GBL 78th St. LLC v Keita
2015 NY Slip Op 31367(U)
July 23, 2015
Supreme Court, New York County
Docket Number: 653924/2013
Judge: Eileen A. Rakower

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

----------X

GBL 78th STREET LLC,

Plaintiff,

Index No. 653924/2013

Seq. No.: 001

- against -

Decision and Order

OUSMANE KEITA,

Defendant.

----------X

HON. EILEEN A. RAKOWER, J.S.C.

This is an action to recover monies owed to the plaintiff, GBL 78th Street, LLC ("Plaintiff" or "GBL") from defendant, Ousmane Keita ("Defendant" or "Keita") based on the terms of the guaranty agreement signed by Keita of payment and performance of Taku Leegey, LLC d/b/a Heartbeat's lease obligations to Plaintiff.

Plaintiff commenced this action on November 12, 2013 by summons and compliant. Defendant submitted an answer on March 11, 2014, denying all allegations and asserting eighteen affirmative defenses. Plaintiff now moves for an Order pursuant to CPLR §3212 granting summary judgment in favor of Plaintiff and against Defendant, dismissing the affirmative defenses and granting judgment in favor of Plaintiff in amount of $36,191.85. Defendant opposes.

GBL submits: the attorney affirmation of Eric J. Canals, dated January 7, 2015; affidavit of Katerina Siamboulis ("Siamboulis"), an authorized agent of Plaintiff, dated February 27, 2015; the summons and verified complaint; Keita's answer; the Lease; the Guaranty; Plaintiff's payment history; the court order and marshal's notice of possession; and copies of Keita's W-9 forms.

Defendant opposes. Defendant submits: the attorney affirmation of Neil L. Postrygacz, dated April 12, 2015; the Resolution ending the partnership with his ex-partner Diagne; the email chain between Diagne, Tim O'Keefe ("O'Keefe"), "who is, upon information and belief, the managing agent or broker for Plaintiff," and Keita.

In the affidavit of Siamboulis, Siamboulis avers that GBL and Taku Leegy entered into a commercial lease agreement on September 26, 2008 regarding unit Store 2 at 243 East 78th Street New York, NY 10075 (the "Premise"). Pursuant to the Lease, Taku Leegey agreed to pay GBL a monthly rent of $2,392.00 for the use and occupancy of the Premises for a five-year-term commencing on October 1, 2008 and ending on September 30, 2013.

Keita entered into a guaranty agreement dated September 26, 2008 (the "Guaranty").

Pursuant to the Guaranty:

1. The undersigned guarantees to Landlord, its successors and assignees, that they shall pay to Landlord all rent and additional rent that has accrued or may accrue under the terms of the herein Lease (hereinafter referred to as Accrued Rent), to the latest date that Tenant and its assigns and sublessees, if any, shall have completely performed all of the following and provided Tenant shall give Landlord no less that one hundred fifty (150) days prior written notice of Tenant's intention to vacate the Premises:

    (i) Vacated and surrendered the Demised Premises;
    (ii) Delivered the keys to the Premises to the Landlord, and
    (iii) Paid to Landlord the amount of the Rent, Additional Rent and the Rent Credit still owing under the Lease for the first thirty-six (36) months of the Lease in the event the Guarantor shall exercise the rights under the Guaranty prior to the expiration of the first thirty-six (36) months of the term of the Lease.

The Guaranty further provides:

3. This guarantee is absolute and unconditional and is a guarantee of payment and not of collection. The parties hereto waive all notice of non-payment, non-performance, non-observance or proof, or notice, or demand, whereby to charge the undersigned therefor, all of which the undersigned expressly waives and expressly agrees that the validity of the Agreement, and the obligation of the Guarantor hereto shall in no way be terminated, affected or impaired by reason of the assertion by Landlord against Tenant of any of the rights or remedies reserved to Landlord pursuant to the performance of the within Lease. The undersigned further covenants and agrees that this guarantee shall remain and continue in full force and effect, as to any renewal, modification, or extension of this Lease and during any period when Tenant is occupying he premises as a "statutory tenant."

Keita further avers that on or about December 2011, Taku Leegey "ceased making rent payments, defaulting on its obligations under the lease agreement." On June 22, 2012, GBL obtained a judgment of possession against Taku Leegey with a warrant of eviction issued and stayed through July 10, 2012. GBL also obtained a money judgment against Taku Leegey in the amount of $25,812.16 for use and occupancy through May 2012.

In opposition, the attorney affirmation of Neil Postrygacz is submitted on Keita's behalf. Annexed to Mr. Postrygacz's affirmation are the following exhibits: a Resolution dated February 16, 2009 signed by Diagne and Keita in which they agree to end their "business relationship as of February 16, 2009" under certain "terms and conditions," and an email chain between Keita, Diagne, and O'Keefe.

Mr. Postrygacz claims that at the time the Lease and Guaranty were executed on September 26, 2008, Keita and non-party Motar Diagne ("Diagne") were both general partners at Taku Leegey. Mr. Postrygacz further claims that the business partnership ended on February 16, 2009, and Keita was divested of all ownership in Taku Leegey. Mr. Postrygacz further claims that GBL was made aware of this change "as early as April 25, 2011."

However, the email chain shows that on August 26, 2011, at 10:34 am, O'Keefe emailed Diagne, stating, "Please note that this WILL be a lease change

and will require a new lease ... This is a Lease assignment which was not approved by our office based on the terms of the existing lease with Taku Leegey."

Thereafter, on August 26, 2011, at 11:30 am, Diagne responded to O'Keefe's email, stating, "I am still looking for the letter I mailed to the landlord informing them about the change. I will sent [sic] it as soon I do find it my file." No such letter or new lease is provided.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

"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." (*City of New York v. Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept., 1998]).

"A suretyship relation exists whenever a person becomes responsible for the debt of another." *Fehr Bros, Inc. v. Scheinman*, 121 A.D. 2d 13, 15 [1st Dept 1986]. "A guaranty is distinguishable from other forms of surety contracts in that it is a separate, independent contract between the guarantor and the creditor-obligee and is collateral to the contractual obligation between the creditor-obligee and the principal-obligor." *Fehr*, 121 A.D. 2d at 15. As further set forth in *Fehr*:

> Being a contract, a guaranty agreement is to be construed like other contracts so as to give effect to the parties' intentions. In particular, the obligations of the guarantor must be strictly construed according to the terms of the agreement and cannot be altered, extended or enlarged by the creditor or debtor without the guarantor's consent, since he cannot be held responsible

> to guarantee a performance different from that which he intended or specified in the guaranty.
>
> For example, when the guarantor has bound himself to satisfy an obligation of a specified debtor, he may not be held liable for the debt of another debtor, unless the contract clearly discloses such an intent.
>
> It is also argued that changes in the entity, the debts of which are guaranteed, which alter the composition, structure or form of the principal-obligor, can also serve to release the guarantor under the theory that such changes have the effect of creating a new obligation to which the guarantor never intended to become liable; that is, the changes create a new principal. Difficulties have arisen not in accepting the logic of this argument, but in determining when the changes are significant enough to justify releasing the guarantor of his obligations.

Fehr, 121 A.D. 2d at 20 (held that corporate president was not released from personal guarantee of corporate debt, even if changes in corporate structure had increased risk to guarantor, where changes were initiated by guarantor, who continued to purchase merchandise on credit without seeking to terminate guarantee agreement according to its terms).

Here, GBL has established the terms of the Guaranty executed by Keita, the underlying debt, and Keita's failure to perform under the Guaranty. Keita, in opposition, fails to demonstrate evidence of release of his obligations under the Guaranty. Keita provides no letter, new lease or any other proof to demonstrate that Keita was discharged from his liability under the Guaranty.

Wherefore it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the Clerk of the court is directed to enter judgment in favor of plaintiff, GBL 78th Street LLC, and against defendant, Ousmane Keita, in the amount of $36,191.85 with interest as prayed for allowable by law at the rate of 9% per annum from the date of November 30, 2012 until the date of entry of this

judgment, as calculated by the clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JULY 23, 2015

Eileen A. Rakower, J.S.C.