

**250 W. 39th St. Inc. v New York Poplin LLC**

2025 NY Slip Op 34442(U)

November 21, 2025

Supreme Court, New York County

Docket Number: Index No. 150176/2022

Judge: Paul A. Goetz

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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. PAUL A. GOETZ** **PART 47**

*Justice*

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250 WEST 39TH STREET INC.,

**INDEX NO. 150176/2022**

Plaintiff,

- v -

NEW YORK POPLIN LLC, KEN MUI

Defendants.

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In this commercial landlord/tenant, breach of guaranty action a bench trial was held on May 19, 2025 with post-trial submissions due on July 21, 2025 (trial tr 97:4-14).<sup>1</sup> Plaintiff’s causes of action are for: 1) breach of lease by tenant, New York Poplin LLC; 2) attorney’s fees as against tenant; 3) breach of guaranty by defendant Ken Mui; and 4) attorney’s fees as against defendant Mui.

In their proposed findings of fact and conclusions of law, the parties agree that: On January 10, 2012 plaintiff/landlord’s predecessor in interest, TR 39<sup>th</sup> St. Land Corp. and plaintiff/landlord’s former tenant HDT Holdings Corporation entered into a lease (original lease) for premises known as 250 West 39<sup>th</sup> St., Suite 603, New York, NY (P’s Ex 2).

**FINDINGS OF FACT**

On March 31, 2016 plaintiff/landlord and HDT Holdings signed a “First Amendment to Office/Loft Lease” (First Amendment) referencing the original lease, stating that TR 39<sup>th</sup> ST. Land Corp. and tenant HDT Holdings Corp entered into the original lease on January 10, 2012

<sup>1</sup> Defendants timely submitted their proposed findings of fact/conclusions of law on July 21, 2025 (NYSCEF Doc No 96). Plaintiff however submitted its proposed findings of fact/conclusions of law four days late on July 25, 2025 (NYSCEF Doc No 98). Plaintiff did not seek an extension nor provide a reason for the untimely filing. Defendants did not object to plaintiff’s untimely submission.

**OTHER ORDER – NON-MOTION**

(P's Ex 3). The First Amendment extends the term of the original lease to March 31, 2018 and includes defendant Mui's signature as the "new guarantor" (*id*). The guaranty annexed to the First Amendment as Exhibit C lists HDT Holdings Corp. as the tenant not defendant New York Poplin (*id*). Plaintiff did not present an assignment of the original lease from TR 39<sup>th</sup> St. Land Corp. to plaintiff nor from TR 39th ST. Land Corp to defendant New York Poplin LLC. (trial tr 40 – 41). The guaranty provides that the guarantor (defendant Mui) guarantees to the Landlord "[t]he full, prompt, and complete payment of all rent and additional rent due under the (original) Lease, without reference to any acceleration of rent, through and including the Vacate Date" (P's Ex 3, Guaranty, pg 1; P's Ex 4 [First Amendment annexed to the Second Amendment and the Guaranty is annexed to the First Amendment]). The guaranty to the First Amendment defines that Vacate Date as "the date that Tenant, after giving Landlord at least one (1) month notice of the intention to vacate the Premises, surrenders the Premises to Landlord broom clean and vacant, and free of all occupants, and delivers to Landlord a key to the Premises" (*id*, pg 2).

On about April 1, 2018 plaintiff and defendant New York Poplin entered into a Second Amendment to Lease (Second Amendment) extending the term to March 31, 2023 (P's Ex 4). The Second Amendment specifically incorporates the original lease, and the original lease and the First Amendment are annexed to the Second Amendment although the First Amendment is not referenced in the incorporation clause on the first page of the Second Amendment (*id*, pg 1). Also annexed to the Second Amendment is a copy of the guaranty attached to the original lease.

Paragraph twelve of the Second Amendment provides that the "Second Amendment and Exhibits and Schedules attached hereto, and the Original Lease contain the entire agreement between Landlord and Tenant . . . (and) no prior agreements or understandings with respect to the Demised Premises shall be valid or of any force or effect (P's Ex 4). Paragraph 21 of the

Second Amendment provides that the guarantor “reaffirms all of the obligations of that certain Guaranty described Exhibit A” (*id.*). The guaranty in Exhibit A as previously mentioned is from the original lease dated January 10, 2012.

By correspondence dated June 25, 2020, the tenant informed plaintiff that it would be vacating the premises on June 26, 2020 (P’s Ex C; trial tr p 48). Plaintiff acknowledged that defendant tenant was moving out by email correspondence on June 26, 2020 wherein plaintiff granted defendant tenant permission to use the freight elevator during its move-out (D’s F; trial tr p 53 – 54). There is no dispute that defendant tenant’s rent was paid through June 2020.

Plaintiff submitted a rent ledger showing that defendant tenant failed to pay rent in the amount of \$483,903.00 pursuant to the lease as incorporated into the Second Amendment. The rent ledger shows a negative balance owed of \$266.47 as of October 2021 and rent due accruing from December, 2021 until the expiration of the Second Amendment on March 31, 2023 (P’s Ex 5 p 5; trial tr p 35 - 36).

With respect to defendant tenant New York Poplin defendants argue that plaintiff failed to present an assignment of the lease from predecessor owner/landlord TR 39<sup>th</sup> St Land Corp to plaintiff or that plaintiff was TR39th St Land Corp.’s legal successor in interest and therefor failed to establish a lease for the premises between plaintiff and defendant tenant New York Poplin. Defendants further argue with respect to defendant tenant that plaintiff failed to establish that defendant tenant did not pay rent and additional rent because it failed to satisfy the requirements of CPLR § 4518.

With respect to defendant Mui defendants argue that plaintiff failed to establish that defendant Mui was an unconditional guarantor and the guaranty Mui executed was a “good guy guaranty” which only guaranteed payment to plaintiff “through and including the vacate date.”

Defendants further argue that defendant tenant gave plaintiff proper and timely written notice, and that plaintiff was not required to accept defendant/tenant's surrender of possession.

### CONCLUSIONS OF LAW

Notwithstanding defendants argument to the contrary, plaintiff landlord was not required to present a written assignment of the lease to establish a landlord/tenant relationship between plaintiff and New York Poplin, since “a tenant may assume a lease by its actions, even where no written lease is present . . . [since] [t]he presence of a tenant in possession that is paying rent gives rise to a presumption of an assignment sufficient to satisfy the statute of frauds” (*Rottenberg v Alexander Ct. Condo.*, 239 AD3d 907, 908 [2<sup>nd</sup> Dept June 18, 2025]; *quoting Gateway I Grp. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 147 [2<sup>nd</sup> Dept 2009]), and here there is no dispute that defendant tenant New York Poplin had possession of the premises and paid rent for a certain period of time. Consequently, plaintiff established a landlord tenant relationship between plaintiff and defendant tenant New York Poplin.

#### *Defendant tenant New York Poplin*

Plaintiff established that defendant tenant defaulted under the terms of the Lease as amended by the Second Amendment by failing to pay plaintiff a total of \$483,903.00 in rent and additional rent for the period December 2021 to March 31, 2023 (P's Ex 5, p 5; trial tr p 35 - 36). While defendants argue in their post-trial proposed findings of fact and conclusions of law that plaintiff failed to satisfy the business record exception to the hearsay rule in CPLR § 4518, defendants' objection on the same grounds at trial was overruled (trial tr p 36) and they do not get a second bite at the apple in their post-trial submission.

*Defendant guarantor Mui*

“A guaranty is subject to the ordinary principles of contract construction. It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed.” (*1995 CAM, LLC v West Side Advisors, LLC*, 2025 NY Slip Op 05782; 2025 NY LEXIS 1771 [Oct 21, 2025] [internal quotation marks omitted]). As here, “[n]either party claims that the [Second Amendment] is ambiguous or incomplete. In the absence of any ambiguity, [a court is to] look solely to the language used by the parties to discern the contract’s meaning. This rule is applied with special force in the context of real property transactions, where commercial certainty is a paramount concern . . . A guaranty is to be interpreted in the strictest manner” (*id.*).

Both defendants and plaintiff rely on the guaranty attached to the First Amendment (*see* plaintiff’s post-trial submission [NYSCEF Doc No 98] § 7; and defendants’ post-trial submission [NYSCEF Doc No 96] § 26 and Ds’ Ex C). While the First Amendment with an attached guaranty is attached to the Second Amendment, an attachment standing alone does not incorporate the attached document into the underlying contract because “[t]he doctrine of incorporation by reference requires that the paper to be incorporated into a written instrument by reference [here the guaranty attached to the First Amendment] must be so referred to and described in the instrument [here the Second Amendment] that the paper may be identified beyond all reasonable doubt” (*Garcia v Fed LI, LLC*, 239 AD3d 942, 946 [2<sup>nd</sup> Dept June 25, 2025]). According to the Second Amendment “[e]xcept for the Original Lease and [the] Second Amendment, no prior agreements or understandings with respect to the Demised Premises shall be valid or of any force or effect” (P’s Ex 4, ¶ 12). And the “Second Amendment and the Original Lease shall be deemed to be, for all purposes, one instrument” (P’s Ex 4, ¶ 16).

Therefore, looking solely at the language in the Second Amendment, consideration of the First Amendment to determine the parties' rights and responsibilities is precluded by paragraph 12 and 16 of the Second Amendment.

Consequently, under the terms of the Second Amendment only the terms of the guaranty agreement included with the original lease are binding on the parties and that guaranty agreement provides that:

Owner requires [Mui] to guarantee the Obligations (as defined herein)<sup>2</sup> through date (the "Surrender Date") possession of the Demised Premises shall be surrendered to Owner vacant, broom clean and otherwise in the condition required by the terms of the Lease, in order to ensure that Tenant and all other occupants will vacate the Demised Premises. The result being that if Tenant and all other occupants vacate the Demised Premises at the time of the expiration [of the lease] *or earlier termination of the Lease*, [Mui] will have no further obligation or liability under this Agreement accruing after such vacation (although [ ] [Mui] shall not be released from any obligation or liability accruing prior to such vacation, and the obligation and liability of Tenant under the Lease will continue in accordance with the Lease following vacation).

(see P's Ex 4 [Second Amendment], with attached original lease with attached guaranty agreement ¶ B [emphasis provided]). Unlike the guaranty in the First Amendment (P's Ex 3), the guaranty for the Lease does not use the term "Vacate Date".<sup>3</sup> The guaranty in the Lease merely requires defendant tenant to surrender the premises to plaintiff vacant and in broom clean condition. There was no evidence at trial that the premises was not vacant and in broom clean condition on the June 26, 2020 surrender date. Because the Lease did not require defendant tenant to provide plaintiff with 30 days written notice of defendant tenant's intent to surrender the premises, plaintiff's argument that surrender was never effectuated because defendant tenant

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<sup>2</sup> The obligations include "Base Rent due and owing under the Lease through and including the Surrender Date, and . . . all of the Owner's costs of collection, if any, under this Agreement (including, without limitation, Owner's attorneys' fees and disbursements) (collectively, the "Obligations"), provided that the [guarantor] will have no obligation or liability for Obligations which accrue under the Lease following the Surrender Date" (see P's Ex 4 [Second Amendment], with attached original lease with attached guaranty agreement ¶ [D 1]).

<sup>3</sup> The First Amendment defines "Vacate Date" as "the date that Tenant, after giving Landlord at least one (1) month notice of its intention to vacate the Premises, surrenders the Premises to Landlord broom clean and vacant, and free of all occupants, and delivers to Landlord a key to the Premises" (P's Ex 4).

failed to notify plaintiff of its intent to surrender is unavailing because the terms of the original Lease did not require defendant tenant to provide plaintiff with 30 days written notice, it only required defendant tenant to surrender the premises vacant and in broom clean condition.

Accordingly, defendant guarantor Mui is not liable to plaintiff for any accrued rent on or after June 26, 2020.

*Attorneys' Fees*

Pursuant to section 19 of the Lease plaintiff as the prevailing party against defendant tenant is entitled to recover from defendant tenant plaintiff's attorneys' fees in prosecuting this action (P's Ex 4). Paragraph 5 of the guaranty annexed to the Lease requires the guarantor to reimburse plaintiff for attorneys' fees regardless of whether plaintiff is the prevailing party [i.e. no requirement that plaintiff prevail in an action seeking to enforce the guaranty] (*id*).

Consequently, since there is no limitation on whether plaintiff can recover attorneys' fees in an action to enforce the guarantee, plaintiff is entitled to recover its attorneys' fees from defendant Mui as well even though plaintiff is not the prevailing party as against Mui.

Based on the foregoing it is,

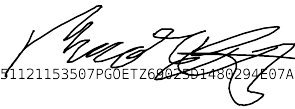
ORDERED that on plaintiff's first cause of action for breach of Lease by defendant tenant New York Poplin, LLC, plaintiff is awarded \$483,903.00 in rent and additional rent for the period December 2021 to March 31, 2023 with statutory interest from March 31, 2023 as calculated by the clerk; and it is further

ORDERED that plaintiff's third cause of action for breach of guaranty by defendant guarantor, Ken Mui is dismissed; and it is further

ORDERED that on plaintiff’s second and fourth causes of action for attorneys’ fees as against defendant tenant New York Poplin, LLC, and defendant guarantor Ken Mui respectively plaintiff is entitled to recover from both defendants its reasonable attorneys’ fees; and it is further

ORDERED that plaintiff shall submit an affirmation in support of its request for reasonable attorneys’ fees within 20 days of entry of this order via NYSCEF and via e-mail to [SFC-Part47-Clerk@nycourts.gov](mailto:SFC-Part47-Clerk@nycourts.gov); and defendants’ opposition, if any, shall be submitted in the same manner within 15 days thereafter; and it is further

ORDERED that the clerk shall enter judgment accordingly.

  
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DATE: 11/21/2025

PAUL A. GOETZ, JSC

Check One:  Case Disposed  Non-Final Disposition  
Check if Appropriate:  Other (Specify \_\_\_\_\_ )