

<b>Olympia House, LLC v Khristov</b>
2016 NY Slip Op 31617(U)
August 24, 2016
Supreme Court, New York County
Docket Number: 651049/12
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 61

X

OLYMPIA HOUSE, LLC,

Plaintiff,

-against-

Index No. 651049/12  
Motion Seq. No. 003

VICTORIA KHRISTOV,

LIODEMILA BIRZOLUL,

Defendants.

X

**OSTRAGER, J:**

Before the Court at this time is plaintiff's motion for a default judgment against defendant LiouDEMILA Birzolul and for summary judgment against defendant Victoria Khristov. The background facts are as follows.

Plaintiff Olympia House, LLC commenced this action as owner of the premises at 279 East 44<sup>th</sup> Street in Manhattan to recover monies allegedly due pursuant to a commercial lease for the ground floor premises naming RUS Coffee Inc. as the tenant (the "Owner" and "Tenant" respectively). The lease, dated March 31, 2008, provided for the rental of the premises to RUS as Tenant through March 31, 2018 (the Lease is attached to the moving papers as Exh A). It is undisputed that the defendants herein, Victoria Khristov and Liousemila Birzolul, signed a written Guaranty pursuant to paragraph 77 of the Lease concurrently with the Tenant's execution of the Lease (Exh B).

According to the Affidavit of the Owner's Managing Agent Christopher Lee (at ¶5), the Tenant was evicted from the premises on or about March 21, 2012 for nonpayment of rent based on a Civil Court proceeding. Shortly thereafter, the Owner

commenced this action against the two Guarantors to recover \$239,455.000 in rent, additional rent and taxes allegedly due under the Lease at the time of the eviction. The Owner also seeks to recover \$20,368.79 for rent for April 2012, the month after the Tenant was evicted, claiming that the Owner was unable to sign a lease for the premises with a new tenant until May 1, 2012 (Lee Aff at ¶7,9; see also Exh G). Lastly, the Owner seeks to recover \$50,700.33 for broker's fees allegedly incurred in connection with the rental of the premises to the new tenant (Lee Aff, ¶8, Exh H).

After three years of unexplained inaction on the part of plaintiff Olympia House following the April 2012 commencement of this action, the plaintiff requested a preliminary conference in November of 2015 and the action was assigned to this Court. After some limited discovery, the Owner made the instant motion for a default judgment against defendant Liudemila Birzolul, who has never appeared or answered the Complaint, and for summary judgment against defendant Victoria Khristov, who has appeared by counsel and filed an Answer with a cross-claim against her co-defendant Birzolul seeking indemnification should any judgment be entered against her.

Although as noted earlier defendant Birzolul has not appeared or opposed the motion, defendant Khristov has vigorously opposed based primarily on her Fifth Affirmative Defense that the amendment of the Lease without Ms. Khristov's knowledge or consent has relieved her of any obligation under the Guaranty. In her Affidavit (¶13), Ms. Khristov explains that she "was supposed to be a partner in Rus Coffee Inc. but within a short time, [she] had a falling out with the co-defendant and her husband and ... was forced out." She indicates (at ¶6) that she learned from reading plaintiff's papers in this action that the Lease was amended after she executed the Guaranty, and that she

“never agreed to any modification.” Her counsel contends in his Affirmation (¶26) that the amendment was significant in that, among other things, it modified the real estate tax provision of the Lease and thus relieved Ms. Khristov of any and all obligations under the Guaranty.

As evidence of the amendment, the defendant includes in her opposition papers as Exhibit C an unsigned document entitled “Amendment to Lease” dated October 2010 that clearly referenced the 2008 Lease between the Owner and the Tenant RUS Coffee, Inc. Provided with that document is a copy of an October 28, 2010 letter to “Olga” at RUS Coffee signed by Chris Lee as Managing Agent for the Owner Olympia House. The letter indicates that the Owner agrees to execute the Amendment to Lease “upon delivery of a certified check for \$51,375.05 ... representing Base Rent paid through November 2010.” Also provided is a copy of a bank check for that amount dated October 29, 2010 and payable to Olympia House LLC, with “Sergey Yevelev” named as the remitter. These documents confirm that the Lease was in fact amended, and the Owner in its Reply does not suggest otherwise.

However, the Owner in Reply disputes that the Amendment modified the real estate tax provision or otherwise modified the Lease in any significant way. Further, the Owner’s counsel seeks to distinguish the cases on which the Guarantor has relied in its opposition papers and insists that the Guarantor remains fully obligated under the terms of the Guaranty.

The analysis here necessarily begins with the terms of the Guaranty, which shall “be interpreted in the strictest manner.” *White Rose Food et al. v Saleh*, 99 NY2d 589, 591 (2003). The courts have repeatedly held that a “guarantor should not be bound

beyond the express terms of his guarantee.” *Lo-Ho LLC v Batista*, 62 AD3d 558, 559-60 (1<sup>st</sup> Dep’t 2009), quoting *665-75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD2d 270, 271 (1<sup>st</sup> Dep’t 1999). In this case, the Guaranty expressly states in paragraph 1(a) (with emphasis added) that the defendant Guarantors guaranteed “**absolutely and unconditionally**, jointly and severally”:

the full and prompt payment of the Fixed Rent, Additional Rent and all other sums and charges payable by Tenant, its successors and assigns, under and pursuant to the Lease. ... If at any time Tenant should default in the payment of Fixed Rent, Additional Rent or any other sums and charges payable by Tenant, its successors and assigns, under or pursuant to the Lease ..., Guarantor shall forthwith pay such Fixed Rent, Additional Rent and other sums and charges, and any arrears thereof, to Owner, ... Guarantor shall also forthwith pay to Owner all damages, costs and expenses that may arise in consequence of any default under the Lease by Tenant, or by Tenant’s successors or assigns, including, without limitation, all attorneys’ fees, disbursements and Court costs incurred by Owner or arising out of or in connection with any such default and/or enforcement of this Guaranty.

Paragraph 5 of the Guaranty describes the lasting effect of the Guaranty, stating in relevant part that:

Guarantor’s obligations under this Guaranty shall remain in full force and effect without regard to, and shall not be impaired or affected by: (a) any amendment, extension, renewal or modification of, or addition or supplement to, any of the terms, conditions or provisions of the Lease; (b) any assignment of the Lease or subletting thereunder; ... (h) any sale, lease or transfer of any or all of the assets, shares of stock, partnership interest or other ownership interests of Tenant or Guarantor to any person, firm or entity; or (l) any other circumstance, whether or not Guarantor shall have had notice or knowledge thereof.

Turning to the Amendment to Lease at issue, the Owner is correct that the document does not modify, or even mention, real estate taxes. What is more, none of the amendments modified the Lease terms in any significant way. The first three provisions in the Amendment simply expanded the permitted use of the premises by

allowing light cooking, social gatherings and the service of alcoholic beverages, whereas the original Lease limited the uses of the premises as a coffee shop. In sharp contrast to the facts in *Lo-Ho LLC v Batista*, 62 AD3d 558 (1<sup>st</sup> Dep't 2009) relied upon by the Guarantor, wherein the "Extension of Lease" added a five-year term to the original lease with significantly higher rent and taxes payable and renovation obligations added, these three provisions did not significantly increase the Tenant's burden so as to effectively create a new lease and thereby invalidate the Guaranty. The continued effect of the Guaranty, despite these amendments, is also supported by the clear and unequivocal language in paragraph 5 of the Guaranty, quoted above, which dictates that the Guaranty "shall remain in full force and effect without regard to ... any amendment ... of the Lease."

Nor is Ms. Khristov relieved of her obligations under the Guaranty based on the fourth provision in the Amendment to Lease. That provision permitted the Tenant to transfer 50% of the outstanding stock to Sergey Yevelev, the remitter on the above-referenced check, and thereby modified ¶64 of the Lease which prohibited any assignment. Wholly unavailing is the claim by defendant's counsel (at ¶9) that this provision necessarily alerted Olympia to the fact that Ms. Khristov was "no longer involved" in RUS and thereby obligated Olympia to secure a new guaranty. The Amendment does not prove knowledge, and Ms. Khristov has offered no additional information in her own affidavit. What is more, if in fact the sale completely relieved Ms. Khristov of any ownership interest in RUS, it was her responsibility, and not Olympia's, to seek to replace here Guaranty with one by Yevelev. Lastly, and quite significantly, the above-quoted language in the Guaranty expressly obligates the Guarantor to pay the

obligations of the "Tenant, its successors and assigns." The fifth and final provision of the Amendment to Lease states that "All other terms and conditions of the Lease shall remain in full force and effect," further enforcing the Guarantor's continued obligations under the Lease.

Based on the above analysis, plaintiff is entitled to summary judgment dismissing Ms. Khristov's Fourth and Fifth Affirmative Defenses based on the Amendment to Lease. As there is no evidence that the claim is time-barred, the Second Affirmative Defense is also dismissed. Additionally, as defendant has made no showing that plaintiff's claims are barred by the statute of frauds, the Third Affirmative Defense is dismissed.

Nevertheless, plaintiff has not established its entitlement to all the relief requested in the moving papers. As to the default judgment sought against defendant Liousemila Birzolul, the Court indicated at oral argument that, while defendant Birzolul had, in fact, defaulted, the award of any relief depended upon whether plaintiff had established its case. Here, plaintiff has failed to move "within one year after the default" as required by CPLR §3215(c). As noted earlier, the default occurred in the Spring of 2012, and no action whatsoever was taken by plaintiff until November 2015, with this motion filed thereafter. Under these circumstances, the statute states that "the court shall not enter judgment but shall dismiss the complaint as abandoned ... unless sufficient cause is shown by the complaint should not be dismissed." No such showing has been made, nor any explanation offered for the delay. Thus, the motion for a default judgment is denied without prejudice to a new motion that makes the statutorily required showing.

Plaintiff's delay in proceeding here may also negatively impact Ms. Khristov's cross-claim against Birzolul for indemnification in that Khristov may not be able to locate Birzolul or enforce any judgment against her as a direct result of plaintiff's extended delay. Thus, the Court declines to dismiss the Sixth Affirmative Defense based on laches. The disposition of that defense must await the completion of discovery and further proceedings.

If Olympia ultimately defeats that defense, recovery against Khristov would still be limited. Based on the terms of the Lease and the Guaranty, Olympia would be entitled to recover rent, additional rent, and real estate taxes through March 31, 2012 when the Tenant was evicted, assuming those amounts are adequately established at a hearing as the papers are insufficient on that point. Additionally, pursuant to paragraph 15 of the Guaranty, the Guarantor's liability would extend beyond the date of eviction to cover the April 2012 rent, as rent was still due when the Tenant was evicted. *See, 300 Park Avenue, Inc. v Café 49, Inc.*, 89 AD3rd 634 (1<sup>st</sup> Dep't 2011)(extending Guarantor's liability as all conditions in the Guaranty for the termination of liability had not been satisfied). Further, paragraph 1 of the Guaranty quoted above expressly establishes the Guarantor's liability for attorney's fees, but a hearing would be required to determine the amount as the documentary evidence provided with the motion is too conclusory.

The claim for broker's fees is questionable. Paragraph 1 of the Guaranty, quoted above, limits the Guarantor's liability to "all damages, costs and expenses that may arise in consequence of any default under the Lease by Tenant." While attorney's fees are expressly included, neither broker's fees nor the costs of re-letting are included. As



Olympia routinely uses a broker to lease the premises, the broker's fees incurred here do not appear to be a "consequence of any default under the Lease by the Tenant." However, the Court will grant both sides an opportunity to present case law on that issue should plaintiff overcome the laches defense and be entitled to obtain a judgment against the Guarantor.

Accordingly, it is hereby

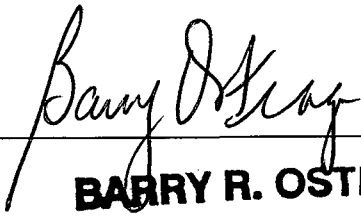
ORDERED that plaintiff's motion for a default judgment against defendant Liouudemila Birzolul is denied without prejudice to renewal within thirty days in accordance with this decision; and it is further

ORDERED that plaintiff's motion for summary judgment against defendant Victoria Khristov is granted to the extent of dismissing the Second, Third, Fourth and Fifth Affirmative Defenses and is otherwise denied; and it is further

ORDERED that a status conference is scheduled for October 18, 2016 at 9:30 a.m. to arrange for the completion of discovery and any further proceedings. Only counsel with full authority shall appear.

This constitutes the decision and order of this Court.

Dated: August 24, 2016

  
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**BARRY R. OSTRAGER** S.C.  
JSC