1 Madison Off. Fee LLC v Wander
2025 NY Slip Op 33366(U)
September 5, 2025
Supreme Court, New York County
Docket Number: Index No. 652418/2024
Judge: Phaedra F. Perry-Bond
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PHAEDRA F. PERRY-BOND — *Justice* — PART 35

INDEX NO. 652418/2024

MOTION DATE 01/17/2025

MOTION SEQ. NO. 001

1 MADISON OFFICE FEE LLC
Plaintiff,

- v -

JOSH WANDER,
Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 were read on this motion to/for JUDGMENT – SUMMARY. Upon the foregoing documents, plaintiff's motion for summary judgment is granted, and defendant's cross-motion is denied.

Factual and Procedural History

This action involves a commercial lease for the entire rentable portion of the 27th floor of 1 Madison Avenue, New York, NY, between plaintiff, 1 Madison Office Fee LLC (Landlord), tenants, 77 Partners LLC and 600 Partners LLC (collectively, Tenants) and a personal guaranty provided by defendant, Josh Wander (Guarantor) (NYSCEF Doc. No. 1, ⁋⁋1-4).

On January 25, 2023, Landlord and Tenants, all represented by counsel, executed a 96-page lease (NYSCEF Doc. No. 9). As part of the lease, Tenants were to provide a security deposit of $5 million, in either "cash or an unconditional irrevocable letter of credit" on or before February 28, 2023 (NYSCEF Doc. No. 9, Article 50, ⁋50.01(a)). Tenants failed to deliver the security deposit in accordance with the lease (NYSCEF Doc. No. 8, ⁋6).

As a result of Tenants failure to provide the security deposit, Landlord commenced a proceeding to enforce the lease, however, to resolve the issue, on or about October 3, 2023, Landlord and Tenants amended the security deposit portion of the lease by a letter agreement (NYSCEF Doc. No. 8, ⁋⁋7-8; and NYSCEF Doc. No. 10). In connection with same, Landlord required a guaranty to secure payment of the security deposit, which Guarantor executed on October 6, 2023 (NYSCEF Doc. No. 11).

Under the letter amendment, Tenants were required to pay the security deposit in three installments: 1) $1 million on or before September 28, 2023 (which Landlord acknowledged as received); 2) a second installment of $1.5 million on or before November 10, 2023; and 3) a third installment of $2.5 million on or before December 15, 2023 (NYSCEF Doc. No. 10; and NYSCEF Doc. No. 8, ⁋7). The guaranty secured the payment of the final two security deposit installments, totaling $4 million, from Guarantor, who was a manager of Tenants (NYSCEF Doc. No. 11, p. 1).

Among the various requirements in the guaranty, Guarantor:

> "unconditionally guarantees to Landlord the prompt payment when due of each installment of the Remaining Security in accordance with the terms of the Lease Amendment and .. that if default or breach shall at any time be made by [Tenants]… to pay each installment of the Remaining Security when due, … and also all damages that may arise in consequence of the non-performance…. Guarantor shall pay to Landlord on demand, all expenses … relating to the enforcement or protection of Landlord's rights under this Guaranty or under the Lease Amendment" (NYSCEF Doc. No. 11, ⁋1).

While Tenants paid the second security deposit installment, they failed to pay the third installment on or before December 15, 2023 (NYSCEF Doc. No. 6, ⁋13; NYSCEF Doc. No. 8, ⁋9; and NYSCEF Doc. No. 22, ⁋10 and ⁋12). On May 8, 2024, Landlord sent Tenants a notice to cure the default for failing to pay the final security deposit payment (NYSCEF Doc. No. 8, ⁋10; NYSCEF Doc. No. 12).

On May 9, 2024, Landlord commenced this action against Guarantor by filing a summons and verified complaint (NYSCEF Doc. No. 1), and same was served on or about May 14, 2024 (NYSCEF Doc. Nos. 2 and 3). Tenants failed to cure the default, and Landlord terminated the Lease on June 17, 2024 (NYSCEF Doc. No. 29, ⁋13-14).

Guarantor appeared by counsel on or about August 6, 2024, and executed stipulations extending time to respond to Landlord's complaint (NYSCEF Doc. Nos. 4 and 5). On August 20, 2024, Guarantor filed and served an answer, which included an admission Tenants failed to pay the third installment of the security deposit, and listed 17 affirmative defenses (NYSCEF Doc. No. 6, ⁋13 and pp. 4-6).

On January 16, 2025, Landlord filed the instant motion, pursuant to Civil Practice Law and Rules (CPLR) 3212, seeking an order dismissing all of Guarantor's affirmative defenses, and summary judgment on Landlord's first and second causes of action. After filing a stipulation adjourning the motion, and setting up a briefing schedule, Guarantor filed a cross-motion dated February 25, 2025, to lift the discovery stay, pursuant to CPLR 3214(b), compel Landlord to respond to discovery demands, pursuant to CPLR 3214, and denying or continuing Landlord's motion for summary judgment, pending completion of discovery, pursuant to CPLR 3212(f) (NYSCEF Doc. Nos. 20, 21, 22, 23 and 29). Landlord filed opposition to the cross-motion and papers in further support of its' motion, and Guarantor filed a memo of law in reply (NYSCEF Doc. Nos. 31 and 34). Papers for the motion and cross-motion were submitted on March 27, 2025, and oral arguments were held on May 29, 2025.

<u>Discussion</u>

It is well settled "[t]he 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 eliminate

any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a *prima facie* showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). Since summary judgment is a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

The court's function on summary judgment is "issue-finding rather than issue-determination" (*Mayo v Santis*, 74 AD3d 470, 471 [1st Dept 2010]). In deciding the motion, "the court should draw all reasonable inferences in favor of the nonmoving party" and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989] [citations omitted]). " '[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' " to defeat a motion for summary judgment (*Siegel v City of New York*, 86 AD3d 452, 455 [1st Dept 2011], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A) Dismissal of Guarantor's Affirmative Defenses

Landlord's request to dismiss Guarantor's 17 affirmative defenses, pursuant to CPLR 3212, is granted. The terms in the guaranty state:

> "Guarantor hereby expressly waives and releases . . .; (b) the right to interpose any substantive or procedural defense of the law of guarantee . . . except the defense of prior payment or prior performance by [Tenants] . . . ;(e) the right to interpose any defense (except as allowed under (b) above), set off or counterclaim of any nature or description in any action or proceeding; . . ." (NYSCEF Doc. 11, ¶5).

During the negotiation of the lease, letter agreement, and guaranty, both sides were business persons with experienced lawyers, and the Court will not disturb the negotiated terms in the agreement. (*See 425 Fifth Ave. Realty Assoc. v Yeshiva Univ.*, 228 AD2d 178 [1st Dept 1996] quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978].)

B) Summary Judgment on Breach of Contract and Legal Fees

"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" (*4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st Dept 2014] citing *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Here, neither party disputes the existence, or validity, of the lease, the amendment to the lease, the guaranty, or the fact the third security deposit installment of $2.5 million was not paid by Tenants. (*See* NYSCEF Doc Nos. 6, 8, 9, 10, 11, 12 and 29.) Landlord's managing agent affirmed that, "neither Tenant nor [Guarantor] has paid to [Landlord] the 3rd Installment of $2,500,000.00" (NYSCEF Doc. No. 8, ⁋12). Guarantor has not offered any evidence to refute this fact. As such, Landlord meets all three prongs for enforcement of a written guaranty.

However, the guaranty is not directly for payment of rent or damages, but a security deposit. Security deposits are governed by General Obligations Law (GOL) § 7-103, which states:

> "[w]henever money shall be deposited . . . on a contract . . . for the use or rental of real property as security for the performance of the contract or agreement or to be applied to payments upon such contract or agreement when due, such money, . . . until repaid or so applied, shall continue to be the money of the person making such deposit . . . ."

"The security deposit remains the property of the tenant unless and until he has defaulted in his obligations under the lease." (*Rivertower Assoc. v Chalfen*, 153 AD2d 196, 199 [1st Dept 1990] citing GOL § 7-103[1] and *People v Horowitz*, 309 NY 426, 428 [1956].) And when negotiating liquidated damages clauses "parties are free to agree . . . 'provided that the clause is

neither unconscionable nor contrary to public policy'" (*172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assoc.*, 24 NY3d 528, 536 [2014] quoting *Truck Rent-A-Ctr. V Puritan Farms 2nd, Inc.*, 41 NY2d 420, 424 [1977]).

Within the security deposit section of the Lease, the Landlord:

> "may, at its option, . . . use, apply, or retain the whole or any part of the security so deposited . . .to the extent required for the payment of (i) any Fixed Annual Rent and Additional Rent or any other sums as to which Tenant is in default, (ii) any sum which Landlord may expend or may be required to expend by reason of Tenant's default in respect of any of the terms, covenants and conditions of this Lease, including but not limited to, any reletting costs or expenses, (iii) and damages or deficiency in the reletting of the Premises, whether such damages or deficiency accrued before or after summary proceedings or other re-entry by Landlord . . . " (NYSCEF Doc. No. 9, ⁋50.02(a)).

Tenants and Landlord negotiated for the use of the security deposit to be applied against damages in the event of a default (NYSCEF Doc. No. 9, ⁋50.02(a)). " 'Where a contract was negotiated between sophisticated, counseled businesspeople negotiating at arm's length, courts should be especially reluctant to interpret an agreement as impliedly stating something which the parties' specifically did not include" (*Donohue v Cuomo*, 38 NY3d 1, 12-13 [2022] quoting *2138747 Ontario, Inc. v Samsung C&T Corp.*, 31 NY3d 372, 381 [2018][internal quotation marks and citation omitted]). (*See also Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014] ["Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole"].)

What is missing in Landlord's papers is proof of the unpaid rent and/or damages by reason of Tenants' default to be applied against the security deposit. Landlord received the first two payments of the security deposit totaling $2.5 million. However, Landlord provided no evidence the damages it suffered due to Tenants' breach exceeded the $2.5 million security deposit already

on-hand. While liability has been established, Landlord has not proved the amount of damages to be applied against the security deposit.

The Court grants Landlord summary judgment on the issue of liability, as to its first and second causes of action, based on the terms of the lease, letter agreement and guaranty. However, an inquest is required to determine, what, if any, of the outstanding $2.5 million security deposit Guarantor must pay.

C) Guarantor's Cross-Motion for Discovery Under CPLR 3124

The Court is not persuaded by Guarantor's cross-motion to deny or continue the motion for summary judgment, pursuant to CPLR 3212(f), pending completion of the discovery process, or compel Landlord, pursuant to CPLR 3124, to provide requested discovery.

Pursuant to the Part 35 rules, which were published on or about February 4, 2025, "[t]he submission of a motion for summary judgment does **NOT** automatically stay discovery, unless directed by the court." Part 35 rules also state, "[d]iscovery motions may not be filed without first conferencing with the Court. No exceptions" (emphasis omitted). Guarantor's cross-motion was filed on February 25, 2025, well after the part rules were published. As such, Guarantor's cross-motion is moot, as discovery was not stayed and Guarantor filed a cross-motion to compel without first meeting the Part 35 prerequisite of a discovery conference.

Even assuming *arguendo*, the Part 35 rules did not render Guarantor's cross-motion moot, defeating a summary judgment motion on CPLR 3212(f) grounds requires the party seeking further discovery "establish how discovery will uncover further evidence or material in the exclusive possession of the [opposing party]" (*Kent v East 11th Street*, 80 AD3d 106, 114, [1st Dept 2010] (citations omitted). (*See also Berkeley Fed. Bank & Trust v 229 E. 53rd Street Assoc.*, 242 AD2d 489, 490 [1st Dept 1997] There must be an actual likelihood of locating additional relevant

evidence, the mere hope of finding evidence is insufficient (*Kent v East 11th Street*, 80 AD3d at 114, [1st Dept 2010] citing *Neryaev v. Solon*, 6 AD3d 510, 510 [2d Dept 2004]).

Here, the facts establish a lease between Landlord and Tenants, an amendment to same, a guaranty signed by Guarantor, and a subsequent default in the payment of the third installment of the security deposit (NYSCEF Doc Nos. 6, 8, 9, 10 ,11 and 12). The Guarantor does not contest any of those facts. Also, as noted above, the only open issue is determination of the amount of damages suffered by Landlord because of Tenants' default on their contractual obligations, and, if the damages exceed the security deposit the Landlord already has on hand, how much the Guarantor needs to pay of the missing $2.5 million security deposit.

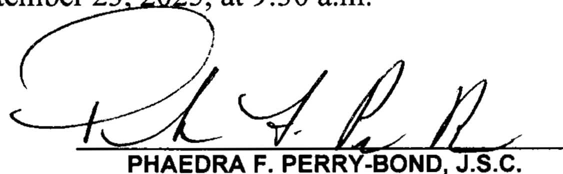
Accordingly, it is hereby:

ORDERED that Guarantor's cross-motion is denied as moot in its entirety; and it is further

ORDERED that Landlord's motion for summary judgment to strike Guarantor's 17 affirmative defenses from his answer is granted; and it is further

ORDERED that Landlord's motion for summary judgment against Guarantor on the first and second causes of action is granted, as to liability only, and the amount due from Guarantor shall be determined at an inquest to be held at 10:00 a.m. on January 15, 2026, after completion of discovery limited to damages incurred by Landlord as a result of Tenants' default; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 35, Room 684 at 111 Centre Street, New York, New York, on September 23, 2025, at 9:30 a.m.



09/05/2025
DATE

PHAEDRA F. PERRY-BOND, 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