

LPS Baxter Holding Co. LLC v Salerno

2018 NY Slip Op 30410(U)

February 27, 2018

Supreme Court, New York County

Docket Number: 652954/2016

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN
Justice

PART 58

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LPS BAXTER HOLDING COMPANY LLC
Plaintiff,

INDEX NO. 652954/2016

MOTION DATE 10/3/2017

- v -

MOTION SEQ. NO. 002

VICTOR SALERNO,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this application to/for Judgment - Summary

Upon the foregoing documents, it is

Motion for summary judgment is granted. It is undisputed that defendant signed a personal guarantee for the full performance of all terms under the lease between plaintiff and Dave’s Warehouse; that the tenant failed to make certain payments; that plaintiff and tenant entered into an agreement (the “Estoppel Agreement”) whereby tenant delivered an estoppel certificate that waived certain claims to plaintiff in exchange for a rent abatement of \$10,0000; that paragraph 5 of the Estoppel Agreement stated “The Parties hereto acknowledge and agree that, notwithstanding anything contained in the Limited Guaranty to the contrary, the Abatement Credit shall expressly inure to the benefit of Limited Guarantor, and that Limited Guarantor shall

be a third party beneficiary of this Agreement“; and that tenant failed to pay the amount outstanding under the lease.

Plaintiff commenced this action under the guarantee and has moved herein for summary judgment and to dismiss the affirmative defenses. Plaintiff has established through the submission of the exhibits to this motion, including but not limited to, the lease, judgments of the Civil Court and the affidavit of Mark Engel, *prima facie* entitlement to summary judgment. Defendant argues that notwithstanding paragraph 5 of the Estoppel Agreement, signed by defendant in his capacity as “authorized signatory” for tenant, he should be relieved from his obligation under the guarantee due to the Estoppel Agreement. Specifically, defendant argues that a guarantor is not obligated beyond the express terms of the guarantee and that it does not apply to an amendment to the lease, which defendant argues the Estoppel Agreement was.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]]. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

“Where an obligee materially alters the terms of the contract and increases the risks imposed on the surety [or guarantor] by such acts as modifying the duties of the principal [or] extending the time for the principal's performance” – as here – the surety [or guarantor – here Mr. Frydman] “. . . is relieved of its obligation.” 63 N.Y. Jur. 2d Guaranty and Suretyship § 190 (emphasis added).” Further, “the rule that an extension of the time of payment of the debt without the consent of a surety bound for its payment discharges the surety is applied without regard, at least in the case of an uncompensated surety, to whether the surety suffers substantial injury as a result of the extension, or it works to his or her detriment.” Id., § 205.”


Defendant’s argument is without merit. First of all, the Estoppel Agreement did not materially alter the terms of the contract, increase the risks, modify the duties or extend the time of payment under the contract. Similarly, the Estoppel Agreement did not amend the lease. The Estoppel Agreement settled disputes about conditions between the tenant and landlord and granted an abatement. Arguably, the Estoppel Agreement actually improved defendant’s position by reducing the amount defendant could potentially owe. To the extent that defendant argues that the Estoppel Agreement eliminated any potential set-offs, first the guarantee was an unconditional guarantee and second, the lease itself provided for no set-offs it may have. Further, even if the terms were modified in a negative manner, in paragraph 3 of the guarantee defendant had already agreed and that he consented to modifications to the lease. Thus, as there remains no question of fact, summary judgment is granted to plaintiff. The affirmative defenses are dismissed. The amounts sought have been established by plaintiff; the breach of contract claim falls within the six-year statute of limitations. The counterclaim seeks a setoff, something specifically barred by the lease and the guarantee itself prohibits subrogation of rights by the guarantor. Accordingly, it is therefore

ORDERED, that plaintiff is granted summary judgment and the Clerk of the Court shall enter judgment in the amount of \$40,029.95, plus interest from December 1, 2012, plus costs and disbursements as taxed by the Clerk; and it is further

ORDERED, that defendant's affirmative defenses and counterclaim are dismissed.

This constitutes the decision and order of the Court.

2/27/2018
DATE


DAVID BENJAMIN COHEN, J.S.C.
HON. DAVID B. COHEN
J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART		
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	DENIED		