

<b>805 Third N.Y., LLC v Manus</b>
2015 NY Slip Op 31387(U)
July 23, 2015
Supreme Court, New York County
Docket Number: 650296/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----x  
805 THIRD NEW YORK, LLC,

Plaintiff,

Index No. 650296/2015

-against-

**DECISION/ORDER**

ROBERT MANUS,

Defendant.

-----x  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	2

Plaintiff commenced the instant action to recover pursuant to a guaranty signed by defendant Robert Manus (“Manus” or “defendant”). Plaintiff now moves for an Order: (1) pursuant to CPLR §§ 3013 and/or 3211(b) striking defendant’s affirmative defenses; and (2) pursuant to CPLR § 3212 granting it summary judgment against defendant. For the reasons set forth below, plaintiff’s motion is granted.

The relevant facts are as follows. Plaintiff is the owner and landlord of the building located at 805 Third Avenue, New York, New York 10022 (the “Building”). On or about July 31, 2012, defendant executed a guaranty (the “Guaranty”) in connection with a commercial lease (the “Lease”) agreement between plaintiff and non-party CM Third, Inc. (“CM”) to let out a

ground floor store front at the Building. Under the Guaranty, defendant unconditionally guaranteed to plaintiff the payment of an amount equal to three months of rent due under the Lease. Specifically, the Guaranty provided in relevant part as follows: "If Tenant is in default in the payment of the rent under the Lease, the Guarantor hereby unconditionally guarantees to Landlord the payment of an amount equal to three (3) months of the rent under the Lease." Plaintiff alleges that CM failed to pay rent when it became due under the subject lease. Accordingly, it has commenced the instant action against defendant to recover under the Guaranty.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, plaintiff has made a *prima facie* showing of its right to summary judgment by establishing defendant's unconditional guaranties and his failure to perform. Plaintiff has made a *prima facie* showing of its entitlement to summary judgment by presenting the court with the Lease, Guaranty and the affidavit of Steven M. Cherniak, Chief Operating Officer of the manager of plaintiff corporation, who attests to CM's default in the payment of rent and defendant's subsequent default in payment under the Guaranty. This evidence

conclusively establishes that CM defaulted in payment of rent, defendant guaranteed the payment of three times the monthly rent upon such default and has, to date, failed to pay this amount.

In opposition, defendant has failed to produce evidentiary proof in admissible form sufficient to raise a triable issue of fact. Defendant contends that plaintiff's motion should be denied as: (1) the Guaranty is not enforceable because a date for payment is purportedly not included in the instrument; (2) the Guaranty's waiver of defenses and counterclaims is violative of public policy; and (3) summary judgment is premature as no discovery has taken place. The court finds all these arguments to be without merit.

As an initial matter, the lack of a set date for payment does not render the Guaranty unenforceable. Contrary to defendant's contention, the mere fact that the Guaranty does not specifically state a date for payment of the guarantor's obligations does not render the Guaranty void for vagueness as such is not a "material term" of the Guaranty, nor does defendant cite any authority that would support such a finding.

Further, defendant's contention that the Guaranty's waiver of defenses and counterclaims is violative of public policy is unavailing as New York courts uniformly uphold express waiver clauses, like the one present here, to bar the assertion of proscribed defenses and counterclaims. *See, e.g., Reliance Construction Ltd. v. Jim Kennelly*, 70 A.D.3d 418 (1<sup>st</sup> Dept 2010). Indeed, defendant has failed to cite to a single authority wherein a court has held such clauses, like the one present here, void as against public policy.

Finally, defendant's contention that summary judgment should be denied pursuant to CPLR § 3212(f) because discovery remains outstanding is unavailing. It is well settled that "a


claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment.” *Hariri v. Amper*, 51 A.D.3d 146, 152 (1<sup>st</sup> Dept 2008). Here, defendant has presented no evidentiary basis indicating that discovery may lead to relevant evidence to establish his alleged defenses to this matter.

Accordingly, plaintiff’s motion is granted and it is hereby

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$54,000.00 with interest thereon from February 2, 2015, at the statutory rate, together with costs and disbursements; and it is further

ORDERED that the portion of plaintiff’s action that seeks the recovery of attorney’s fees is severed and the issue of the amount of reasonable attorney’s fees plaintiff may recover against the defendant is referred to a Special Referee to hear and report unless the parties agree that the Special Referee may hear and determine. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date. This constitutes the decision and order of the court.

Dated: 7/23/15

Enter:   
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J.S.C.

**CYNTHIA S. KERN**  
J.S.C.