SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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DDR SOUTHEAST JONES BRIDGE, L.L.C.,

Index No. 650806/13

Plaintiff,

- against -

ANA RESTREPO,

Defendant.

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ELLEN M. COIN, J.:

Plaintiff DDR Southeast Jones Bridge, L.L.C. moves for summary judgment against defendant Ana Restrepo.

Defendant cross-moves, pursuant to CPLR 3212, for summary judgment.

Plaintiff, as landlord, and Mish Mish LLC, as tenant (Tenant), entered into a lease dated November 13, 2007 (Lease), for space to be used as a restaurant located at the Jones Bridge Plaza shopping center in Norcross, Georgia (Lease, ¶ 1). Defendant executed a "Guarantee – Personal," also dated November 13, 2007 (Guarantee), allegedly, to induce plaintiff to enter into the Lease. Plaintiff alleges that based upon the Tenant's default under the Lease, defendant is liable for unpaid rent and related charges pursuant to the Guarantee.

Plaintiff now seeks summary judgment on the Guarantee. Plaintiff claims that the total balance due, prior to the application of additional interest and attorneys' fees, is $531,894.54, which includes monthly obligations in the amount of $270,725.71; minus rents received from replacement tenants in the amount of $30,934.17; interest accrued through January 15, 2016, in the amount of $151,158, with interest continuing to accrue at the contract default rate of 15% per

annum; reasonable attorneys' fees for an eviction action in the amount of $1,945; liquidated damages in the amount of $125,000; and, the costs associated with replacement tenants in the amount of $14,000.

Plaintiff presents the Guarantee, together with its employee's affidavit of nonpayment, which includes calculation summaries, and annexes records that reflect the underlying data in plaintiff's computer system. Plaintiff argues that an unconditional guaranty precludes the guarantor from asserting defenses which may have been asserted by the principal obligor. The language of the Guarantee is that of absolute and unconditional liability for payment of any and all sums due from Tenant, and defendant waived defenses based upon the termination of Tenant's liability.

Plaintiff also contends that it is entitled to attorneys' fees, pursuant to the Lease and Guarantee. The Guarantee provides: "If Landlord is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay to Landlord all costs incurred, including, without limitation, reasonable attorneys' fees." (Howarth Aff., Ex. C at 2).

In opposition to the motion and in support of the cross-motion, defendant first argues that New York law does not apply to either the motion or the cross-motion. The final paragraph of the Guarantee provides that it "shall be governed by and construed in accordance with the laws of the State of Georgia." Furthermore, she contends, the chosen law bears a reasonable relationship to the parties or the transaction, because the leased premises were located in Georgia.

Defendant states that, under Georgia law, an action for default under a lease must be commenced within four years of the default (citing Ga Stat § 11-2A-506). Plaintiff sued defendant on the Guarantee on March 7, 2013, more than four years after the purported default

under the Lease on November 1, 2008. Thus, she argues, the underlying obligation was rendered unenforceable against the primary obligor (Tenant). Plaintiff waited until its claim against Tenant had expired, and then sought to recover directly against defendant based upon the Guarantee. Defendant contends that the underlying obligation, for which plaintiff seeks recompense, was extinguished under Georgia law prior to the filing of this action. Therefore, plaintiff cannot assert a viable claim.

Notwithstanding these arguments, and for the reasons discussed below, plaintiff's motion is granted in part. Defendant's cross-motion is denied.

DISCUSSION

As a preliminary matter, Georgia law is applicable to the substantive issues presented here. The relevance of Georgia law is discussed below. The Guarantee provides that it "shall be governed by, and construed in accordance with the laws of the State of Georgia" (Guarantee at 3).

"Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction" (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]). Plaintiff argues that there is no practical connection with Georgia, because defendant executed the Guarantee while a New York resident, and her payments would originate from here. Moreover, plaintiff's principal place of business is in Ohio. Plaintiff does not explain why it either drafted or accepted the Guarantee that provides for the application of Georgia law, and now seeks to disavow it. In any event, Georgia bears a reasonable relationship with the transaction at issue, because the leased premises, which are the subject of the Guarantee, were located in Georgia. In addition, Tenant is a Georgia limited liability company (*see* Lease, introductory paragraph).

Nevertheless, "[c]hoice of law provisions typically apply to only substantive issues" (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010]). "Under New York choice-of-law rules, matters of procedure are governed by the law of the forum" (*Lerner v Prince*, 119 AD3d 122, 127 [1st Dept 2014]). "Because New York is the forum state, New York's choice-of-law principles determine whether a particular issue . . . is substantive or procedural" (*id.*). "[S]tatutes of limitations are considered procedural because they are deemed as pertaining to the remedy rather than the right" (*Portfolio Recovery Assoc., LLC*, 14 NY3d at 416 [internal quotation marks and citation omitted]; *Melcher v Apollo Med. Fund Mgt. L.L.C.*, 25 AD3d 482, 483 [1st Dept 2006]).

Defendant failed to assert the statute of limitations as an affirmative defense in her answer, and failed to seek dismissal of the complaint pursuant to CPLR 3211. Thus, as a procedural matter, she waived the defense of the statute of limitations (CPLR 3211[a][5][e]; *Levine v Pita Grill II,* 69 AD3d 496 [1st Dept 2010]). No doubt her procedural lapse was due to the fact that in the Guarantee itself she expressly waived "the benefit of any statute of limitations affecting [her] liability under [the] Guarantee" (Howarth Aff., Ex. C at 1). Accordingly, her present assertion of the statute of limitations falls.

Plaintiff, as the proponent of a motion for summary judgment, has the initial burden of establishing a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"Plaintiff landlord demonstrated its prima facie entitlement to summary judgment on the issue of liability by establishing that defendant signed an absolute and unconditional guaranty of a commercial lease, that the tenant was in arrears in payment of base rent and additional rent, and

that defendant failed to perform under the guaranty" (*Moon 170 Mercer, Inc. v Vella*, 122 AD3d 544, 544 [1st Dept 2014]; *Bank of Am. v Tatham*, 305 AD2d 183, 183 [1st Dept 2003]). The burden thus shifted to defendant to produce evidentiary proof in admissible form establishing the existence of a material issue of fact requiring a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Defendant has not met her burden.

For the reasons discussed above, the enforceability of the Guarantee is governed by Georgia law. Defendant argues that under Georgia law, she is not liable, because the debtor is no longer liable, in that the time in which to sue has expired. However, in *Griswold v Whetsell* (157 Ga App 800 [1981]), the contract stated, in relevant part:

> "the undersigned hereby unconditionally guarantees the payment of the note on the reverse side hereof and all extensions or renewals ... waives presentment ... demand ... notice of dishonor ... all without notice to or consent of any of the undersigned and without affecting the liability of the undersigned hereunder, any of whom may be sued by the holder hereof with or without joining any of the other indorsers or makers of this Note and without first or contemporaneously suing such other persons, or otherwise seeking or proceeding to collect from them"

(157 Ga App at 802). In *Griswold*, the Court found that the words of this provision "conclusively show the signer was a surety who could be sued individually or jointly with the maker, or without suit first being brought against the maker. It evidences primary liability-not secondary liability" (*id.*). The Court also noted that, as is the case here, defendant received no consideration, and "the contract of a surety is one where the person obligates himself to pay the debt of another in consideration of credit or indulgence to his principal .... Stated otherwise, the actual consideration for the signature of the surety is the extension of credit to his principal" (*id.* [internal citation omitted]). Here, the Guarantee similarly provides that defendant:

> "unconditionally and absolutely guarantees and promises, to and for the benefit of Landlord, its successors and assigns, that Tenant shall perform the provisions of the Lease that Tenant is to perform, including, but not limited to, payment of Minimum

> Rent, Percentage Rent, and any and all other sums, charges, costs and expenses payable by Tenant, its successors and assigns, under the Lease and the full performance and observance of all of the covenants, terms, conditions and agreements therein provided to be performed and observed by Tenant, Its successors and assigns.
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> "If Guarantor is more than one person, Guarantor's obligations are joint and several and are independent of Tenant's obligations under the Lease and shall not be discharged except by payment to and receipt by Landlord of all sums due under the Lease. A separate action may be brought or prosecuted against any Guarantor whether the action is brought or prosecuted against any other Guarantor or Tenant, or all, or whether any other Guarantor or Tenant, or all, are joined in the action.
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> "Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this Guarantee"
>
> (Guarantee at 1).

Moreover the Guarantee provides: (1) the guarantee of the performance of the Lease "shall not be affected by Landlord's failure or delay to enforce any of its rights"; (2) if "Tenant defaults under the Lease, Landlord can proceed immediately against Guarantor or Tenant, or both, without prior notice to Guarantor, or Landlord can enforce against Guarantor or Tenant, or both, any rights that it has under the Lease or pursuant to applicable laws"; (3) if "the Lease terminates and Landlord has any rights it can enforce against Tenant after termination, Landlord can enforce those rights against Guarantor without giving previous notice to Tenant or Guarantor, or without making any demand on either of them;" (4) the "Guarantee is a guarantee of payment and not of collection"; (5) Guarantor waives the right to require Landlord to (a) proceed against Tenant, (b) proceed against or exhaust any security that Landlord holds from Tenant, or (c) pursue any other remedy in Landlord's power; and (6) "Guarantor waives all presentments, demands for performance, notices of nonperformance, protests, notices of protest,

notices of dishonor and notices of acceptance of this Guarantee, and waives all notices of the existence, creation or incurring of new or additional obligations" (Guarantee at 1-2).

Thus, plaintiff was entitled to proceed against defendant regardless of the status of Tenant (*see Blalock v Central Bank of Georgia*, 170 Ga App 140, 141 [1984] ["contract here styled a guaranty unconditionally obligated defendant to pay the indebtedness therein and expressly subjected him to suit by the holder of the instrument without first proceeding against the principal and could be treated as a contract of suretyship"]; *Hazel v Tharpe & Brooks, Inc.*, 159 Ga App 415, 415 [1981] [citation omitted] ["language of the 'guaranty of payment' unconditionally obligated the defendants to pay the indebtedness and expressly subjected them to suit by the holder 'with or without first or contemporaneously suing . . . other persons, or otherwise seeking or proceeding to collect from them.' Thus, the trial court did not err in finding that the agreement created an unconditional suretyship rather than, as argued by defendants, a conditional guaranty"]; *Griswold,* 157 Ga App 800).

Defendant cites Georgia Code Annotated (OCGA) § 10–7–2; *State Dept. of Corrections v Developers Sur. and Indem. Co.* (324 Ga App 371 [2013]), *affd* 295 Ga 741 [2014]; and *McWhirter Material Handling Co. v Georgia Paper Stock Co.* (118 Ga App 582 [1968]), for the proposition that where a primary obligor is no longer liable, the secondary obligor cannot be held liable. The facts underlying these two decisions bear no resemblance to those presented here. Furthermore, as discussed above, defendant is not a secondary obligor.

As for defendant's reliance upon OCGA § 10–7–2, that statute provides:

> "The obligation of the surety is accessory to that of his principal; and, if the latter from any cause becomes extinct, the former shall cease of course, even though it is in judgment. If, however, the original contract of the principal was invalid from a disability to contract and this disability was known to the surety, he shall still be bound."

Defendant has not shown that the obligation of Tenant has become "extinct." Assuming arguendo, that the statute of limitations has run on the claim against Tenant, that would not mean that its obligation has become extinct. Rather, it would indicate that plaintiff may be unable to enforce that obligation in a legal action, but only if Tenant raises and prevails on the defense. But if not raised, theoretically, plaintiff could prevail against Tenant (*see Orix Fin. Servs., Inc. v Haynes*, 56 AD3d 377, 377 [1st Dept 2008] ["statute of limitations must be pleaded as an affirmative defense and cannot be asserted sua sponte by the court as a basis for denying an unopposed motion for a default judgment"]; *see also Franklin v Mobley*, 202 Ga 212, 218 [1947] ["a debt does not become extinct merely because it has become barred by limitation"]). Defendant's reliance on OCGA § 10–7–2 is unavailing.

As for damages, plaintiff submits the affidavit of Renee B. Weiss, Assistant General Counsel of Litigation/Operations for DDR Corp., plaintiff's affiliate. Ms. Weiss states that under this five-year lease, Tenant was responsible for payment of the minimum rent and proportional share of real estate taxes and assessments, insurance, and common area maintenance (CAM), based upon the square footage of the leased space (Weiss aff, ¶ 3). The minimum monthly rent charges were $3,916.67 (first year), $4,035.00 (second year), $4,155.00 (third year), $4,280.00 (fourth year), and $4,408.33 (fifth year). There was also "Additional Rent (collectively "Monthly Obligations"), which includes CAM, insurance and real estate tax charges, charges for utilities and trash removal, and a major repair reserve (*id.*, ¶ 5). A default in payment of Monthly Obligations entitled plaintiff to recover interest on the outstanding balance at a rate of 15% per annum, and reasonable attorneys' fees (*id.*, ¶ 6). Termination of the Lease after a default in payment also entitles plaintiff to recover the balance due for the remainder of

the term, less credit for any payments received from subsequent tenants (*id.*, ¶ 7). Ms. Weiss also notes that the Lease provides for liquidated damages of $50 a day for each day rent is late after the first of the month (Late Charge), and that defendant is liable for attorneys' fees to enforce the Guarantee (*id.*, ¶ 10).

Ms. Weiss alleges that the Tenant defaulted in payment due on the account on November l, 2008 (*id.*, ¶ 11). Plaintiff initiated eviction proceedings on May 7, 2009, and the Tenant vacated the premises on August 27, 2009. The last three payments made on the account were $2,500 (March 5, 2009); $4,751.97 (April 15, 2009), and $3,000 (May 28, 2009). The security deposit of $4,621.67 was applied to the account on July 27, 2009 (*id.*, ¶ 12).

Allegedly, the amount presently due is comprised of Monthly Obligations, liquidated damages, interest accrued on the past due amount, with a credit for rent paid by replacement tenants (less re-letting expenses); together with reasonable attorneys' fees (*id.*, ¶ 13). The unpaid Monthly Obligations through March 31, 2010, amounted to $84,003.75. Charges reflected on the report include: CAM, real estate taxes, reserve for major repair, rent base charges, insurance charges, prior year common area maintenance charges, trash removal (current), trash removal (past), insurance charge (prior), real estate tax (prior), late fee, and water and sewage charges; all charges were allocated to each tenant pro rata (*id.*, ¶ 16). As of January 15, 2016, plaintiff states that it calculated that $125,000 is due for liquidated damages, assessing $50 per day for 2,500 days (*id.*, ¶ 18). Additionally, $151;158 in interest is due, plus additional interest on principal from January 15, 2016, calculated on the account's outstanding balance through January 15, 2016, at a rate of 15% per annum, pursuant to paragraph XVI of the Lease (*id.*, ¶ 20).

Plaintiff avers that as of January 15, 2016, the total balance due, prior to application of additional interest and attorneys' fees, is $531,894.54, consisting of charges amounting to

$548,828.71, less a credit in the net amount of $16,934.17 for rents received from tenants, less the costs of the replacement tenant that occupied the space after Tenant's departure. The total amount of rents received from the two tenants is $30,934.17, minus costs incurred of $6,000, and $8,000 in re-letting and build-out expenses.

Based on the foregoing, as of January 15, 2016, plaintiff claims entitlement to recover the sum of $531,894.54, with Monthly Obligations owed in the amount of $270,725.71; minus rents received from replacement tenants in the amount of $30,934.17; interest in the amount of $151,158, with interest continuing to accrue at the contract rate of 15% per annum; reasonable attorneys' fees for the eviction action in the amount of $1,945.00; liquidated damages in the amount of $125,000; costs associated with the replacement tenants in the amount of $14,000; and attorneys' fees, and costs and disbursements of this action. The amount sought in this motion differs from the amount demanded in the complaint due to the accrual of additional liquidated damages and interest, which accrued in accordance with the Lease during the pendency of this action.

Plaintiff provided adequate support for the damages sought of $531,894.54. Defendant does not challenge the foregoing, and has not shown discrepancies in the amounts allegedly owed (*cf. Moon 170 Mercer, Inc.*, 122 AD3d at 545). However, as for the claim for additional interest at the rate of 15% per annum, plaintiff has not adequately substantiated the claim as to the amount of $253,791.54 from the date of January 15, 2016, and that issue, together with the claim for reasonable attorneys' fees, will be referred to a Special Referee.

Accordingly, it is

ORDERED that the motion for summary judgment against defendant Ana Restrepo is granted in favor of plaintiff DDR Southeast Jones Bridge, L.L.C. in the amount of $531,894.54,

together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the issues of the alleged additional interest on $253,791.54 at the contract rate of 15% per annum from January 15, 2016, and the amount of reasonable attorneys' fees (to be determined in accordance with the factors set forth in *Matter of Freeman*, 32 NY2d 610 [1973]) are referred to a Special Referee to hear and report with recommendations, except that in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR Section § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that plaintiff shall file a copy of this order with notice of entry, a note of issue and a statement of readiness, upon the Clerk of the Trial Support Office (Room 158), and shall pay the proper fees, if any, and said Clerk shall place this action on the appropriate calendar for the assessment herein above directed; and it is further

ORDERED that the cross-motion of defendant Ana Restrepo is denied.

Dated: March 28, 2017

ENTER:

Ellen M. Coin, A.J.S.C.