD3 against Elmwood NYT Owner, LLC; Landings NYT Owner, LLC; Oakwood NYT Owner, LLC; Walkill NYT Owner, LLC; Board of Managers 229 West 43rd Street Condominium; Criminal Court of the City of New York; Global Security Group Inc. (Index No. 850176/2020, NYSCEF Doc. No. [NYSCEF] 65, Receiver Order.)

Sturm cross moves to dismiss pursuant to CPLR 3211 (1), (7), and (8), and the Administrative Code of the City of New York § 22-1005. Sturm argues that the 3213 motion is procedurally defective due to short service, leaving this court without jurisdiction. Sturm also attacks the Receiver's use of CPLR 3213, arguing that the guaranty is not an instrument for the payment of money only. If this is a valid proceeding, then Sturm next argues that the guaranty is unenforceable pursuant to a 2021 NYC COVID-19 regulation, Administrative Code § 22-1005. Sturm also questions the foundation for the accounts receivable report that the Receiver relies on to show that tenant The Ribbon Worldwide 44 LLC (Ribbon) failed to pay rent since 2020. Finally, Sturm objects on procedural grounds because the Receiver has not made a proper demand for real estate tax escalation charges, electric or water, sewage and steam charges as required by a lease for premises located at 229 West 43rd Street (Lease), or electric charges. (NYSCEF 18, Lease §§7.2[b], 7.1[f], 7.3, 10.3.)

On March 7, 2018, landlord Elmwood NYT Owner LLC, Oakwood NYT Owner LLC, Wallkill NYT Owner LLC and Landings NYT LLC entered into the Lease with the Ribbon. (*Id.* at 1.) The Receiver is the successor in interest to landlord. (Index No. 850176/2020, NYSCEF 65, Receiver Order.) On September 15, 2021, Sturm and the Receiver negotiated a lease amendment pursuant to which Sturm reaffirmed his guaranty of the lease (Lease Amendment). (NYSCEF 17, Kretschmann aff ¶¶6, 8; NYSCEF 20, Lease Amendment §5.) The Ribbon waived all defenses under the general guaranty waiver and the specific waiver of COVID-19 defenses. (NYSCEF 20, Lease Amendment § 7.) The parties agreed to a reduction in rent contingent on the

Ribbon paying its lease obligations. (*Id.* § 3 [b].) The Ribbon would be liable for the waived rent as additional rent if the Ribbon defaulted on the Lease Amendment. (*Id.*)

Soon after the Lease Amendment was executed in September 2021, the Ribbon stopped paying rent. (NYSCEF 17, Kretschmann aff ¶9.)

For the reasons stated on the record, the court rejected Sturm's procedural objection of short service. (NYSCEF 47, tr at 28:19-29:5, 29:14-30:5.) Sturm agreed to this court's jurisdiction in the guaranty. (NYSCEF 19, Guaranty ¶14.) Accordingly, the court rejects Sturm's cases dismissing 3213 motions for lack of jurisdiction; none of the cases involved consent to jurisdiction. Sturm was served with a summons on November 30, 2022. (NYSCEF 10, Aff of Service.) "Because personal jurisdiction has been acquired by the service of the summons, late service of a motion does not affect jurisdiction." (*Plaza 400 Owners Corp. v Resnicoff*, 168 Misc 2d 837, 839 [Civ Ct, NY County 1996].) Nevertheless, short service of the motion was corrected by amending the Notice of Motion (NYSCEF 14), and there was no prejudice. (*Plaza 400 Owners Corp.*, 168 Misc 2d at 839.) Indeed, Sturm did not request additional time, but cross moved to dismiss on a variety of grounds.

For the reasons stated on the record, the court found that the Receiver satisfied the requirements of CPLR 3213. To establish a prima facie case for summary judgment in lieu of complaint, plaintiff shall (1) produce the agreement executed by a defendant; (2) demonstrate the instrument is for the payment of money only; and (3) establish defendant's failure to pay. (See *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015].) To satisfy this standard, a plaintiff need only submit (1) the instrument sued upon, and (2) an

affidavit of nonpayment. (*Poah One Acquisition Holdings V Ltd. v Armenta*, 96 AD3d 560, 560 (1st Dept 2012].) The Receiver submitted the guaranty and an affidavit delineating the failure to pay. (NYSCEF 19, Guaranty; NYSCEF 6, Nov. 15, 2022 Kretschmann aff; NYSCEF 17, Dec. 27, 2022 Kretschmann aff.) Sturm explicitly agreed to “absolute, unconditional and irrevocable ... guarantee of payment ... (and not merely of collection).” (NYSCEF 19, Guaranty ¶4.) To the extent there are performance obligations in the guaranty, they do not preclude a 3213 motion “where, as here, performance is not a condition precedent to payment.” (*45-47-49 Eighth Ave. LLC v Conti*, 220 AD3d 473, 473 [1st Dept 2023].) “The existence of various clauses contained in a contractual agreement in addition to the unconditional promise to pay money does not necessarily disqualify the agreement as an instrument for the payment of money only.” (*First Interstate Credit Alliance., Inc. v Sokol*, 179 AD2d 583, 584 [1st Dept 1992] [citation omitted].) Accordingly, the guaranty is an instrument for the payment of money only.

Hence, the issue is the amount of the judgment against Sturm. The Receiver seeks \$3,006,434.36 which is comprised of:

1. Receiver waived arrearage of **\$2,163,885.44**<sup>2</sup> for the period of April 1, 2020 to April 30, 2021.<sup>3</sup> (NYSCEF 17, Kretschmann aff ¶¶14-15; NYSCEF 20, Lease Amendment §3 [a].)
2. Electricity in the amount of **\$126,980.68**, for the period August 2021 through August 2022. (NYSCEF 17, Kretschmann aff ¶12; NYSCEF 18, Lease §10.3.)

<sup>2</sup> The waived arrearage of \$2,163,885.44, is reduced by \$350,000, the amount that the Receiver subsequently recovered on a Letter of Credit. (NYSCEF 17, Kretschmann aff ¶15; NYSCEF 45, Robson Feb. 9, 2024 letter informing court that proceeds are held in escrow.) Accordingly, the waived arrearage that the Receiver seeks is **\$1,813,855.44**.

<sup>3</sup> Sturm challenges this amount based on the NYC COVID-19 regulation because it falls during the Protected Period.

3. Water and sewage charges in the amount of **\$17,674.78** for the period September 2021 through August 2022. (NYSCEF 17, Kretschmann aff ¶12; NYSCEF 18, Lease §§10.3, 7.1, and at 4.)
4. Monthly Tax Arrearage payments totaling **\$119,936.24**,<sup>4</sup> for the period May 1, 2021 through July 31, 2021. (Kretschmann aff ¶ 12; NYSCEF 20, Lease Amendment §3[a].)
5. Percentage Rent in the amount of **\$6,344.38** for the month of October 2021. (NYSCEF 17, Kretschmann aff ¶12; NYSCEF 20, Lease Amendment §3[c].)
6. Steam in the amount of **\$41.47** for the period from January 2022 through November 2022. (NYSCEF 17, Kretschmann aff ¶12; NYSCEF 18, Lease §7.1[f], and at 4.)
7. Modified Fixed Rent in the amount of **\$200,000** for the period from December 2021 to January 2022 and June to October 2022. (NYSCEF 17, Kretschmann aff ¶12; NYSCEF 20, Lease Amendment §3[c].)
8. Monthly Arrearage Payments totaling **\$383,333.28**<sup>5</sup> for the period September 2021 to January 2022 and May to November 2022. (NYSCEF 17 Kretschmann aff ¶12; NYSCEF 20, Lease Amendment §3[a].)
9. Real estate taxes in the amount of **\$331,404.79** for the period 2022 to 2023. (NYSCEF 17, Kretschmann aff ¶12; NYSCEF 18, Lease §7.1[b], and at 4.)
10. Interest in the amount of **\$6,833.30**.<sup>6</sup> (NYSCEF 17, Kretschmann aff ¶12; NYSCEF 18, Lease §19.1[a].)

Sturm challenges any amounts sought for the period from March 7, 2020 to June 30, 2021 based on NYC COVID-19 restrictions. Section 22-1005 of the Administrative Code, entitled “Personal liability provisions in commercial leases,” and effective May 26, 2020 (Covid Statute), provides:

“A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant

<sup>4</sup> Sturm challenges this amount based on the NYC COVID-19 regulation because it falls during the Protected Period.

<sup>5</sup> Sturm challenges this amount based on the NYC COVID-19 regulation because it falls during the Protected Period.

<sup>6</sup> For an unspecified period, and thus, arguably stemming from the Protected Period.

under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):

(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;

(b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

(c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. 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.) The statute was amended in September 2020 to include a provision “relating to such a lease or other rental agreement.” (See Local Law No. 98 [2020] of City of NY §1.) The New York City Council also clarified its “intent that [the statute's] personal liability protections apply regardless of whether a personal liability provision appears within a commercial lease ... itself or ... a separate agreement relating to the same property.” (See Local Law No. 98 [2020] of City of NY §1, Declaration of Legislative Intent and Findings ¶ 11.)

The question is whether Sturm’s default occurred during the statutory period. Sturm challenges \$2,265,195.68 of the \$3 million, and other amounts sought by the Receiver, as barred by the Covid Statute because the defaults occurred during the protected period of March 7, 2020 to June 30, 2021 (Protected Period). The Receiver

asserts that the default occurred after the Protected Period because the Receiver waived the Ribbon's earlier defaults unless the Ribbon defaulted in payment going forward under the Lease Amendment. Moreover, the Ribbon waived all defenses under the general guaranty waiver and the specific waiver of COVID-19 defenses. The Covid Statute does not expressly prohibit waiver of a statutory protection as required by *Estro Chem. Co. v Falk*, 303 NY 83 (1951). (*Id.* at 87 ["we think that the express provision of the statute now under consideration and public policy require a holding in cases such as this, involving as it does excessive payment of rent, that under no circumstances may tenants waive or release or otherwise settle by agreement their right to recover rent paid in excess of that permitted by law. This is in accord with holdings that a 'statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy'" (citations omitted)].) The arrearage waiver in the Lease Amendment distinguishes this case from *Diamond 47 Nails Inc. v L'Envie Hair Studio, Inc.*, 2022 NY Slip Op 30932(U) (Sup Ct, NY County 2022), where the defaults very clearly occurred during the Protected Period. Finally, Sturm's argument that there is no waiver is confounding since the Lease Amendment very clearly provides for a waiver: "Notwithstanding anything to the contrary contained herein, Landlord hereby waives the Fixed Rent due and payable for the period commencing on May 1, 2021 and ending on July 31, 2021 (i.e., \$562,500.00) (the 'May - July Arrearage')." (NYSCEF 20, Lease Amendment §3[a].) In another provision, the parties agreed:

"Provided that Tenant is not in default under the Original Lease or this Amendment, without limitation of Landlord's right to deliver an updated Landlord's Operating Statement or Landlord's Tax Statement and Tenant's obligation to pay any discrepancy pursuant to Sections 7.2 and 7.3 of the Original

Lease, Landlord shall waive the remainder of the Arrearage and all of the May - July Arrearage (i.e., \$2,163,885.44) (the 'Waived Arrearage'). If the Term of the Lease is terminated prior to its stated expiration date for any reason not the result of Landlord's default, then in addition to all other damages and remedies provided in the Lease or by law for Landlord, Landlord shall be entitled to return of the total amount of the Waived Arrearage, which sum shall be deemed Additional Rent due and owing prior to such termination of the Term of the Lease. The obligation of Tenant to pay such Additional Rent to Landlord shall survive the termination of the Term of the Lease." (*Id.* §3[b].)

Sturm reaffirmed the guaranty in the Lease Amendment. Therefore, the court finds that the operative defaults occurred after September 2021 – subsequent to the Protected Period. Sturm's strategy of repeating that defaults occurring during the Protected Period are exempt and citing cases to that effect does not change the fact that the defaults here occurred afterwards. Reviving the waived arrearage does not violate the City Council's intent in enacting the Covid Statute. (*Cf. Diamond 47 Nails Inc.*, 2022 NY Slip Op 30932[U], \*4.) The Receiver waived the defaults during the Protected Period, meaning neither the Ribbon nor Sturm were responsible for defaults during the Protected Period. Such waiver goes beyond the intent of the Covid Statute which simply terminates a guarantor's responsibility for rent payment defaults during the Protected Period: the tenant remains liable for payments during the Protected Period. This is not an end run around the Covid Statute, but proceeding exactly as Justice Engoron suggested in *Diamond 47 Nails, Inc.* (*Id.*)

The Receiver's initial motion establishes his prima facie case with the guaranty and Receiver's affidavit. (See *Poah One Acquisition Holdings V Ltd.*, 96 AD3d at 560.) The Receiver is capable of and has established the foundation for the accounts receivable report. (NYSCEF 17, Kretschmann aff ¶1.) Accordingly, the burden shifted to Sturm, but he has failed to satisfy his burden.

The court rejects Sturm's objection to various charges based on the absence of notice. Sturm waived notice of any demands for such charges. (NYSCEF 19, Guaranty ¶4.) The Receiver's affidavit and accounts receivable report is sufficient to evidence that these charges are owing. Sturm does not challenge that the amounts are owing, only that he did not receive notices consistent with the Lease, but the latter argument was waived. However, the court rejects the Receiver's request for interest in the amount of **\$6,833.30** because the Receiver failed to explain the calculation and time period. (NYSCEF 17, Kretschmann aff ¶12; NYSCEF 18, Lease §19.1[a].) Likewise, the default in paying the Monthly Tax Arrearage totaling **\$119,936.24**, for the period May 1, 2021 through June 30, 2021 occurred during the Protected Period. (NYSCEF 17, Kretschmann aff ¶12; NYSCEF 20, Lease Amendment §3[a].) However, it was not waived by the Receiver in the Lease Amendment and thus not recoverable under the Guaranty. Accordingly, the court calculates a monthly tax arrearage of \$39,978.74 and deducts \$79,957.48.

The court has considered Sturm's remaining arguments and finds them without merit or otherwise not requiring an alternate result.

The court finds that Sturm is liable for **\$2,919,643.40**.<sup>7</sup>

In addition, the Receiver is entitled to attorneys' fees under the Guaranty §19.1(a).

Accordingly, it is

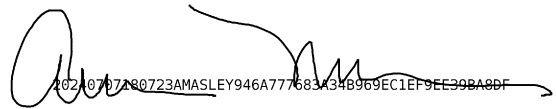
ORDERED that the plaintiff's motion for summary judgment in lieu of complaint is granted on default, and the Clerk of the Court is directed to enter judgment in favor of

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<sup>7</sup> \$3,006,434.36 – \$6,833.30 – 79,957.48.  
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plaintiff and against defendant in the sum of **\$2,919,643.40**, with statutory interest from the date of September 30, 2021, the date of the default, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Receiver shall submit to the court by NYSCEF and email an affidavit of services including attorney bios within 30 days. Sturm may object within 10 days from receipt.



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7/7/2024

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE