SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER **PART** 61
Justice

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MOON 170 MERCER, INC.,

Plaintiff,

- v -

ZACHARY VELLA,

Defendant.

INDEX NO. 155605/2012

MOTION DATE 10/19/2017

MOTION SEQ. NO. 006

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276

were read on this application to/for Vacate - Decision/Order/Judgment/Award

This extremely protracted litigation involves efforts by plaintiff Moon 170 Mercer, Inc., the owner of a commercial condominium unit in a building at Broadway and Mercer Street (the "Owner"), to enforce a personal Guaranty signed by defendant Zachary Vella (the "Guarantor"). The Guaranty was signed in connection with a fifteen-year lease dated December 16, 2009 pursuant to which the Owner leased the space to Mephisto Management, LLC (the "Tenant"). The Tenant operated a restaurant at the premises that closed in or about May 2012, and the Tenant corporation was dissolved and the Tenant removed from possession not long thereafter.

After much motion practice both before Justice Lawrence Marks and this Court and various appeals (which are ongoing), a Judgment was entered in this action on January 23, 2017 in favor of the Owner against the Guarantor for the sum of $1,178,518.62 for rent due pursuant

to the terms of the lease (NYSCEF Doc. No. 202). The Tenant now moves for an order pursuant to CPLR 5015(a)(5) to vacate the Judgment based on the Appellate Division's June 1, 2017 modification of an order entered in a separate damages action commenced by the Tenant against the Owner (the "Tenant action"), arguing that the order had been relied upon for key rulings in this case which the modification calls into question. *Mephisto Management, LLC v Moon 170 Mercer, Inc.*, 151 AD3d 416 (1st Dep't 2017). Additionally, pursuant to CPLR 2221(e) the Guarantor seeks to renew his opposition to the Owner's summary judgment motion, as the Judgment the Guarantor seeks to vacate was entered when the Appellate Division granted the Owner's summary judgment motion in January of this year, before the modification in the Tenant action. *Moon 170 Mercer, Inc. v Vella,* 146 AD3d 537 (1st Dep't 2017).

For the reasons set forth below, the Guarantor's motion is denied in its entirety.

The Guaranty signed in this case on December 16, 2009 contains extremely broad language (NYSCEF Doc. No. 63). The introductory paragraph begins by stating that the Guarantor does "hereby unconditionally, absolutely, irrevocably and personally covenant and guaranty to Landlord, as follows:" What follows are 13 very specific paragraphs that reinforce the fact, expressly reiterated in paragraph 2, that the "Guaranty is primary, absolute and unconditional, and shall not be released, discharged or affected by any modifications to the Lease, or by any waiver or by failure of Landlord to enforce any of the terms and conditions thereof." The Guaranty (at ¶1) obligates the Guarantor to pay "all Base Rent, Additional Rent, and all other charges and the performance of all monetary obligations of Tenant under the Lease." Paragraph 4 adds that those obligations "shall not be released, discharged or affected in any way, by reason of any action or proceeding taken against Tenant under the Lease, including, without limitation, termination of the Lease, and recovery of possession of the Premises."

The only limitation on the Guarantor's liability is set forth in paragraph 5 of the Guaranty, which limits liability to the performance of all Lease obligations of the Tenant through the "Vacate Date" on very specific terms and conditions. Those terms and conditions include that the Tenant (1) give the Landlord at least thirty days prior written notice of its intent to vacate; (2) pay all amounts due under the Lease through the Vacate Date; (3) actually vacate on or before the Vacate Date; (4) execute reasonable surrender documents; (5) return the keys; and (6) forfeit security deposit. Paragraph 5 goes on to state clearly and unequivocally that, should Tenant fail to satisfy each and every one of the six conditions, "the Guarantor's liability under this Guaranty shall continue and shall be unaffected by Tenant's vacatur of the Premises and in such event, notwithstanding the actual vacatur by Tenant, the Guarantor shall in all respects remain liable for the full and punctual performance and observance by Tenant of all terms, covenants and conditions of the Lease on Tenant's part to be kept, performed or observed. ... Furthermore, nothing in this Paragraph 5 shall be deemed to release Guarantor from any liability under this Guaranty relating to any act or omission occurring prior to the Vacate Date, regardless of whether such liability is asserted prior to or after the Vacate Date."

It is undisputed that the Tenant did not satisfy the conditions set forth in Paragraph 5 of the Guaranty so as to limit the Guarantor's liability to the $175,716.79 in rent accrued through the Tenant's vacatur of the premises in February 2013 by means of eviction. Rather, the Guarantor contends that the Appellate Division's reinstatement of the Tenant's wrongful eviction claim in the Tenant action both undermines the First Department's application of collateral estoppel to reject the Guarantor's purported defense in this case and also demonstrates a failure of consideration that renders the Guaranty unenforceable, at least as to the post-eviction rent.

Both arguments fail. The Guarantor's collateral estoppel argument is based on the Tenant's wrongful eviction claim in the separate action. Justice Oing had granted the Owner's pre-answer motion to dismiss the wrongful eviction claim by order entered July 11, 2014 (Index No. 653456/13). Based on that ruling, the Appellate Division in this action rejected efforts by the Guarantor to limit his liability based on the Tenant's wrongful eviction claim. Thus, in affirming Justice Marks' decision awarding the Owner summary judgment on liability in this action, the First Department stated in 2014 that:

> Plaintiff landlord demonstrated its prima facie entitlement to summary judgment on the issue of liability by establishing that defendant signed an absolute and unconditional guaranty of a commercial lease, that the tenant was in arrears in payment of base rent and additional rent, and that defendant failed to perform under the guaranty (*see International Plaza Assoc., L.P. v Lacher*, 104 AD3d 578, 579 [1st Dep't 2013]). Defendant asserts that plaintiff wrongfully evicted the tenant. However, the tenant's wrongful eviction claim was asserted in a separate action against plaintiff and its principal, Michael Shah, and has been dismissed. We note that defendant cannot avail himself of the breach of contract and fraud claims asserted by the tenant in that action because they are independent causes of action that may only be asserted by the tenant (*see Walcutt v Clevite Corp.*, 13 NY2d 48, 55-56 [1963]).

Moon 170 Mercer, Inc. v. Vella, 122 A.D.3d 544, 544–45.

Similarly, in granting the Owner summary judgment on damages, the First Department stated on January 12, 2017 (146 AD3d 537, 537-38) that:

> Defendant's argument that the tenant was unlawfully evicted, and that therefore he is liable only for rent accrued until the tenant's eviction, is barred by the doctrine of collateral estoppel. The claim of unlawful eviction was dismissed on the merits in a separate action between the tenant and plaintiff, and a motion to renew and reargue was denied based on the same purportedly new evidence defendant cites here. Since the unlawful eviction issue was raised in the prior action and decided against the tenant, with whom defendant, as guarantor of the lease, stands in privity, defendant is precluded from relitigating it in this action (*see Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]; *APF 286 Mad LLC v Chittur & Assoc. P.C.*, 132 AD3d 610, 610 [1st Dep't 2015], *lv dismissed* 27 NY3d 952 [2016]).

The Guarantor now argues here that those holdings were undermined when the First

Department's reinstated the Tenant's wrongful eviction claim in the separate Tenant action on June 1, 2017, finding that:

> The complaint states a cause of action for wrongful eviction based on an invalid warrant (RPAPL 853; *see e.g. Rodriguez v 1414-1422 Ogden Ave. Realty Corp.*, 304 AD2d 400 [1st Dep't 2003]; *Mayes v UVI Holdings*, 280 AD2d 153 [1st Dep't 2001]). Defendant Moon 170 Mercer, Inc.'s service of a 10-day notice to cure a default, commencement of a new holdover proceeding, and filing of a petition alleging that the tenancy had recently been terminated arguably reflect an intent to revive the lease after the issuance of a warrant of eviction in an earlier proceeding (*see DiGiglio v Tepedino*, 173 AD2d 763 [2d Dep't 1991], *lv dismissed* 78 NY2d 1007 [1991]).

Mephisto Mgmt., LLC v. Moon 170 Mercer, Inc., 151 A.D.3d 416, 416–17.

This Court rejects the Guarantor's claim that the recent decision by the First Department in the Tenant action entitles him to a decision here vacating the money judgment entered against him. First and foremost, the First Department merely reinstated the wrongful eviction claim based on a finding at the pre-answer stage that a cause of action had been stated; it did ***not*** make a finding in favor of the Tenant on the merits of the wrongful eviction claim.

Moreover, particularly in 2014, the First Department rejected the Guarantor's reliance on the Tenant's wrongful eviction claim for reasons separate and apart from collateral estoppel. As indicated above, the First Department cited "the absolute and unconditional guaranty." Additionally, the First Department stated that: "We note that defendant cannot avail himself of the breach of contract and fraud claims asserted by the tenant in that action ***because they are independent causes of action that may only be asserted by the tenant*** (*see Walcutt v Clevite Corp.*, 13 NY2d 48, 55-56 [1963])" (emphasis added).

In other words, the First Department found that the Guarantor was not entitled to rely on the Tenant's wrongful eviction claim, as that claim belonged only to the Tenant. Such an interpretation is supported by various decisions in this action and in the Tenant action. For

example, in his September 2013 affidavit in opposition to the Owner's motion for summary judgment in this action, the Guarantor indicated that the Tenant had advised him of its intent to claim wrongful eviction (NYSCEF Doc. No. 20 at ¶ 13). In October 2013, the Tenant did commence such an action under Index No. 653456/13. Nevertheless, Justice Marks in December 2013 rejected the Guarantor's attempted reliance on the wrongful eviction claim in this case and found the Owner was entitled to summary judgment on liability, well before Justice Oing dismissed the wrongful eviction claim in July 2014, and the First Department affirmed that part of Justice Marks' decision. 122 AD3d 544.

Further, in finding that the Guarantor "cannot avail himself of the breach of contract" claim asserted by the Tenant in the separate action, the Appellate Division found that the Guarantor could not avail himself of the Tenant's wrongful eviction claim to cap his own liability for rent. It is well established that "a guarantor's liability may exceed the scope of the principal's liability." *International Plaza Assoc., L.P. v Lacher,* 104 AD3d 578, 579 (1st Dep't 2013), citing *Raven E. Corp. v Finkelstein,* 223 AD2d 378 (1st Dep't 1996), *lv dismissed* 88 NY2d 1016 (1996).

This finding is supported by the record. A review of the Tenant's Complaint confirms that the Tenant had asserted its wrongful eviction claim as part of the Second Cause of Action for damages based on breach of contract (¶70); the wrongful eviction claim asserted separately in the Fourth Cause of Action was presumably added to support a request for restoration to possession, which the Tenant apparently no longer seeks, and a request for treble and punitive damages, which cannot inure to the benefit of the Guarantor under the terms of the absolute and unconditional Guaranty. Nor does the Tenant's removal from possession relieve the Guarantor of liability, as confirmed by the express terms of the above-quoted paragraph 4 of the Guaranty.

Additionally, ample case law supports the finding that the judgment entered against the Guarantor should not be vacated based on the mere reinstatement of the Tenant's wrongful eviction claim in the separate action. As the First Department clearly stated in *I Bldg, Inc. v Hong Mei Cheung,* 137 AD3d 478 (2016) (citations omitted):

> Guaranties and leases are separate documents; the former impose obligations on the guarantors and the latter impose obligations on the landlord and the tenant .... When a guarantor is sued on the guaranty, as is the case here, he or she cannot raise a claim or defense which is personal to the principal debtor, such as breach of the principal contract, unless it extends to a failure of consideration for the principal contract, and therefore for the guarantor's contract.

The Court rejects the Guarantor's argument that the wrongful eviction claim constitutes a failure of consideration under the lease, thereby invalidating both the lease and the Guaranty. Quite the contrary, as indicated earlier, the Tenant's wrongful eviction claim, as framed by the complaint and the law, is tantamount to a breach of lease claim and seeks to enforce the terms of the lease through a restoration of possession and damages. *See Maracina v Shirrmeister,* 105 AD2d 672 (1st Dep't 1984).

Wholly misplaced is the Guarantor's reliance on *Walcutt v Clevite Corp.*, 13 NY2d 48 (1963) for its failure of consideration claim. *Walcutt,* which involves a corporate asset transaction, is readily distinguishable on the facts, most significantly because, in sharp contrast to the Guaranty here, "the guaranty in *Walcutt* was not unconditional and did not contain a waiver of defenses." *Plaza Tower LLC v Ruth's Hospitality Group, Inc.*, 126 AD3d 579 (1st Dep't 2015), citing *Harrison Ct. Assoc. v 220 Westchester Ave. Assoc.*, 203 AD2d 244 (2d Dep't 1994) (holding defendant's defense of overcharges was barred by the unconditional guaranty).

As the *Walcutt* court also acknowledged, regardless of the wording of the particular guaranty, "a guarantor when sued alone by the creditor cannot avail himself of an independent

cause of action existing in favor of his principal as a defense or counterclaim ..." 13 NY2d at 55 (citations omitted). So, for example, the Court of Appeals noted that a guarantor cannot assert his principal's defense of fraud or breach of warranty. *Id.* at 55-56. Along the same lines, the First Department has held that a guarantor of a commercial lease cannot avail itself of the tenant's defense that rent could not be accelerated under the lease because the premises had been re-let, finding such a defense "personal to the obligor tenant." *Royal Equites Operating, LLC v Rubin,* 154 AD3d 516, 517 (2017). And in *Hotel 71 Mezz Lender LLC v Mitchell,* 63 AD3d 447, 448 (2009), the First Department held that the guarantor's "defenses sounding in breach of contract [that] are premised on allegations of misconduct by plaintiff [lender] vis-à-vis [the debtor] alone and therefore belong to and may be asserted by [the debtor] alone." Here, the Tenant's wrongful eviction claim, premised on allegations of misconduct by the Owner, is not a defense available to the Guarantor, particularly in light of the absolute and unconditional Guaranty. The recent decision by the Appellate Division in the tenant action does not change that result.

Accordingly, it is hereby

ORDERED that defendant's motion is denied in its entirety.

12/14/2017
DATE

BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

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