

**259 E. 10th St. Realty Assoc., L.P. v Cowgirl's
Baking Inc.**

2016 NY Slip Op 31643(U)

August 29, 2016

Supreme Court, New York County

Docket Number: 154203/2014

Judge: Eileen A. Rakower

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

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259 EAST 10th STREET REALTY ASSOCIATES, L.P.,
d/b/a "259 East 10th St. Realty Associates",

Index No.
154203/2014

Plaintiff,

- v -

**DECISION
and ORDER**

Mot. Seq. 001

COWGIRL'S BAKING INC.
d/b/a "Cowgirl's Baking and Burrito Company"
and LIDIA J. BYHOWER,
Defendants.

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

Plaintiff, 259 East 10th Street Realty Associates, L.P. d/b/a "259 East 10th St. Realty Associates" ("Plaintiff"), brings this action to recover rent and additional rent owed under a commercial lease agreement (the "Lease") between Plaintiff, as landlord, and defendant Cowgirl's Baking Inc. d/b/a "Cowgirl's Baking and Burrito Company" ("Cowgirl's Baking") as tenant, for use of the east store and basement under the building located at 259 East 10th Street, New York, New York 10009 (the "Premises"). The Lease was for a term of five years from September 2010 through August 2015. Plaintiff further claims that Lidia J. Byhower ("Byhower") (and together with Cowgirl's Baking collectively, "Defendants"), executed a Limited Guarantee on or about November 15, 2010 as an essential prerequisite to the Assignment.

Plaintiff commenced this action by Summons and Complaint dated April 30, 2014. Byhower interposed an Answer on September 5, 2013. Plaintiff moves for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Plaintiff against Byhower. Plaintiff does not seek any relief as against Cowgirl's Baking.

Plaintiff submits the affirmation of Deborah Johnson; the affidavit of Martin Hollander, an officer of Plaintiff; copy of the Lease; copy of the Guarantee;

Marshall's Notice; Tenant Invoices; pleadings; Plaintiff's interrogatories; and Defendant's Interrogatories. Byhower submits an affidavit in opposition.

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 Moniger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Dev. Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dept. 2009]). "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 Dep't 1998]).

Byhower executed a Limited Guarantee, which in relevant part states:

LIMITED GUARANTEE - "GOOD GUY"

- A. As an inducement to 259 East 10th St. Realty Assoc. ("Owner") to enter into an Assignment of lease, dated August 13th, 2010 (the "Lease") with Cowgirls Baking, Inc. (the "Tenant"), for East Store (Street Level) in the premises located at 259 East 10th Street, New York, New York (the "Demised Premises"), the undersigned, hereby absolutely, unconditionally and irrevocably guaranty to Owner until the last day of the month (the "Surrender Date") in which the Tenant executes and delivers to Owner an instrument in recordable form whereby the Tenant surrenders of all Tenant's rights under the Lease and delivers to Owner the Demised Premises vacant and in broom clean condition in accordance with the terms of the Lease, free of any subleases, licenses or occupants,

and simultaneously therewith delivers the keys to the Demised Premises to the Owner. *This guarantee shall relate to the payment of all annual rent, real estate tax increases, insurance premiums, water and electric charges, and for the cost of removing any mechanic's liens through such Surrender Date.* In addition, if Tenant shall not have paid all rent required to have been paid by Tenant pursuant to the Lease during the period through and including Surrender Date, *the guarantor(s) agrees to pay to Owner a sum equal to the amount of concession granted to Tenant under the Lease.* (emphasis added).

- B. Any security deposit held by the Owner under the Lease shall not be credited against amounts payable by Tenant, or by Guarantor(s) under the terms of this Guarantee. The acceptance by Owner of payment by Tenant or Guarantor(s) or the acceptance of a such surrender of the Demised Premises shall not be deemed a release or waiver by Owner of any obligations of the Tenant under the Lease, and Tenant's obligation of the Tenant under the Lease, and Tenant's obligations under the Lease shall survive such acceptance and surrender.
- C. This Guarantee is a absolute and unconditional and is a guarantee of payment and not of collection.
- D. Guarantor(s) agree that this Guarantee shall remain in force and effect as to any assignment, transfer, renewal, modification or extension of the Lease, whether or not Guarantor(s) shall have received any notice of or consented to such renewal, modifications, extension, assignment or transfer.
- E. The granting of any extension of time or the forbearance or failure of Owner to insist upon strict performance or observance or any of any of the terms of the Lease, or otherwise to exercise any right therein contained, shall not be construed as a waiver as against Tenant or Guarantor(s) under the Guarantee.

Plaintiff has made a prima facie showing of entitlement to summary judgment on its cause of action for breach of contract, pursuant to Guarantee. Hollander's Affidavit, and the documentary evidence submitted, establishes that, for the period from August 2011 through January 2012, Byhower owes Plaintiff for unpaid base rent and additional rent (water/sewage and tax assessments) under the Lease under the Guarantee in the total sum of \$19,952.08, and for the two month rent concession provided at the Lease onset for September and October 2010 in the amount of \$6,200. Pursuant to paragraph B of the Guarantee, the security deposit shall not be credited to this amount.

In opposition, Byhower attests in her affidavit, "Upon exiting the premises, I called my representative (Erik- Martin Hollander's son) and he had specifically said that the deposit would go towards the delinquent rent and we were all 'good.'" Byhower provides no written document that memorializes such an agreement or a modification of Byhower's obligations under the Guarantee. Byhower does not dispute that she executed the Lease and Guarantee and that she "evacuated the premises" and stopped paying rent in 2011. Byhower does not demonstrate that Tenant "execute[d] and deliver[ed] to Owner an instrument in recordable form whereby the Tenant surrenders of all Tenant's rights under the Lease and delivers to Owner the Demised Premises vacant and in broom clean condition in accordance with the terms of the Lease, free of any subleases, licenses or occupants, and simultaneously therewith deliver[ed] the keys to the Demised Premises to the Owner" in accordance with the terms of the Guarantee. Furthermore, Byhower's arguments belies the very language of the Guarantee which states "[a]ny security deposit held by the Owner under the Lease shall not be credited against amounts payable by Tenant, or by Guarantor(s) under the terms of this Guarantee."

While Plaintiff also seeks attorneys' fees from Byhower that Plaintiff has incurred in the non-payment proceeding and possession of the Premises (\$2,223.20), and attorneys' fees it has paid for the present collection action (\$2,066), Plaintiff has failed to provide the basis for the relief requested. The Guarantee "shall relate to the payment of all annual rent, real estate tax increases, insurance premiums, water and electric charges, and for the cost of removing any mechanic's liens through such Surrender Date." Attorneys' fees incurred in enforcing the Lease or the Guarantee are not listed in the Guarantee as part of Byhower's obligations or defined as "annual rent" under the Lease.

Wherefore it is hereby,

ORDERED that Plaintiff's motion for summary judgment against Defendant Lidia J. Byhower is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant Lidia J. Byhower, in the amount of \$26,152.08 (at the rate of 9% per annum) until the date of entry of 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: AUGUST 29, 2016

AUG 29 2016



EILEEN A. RAKOWER, J.S.C.