

**Barnan Assoc., LLC v 25 Park at 1296 Third Ave.,
LLC**

2018 NY Slip Op 33446(U)

December 21, 2018

Supreme Court, New York County

Docket Number: 152297/2015

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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BARNAN ASSOCIATES, LLC,

Plaintiff,

Index No.: 152297/2015

-against-

Mot. Seq. No. 005

25 PARK AT 1296 THIRD AVENUE, LLC and
ANDREW BRETTSCHEIDER,

DECISION and ORDER

Defendants.

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MELISSA A. CRANE, J.S.C.:

Plaintiff Barnan Associates, LLC (“Barnan”) commenced this action to recover unpaid rent and damages stemming from its sublease of a commercial retail property to 25 Park at 1296 Third Avenue, LLC (“25 Park”). A review of the relevant complicated background and procedural history is necessary to frame the issue this motion presents.

BACKGROUND AND PROCEDURAL HISTORY

In September 2010, 25 Park entered into a ten-year lease (the “Lease”) for a retail space (the “Premises”) on Manhattan’s Upper East Side with landlord Barnan.

Defendant Andrew Brettschneider (“Brettschneider”), contemporaneously executed a written guarantee (the “Guaranty”), whereby Brettschneider personally guaranteed 25 Park’s lease obligations (*Barnan Assoc., LLC v 25 Park at 1296 Third Ave., LLC*, 2017 N.Y. Slip Op. 30531[U], 1 [Sup Ct, New York County 2017]). This Guaranty stated in pertinent part:

The undersigned Guarantor does hereby personally, unconditionally and absolutely agree to guarantee all monetary obligations of Tenant to owner to pay Minimum Rent and Additional Rent and all other monetary charges and fees due under the aforesaid Lease payable by tenant through the date (the “Liability Date”) which is the later to occur of (A) the date which is 90 days after the date Tenant delivers to Landlord notice (the “Vacate Notice”) that Tenant intends to

vacate the Demised Premises and surrender vacant possession of the Demised Premises to Landlord, provided that tenant so vacates and surrenders possession of the Demised Premises by such date, or (B) The Vacate Date (as hereinafter defined), provided, however, that if tenant shall have failed to deliver the Vacate Notice to Landlord, then the liability date shall be the date which is 90 days after the Vacate Dated [sic]”...

The ”Vacate Date” shall mean the first date on which (x) Tenant and all persons claiming under or through Tenant shall have vacated the Demised Premises and surrendered possession of the Demised Premises (and all keys thereto) to Landlord in condition required by the terms of the Lease and (y) Landlord shall have received an instrument in the form annexed to this Agreement as Exhibit A (the “Surrender Declaration”)

Most important, the Good Guy Guaranty limits the liability of Guarantor to “payment of all Minimum Rent, Additional Rent and other monetary charges and fees due and accrued through the date of surrender” (emphasis added).

In the last paragraph, the Guarantor:

“acknowledges that this guaranty and the Guarantors obligations under this Guaranty are and shall at all times continue to be absolute and unconditional in all respects, and shall at all times be valid and enforceable irrespective of any other agreements or circumstances of any nature whatsoever which might otherwise constitute a defense to the guarantee and the obligations of the Guarantor under the guarantee or the obligations of any other person or party (including, without limitation, the Tenant) relating to the guarantee or the obligations of the Guarantor hereunder or otherwise with respect to the Lease with the Tenant.”

The Guaranty then contains a merger clause.

Several years after executing the Lease, business and financial issues prevented 25 Park from fulfilling its Lease obligations (T3.10).¹ Eventually, it was evicted.

Subsequently, in 2014, Barnan commenced an action in the Civil Court of the City of New York because of 25 Park’s failure to pay rent and additional rent under the Lease (the L&T Proceeding; L&T 073085/2014). In October 2014, the parties settled the L&T Proceeding

¹ The March 24, 2016, oral argument transcript (NYSCEF Doc. No. 133) for Mot. Seq. No. 003 be cited as “T3.” followed by the page number.

pursuant to a Stipulation of Settlement (the “Stipulation”; NYSCEF DOC. NO. 31). The Stipulation permitted 25 Park to retain occupancy of the Premises but required 25 Park and Brettschnieder (collectively “Defendants”) pay Barnan rental arrears and attorney’s fees totaling \$179,013.92 over a scheduled three-month period between October and December 2014 (the “Stipulation Payments” or the “Stipulation Money Judgment”). Furthermore, the L&T Proceeding court issued a warrant of eviction (the “Warrant”). Barnan stayed the enforcement of the Warrant provided that Defendants adhered to the terms of the Stipulation and continued remitting future rent payments. If Defendants failed to make the Stipulation Payments or future rental payments, the Warrant permitted Barnan to recover possession of the Premises (T3.10).

Full payment of the Stipulation Payments would have brought Defendants current with their rental payments through October 2014. The Stipulation, however, did not relieve Defendants of their ongoing lease and rental payment obligations, including the Brettschneider guaranty (*see* NYSCEF DOC. NO. 31 at ¶ 13). The parties agree that 25 Park remitted only \$139,000.00 of the Stipulation Payments (Brettschneider Memo at 2, NYSCEF DOC. NO. 152). In or about November 2014, 25 Park defaulted and ceased making the Stipulation Payments. Accordingly, on February 26, 2015, Barnan evicted 25 Park from the Premises pursuant to the Warrant (*id*).

On March 9, 2015, Barnan commenced this action (*see* Barnan Complaint, NYSCEF Doc. No. 1). Barnan’s complaint (the “Complaint”) sought recovery of a principal sum totaling \$189,176.29, that consisted of, *inter alia*, the unpaid Stipulation Payments (\$40,013.92, Barnan Complaint ¶ 8), unpaid rent, additional rent, and damages stemming from Defendants unpaid lease obligations from their default in November 2014 until March 1, 2015 (\$149,162.37, *id* ¶ 14). Barnan argues that under the Lease, Defendants are liable for its vacancy expense until a

new tenant leased and began remitting rent for the Premises (JHT.8).² Additionally, Barnan also requested additional relief in the form of interest on the principal sum and reasonable attorney's fees (Barnan Complaint ¶ 16, 24). In February 2016, plaintiff began to receive rent from a new tenant.

On March 24, 2016, the court heard oral argument on Barnan's first summary judgment motion (Mot. Seq. 002). The court, in a decision by Justice Eileen Rakower, granted Plaintiff summary judgment against Brettschneider limited to the issue of liability (*Barnan Assoc., LLC*, 2017 N.Y. Slip Op. 30531[U], 2; *see also* Mot. Seq. 003 Transcript, NYSCEF DOC. NO. 133). The court denied Plaintiff's motion for summary judgment as to 25 Park based on an outstanding issue concerning the Barnan's maintenance of 25 Park's security deposit, and thus declined to dismiss affirmative defense numbers four, eleven and fifteen (defenses based upon unclean hands, equitable estoppel and a dispute over the rental amounts sought) (*id.*).

On March 15, 2017, this court, in a decision by Justice Eileen Rakower, granted Barnan's unopposed renewed motion for summary judgment (the "Renewed Summary Judgment Motion", Mot. Seq. 003). Barnan's Mot. Seq. 003 moving papers requested the court find:

[A]gainst 25 Park on the issue of liability; enter judgment against (a) Brettschneider for the principal sum of \$179,881.40, plus interest on \$40,013.92 of such sum from October 8, 2014, plus interest on \$139,867.48 of such sum from January 15, 2014 and (b) 25 Park for the principal sum of \$139,867.48, plus interest thereon from January 15, 2014; and schedule a hearing to determine the amount of attorneys' fees for which Defendants are liable. (Barnan Mot. Seq. 003 Memo at 9, NYSCEF DOC. NO. 74).

The court granted Barnan's motion and found 25 Park liable for unpaid rent and damages due from 25 Park under the parties' lease (*Barnan Assoc., LLC*, 2017 N.Y. Slip Op. 30531[U]),

² The October 24, 2017, damages hearing transcript (NYSCEF Doc. No. 110) will be cited as "JHT." followed by the page number.

3). Further, the court "ordered [] an assessment of damages against defendant 25 Park at 1296 Third Avenue, LLC" and ordered Barnan obtain this commissioned assessment (*id*).

On October 24, 2017, pursuant to Justice Rakower's March 2017 decision, JHO Ira Gammerman held a hearing to assess damages. At the hearing, Barnan sought damages of \$761,788.09 (JHT.7) that, for the first time, included unpaid rent for the period during Tenant's lease term when plaintiff did not receive rent: February 26, 2015 through January 31, 2016.

Barnan argued that under the Lease and Stipulation, 25 Park is liable for the unpaid stipulation funds, vacancy expenses following its eviction, and unpaid post-stipulation rental fees (JHT.7-9). Additionally, Barnan argued that Brettschneider's Guaranty rendered him personally liable for the \$761,788.09 (JHT.11). The Defendants asserted that the eviction annulled the lease and that the Barnan's vacancy expense following its ejection was not recoverable. JHO Gammerman found that he lacked authority to resolve this dispute because Justice Rakower did not, in any previous decision, reach the issue of law that would support either parties' argument (JHT.10). Accordingly, JHO Gammerman deferred assessing the issue of whether the Stipulation and 25 Park's subsequent eviction annulled the Lease and the Guaranty, and thereby extinguished 25 Park and Brettschneider's obligation to remunerate Barnan for its vacancy expense from February 26, 2015 through January 31, 2016 (JHT.10) [the "additional period"]).

On December 21, 2017, Barnan filed this motion to obtain a "final Order fixing the amount of damages for which Defendants are liable" at \$761,788.09, not including interest and reasonable attorney's fees (the "Mot. Seq. 005 Damages") (Barnan Mot. Seq. 005 Memo at 2, NYSCEF DOC. NO. 112). Additionally, Barnan posits that Brettschneider is personally liable under the Guaranty for the Mot. Seq. 005 Damages (*id* at 11). This court heard oral argument on May 23, 2018. On the record, defendant conceded that "damages are owed under the good guy

guarantee until 90 days following the date of eviction.” (Tr3.13, 16). Defendant also stated “we concede the initial motion” (Tr3.14)

DISCUSSION

First, the court notes that the Complaint initially sought recovery of unpaid rent for November 2014 until March 1, 2015. However, Barnan’s new demand encompasses alleged unpaid rent from November 2014 until January 31, 2016 (JHT.8-10). Barnan filed the Complaint in March 2015, so it is not surprising that the Complaint does not reflect revised demand, but Barnan could have simply moved to amend the complaint to reflect the augmented vacancy expense period. However, Barnan did not request leave to the amend the Complaint, and the Complaint does not reference the potential extension from March 2015 to January 2016. Therefore, the court could deny plaintiff’s motion for failure to request leave to amend alone.

However, even if plaintiff had sought to amend its complaint, the court still would not award damages under the Guaranty for the additional period. This is because the Guaranty, that plaintiff drafted, does not cover this period of time. “A guaranty of a tenant’s obligations under a lease must be strictly interpreted in order to assure its consistency with the lease terms to which the guarantor actually consented” (*404 Partners, L.P. v Lerner*, 75 AD3d 481, 482 [1st Dep’t 2010]; *see also Levine v Segal*, 256 AD2d 199, 200 [1st Dep’t 1998] [court must strictly construe terms of guaranty in favor of the guarantor]). Here, plaintiff contends that the Guarantor is responsible for all lease payments during the lease period until the time a new tenant started paying because: (1) it never received a vacate notice that would have activated the Liability Date that in turn would cut off the guaranteed period or (2) because plaintiff never satisfied the conditions of the Vacate Date, namely surrendering possession and providing a proper “Surrender Declaration.” However, this is not what the “Good Guy Guaranty” in this case

covers. Unlike the Guaranty in *300 Park v. Café 49, Inc*, 89 AD3d 634 [1st Dep't 2011] that guaranteed payment attributable to "Any part of the Term," the Guaranty here simply does not guaranty that long a period. Here, the parties clearly contemplated cutting off the Guarantor's liability at either the Liability Date or the Vacate Date. It is a non sequitur that, just because neither date occurred, the Guarantor must cover the entire additional period. Moreover, the post eviction rent constitutes liquidated damages arising after the termination of the lease. Had plaintiff intended to include liquidated damages within the ambit of the Guaranty, it should have said so. Nevertheless, as defendant has now conceded the initial motion on the record, the court awards the amounts that plaintiff seeks under that initial motion

Accordingly, it is,

ORDERED that the court denies that part of plaintiff's request for additional liquidated damages for the additional period and it is further

ORDERED that as defendant has conceded liability under motion seq. no 3, the court grants a money judgment against defendant, Mr. Brettschneider in the amount of of \$179,881.40, plus interest om \$40,013.92 of such sum from October 8, 2014 plus interest on \$139,867.48 of such sum from january15, 2014, and it is further

Ordered that the parties are to appear for an inquest to determine the amount of attorney's fees for which Mr. Brettschneider is liable, if any, on January 11, 2019 at 11:00 A.M.

Dated: New York, New York
December 21, 2018

ENTER



Hon. Melissa A. Crane

HON. MELISSA A. CRANE