NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

LIBERTY & NASSAU ASSOCIATES, LLC,

Plaintiff,

-against-

RICHARD COHN and ABRAHAM MERCHANT,

Defendants.

Index No.: 655926/2017
DECISION/ORDER
Motion Seq. Nos. 001; 002

Recitation as required by CPLR 2219 (a), of the papers considered in reviewing the motion of defendants Richard Cohn and Abraham Merchant for dismissal of the complaint of plaintiff Liberty & Nassau Associates, LLC (motion sequence no. 001), and the motion of nonparty Liberty Knights, LLC (Liberty Knights) to intervene in this action (motion sequence no. 002).

Papers	**Numbered**
Motion Sequence No. 001 (Motion to Dismiss):	
Defendants' Notice of Motion and Affirmation in Support	1
Plaintiff's Memorandum in Opposition	2
Defendants' Affidavit in Reply	3
Motion Sequence No. 002 (Motion to Intervene):	
Proposed Intervenor's Notice of Motion and Affidavit in Support	1
Plaintiff's Memorandum in Opposition	2
Proposed Intervenor and Defendants' Affidavit in Reply	3

Matalon Shweky Elman PLLC, New York (Joseph Lee Matalon of counsel), for plaintiff.
Alonso, Andalkar & Facher, P.C., New York (Mark. J. Alonso of counsel), for defendants and proposed intervenor.

Gerald Lebovits, J.

Upon the foregoing papers, it is ordered that the motion to dismiss (motion sequence no. 001) and the motion to intervene (motion sequence no. 002) are both denied.

Plaintiff brings this action against defendants, the co-guarantors of a commercial lease for premises in Manhattan. Plaintiff elected not to sue Liberty Knights (the tenant), a shell entity controlled by defendants, and to proceed solely against the guarantors. Defendants move to dismiss this action on the ground that this action may not proceed in the absence of the tenant. Liberty Knights moves separately to intervene in this action.

In 2003, plaintiff, the landlord of the commercial space at 55 Liberty Street in Manhattan, entered into a sublease with nonparty Liberty Knights for certain premises at that location (the lease [*see* affirmation of Mark J. Alonso, exhibit A]). Under the lease, the tenant is required to pay plaintiff base annual rent and additional rent as specified in the sublease, including real estate taxes, water and sewer charges, and fees for a security guard at the premises (complaint, ¶ 6).

At the same time, Cohn and Merchant, who own and control the tenant, entered into a "Limited Guaranty" in favor of plaintiff (the guaranty [*see* Alonso affirmation, exhibit C]; lease § 47 [c]). In 2007, the lease and guaranty were amended (*see id.*, exhibit B).

Pursuant to the guaranty, defendants agreed to be "jointly and severally" liable for the "Obligations," which include "Minimum Rent" under the Lease, and "Additional Rent," meaning "all other monetary obligations (other than Minimum Rent) under the Lease" (Guaranty at 1). Defendants agreed to be liable for Obligations, even if the landlord could not collect it from the tenant by reason of a release, discharge, defense, or lack or enforceability as to the Tenant:

> "Guarantor *jointly and severally* guarantees prompt payment when due of the obligations, regardless of law, regulation or order now or hereafter in effect in any jurisdiction affecting any terms governing the Obligations or the rights of Landlord with respect thereto. The Guarantor hereby agrees that its obligations under the Guaranty shall be *absolute and unconditional, irrespective of (a) any lack of validity or enforceability of any of, or any release or discharge of the Tenant from liability relating to, the Obligations* or any agreement or instrument relating thereto; (b) the absence of any attempt by the Landlord to collect all or any party of the Obligations . . . or (e) *any other circumstance that might otherwise constitute a defense available to, or a discharge of, the Tenant*"

(Guaranty, at 1 [emphasis added]).

Similarly, the Guaranty provides:

> "This Guaranty is a continuing Guaranty primary, absolute, and unconditional and all Obligations to which it applies or may apply under the terms hereof shall be conclusively presumed to have been created in reliance thereon. This guaranty shall be a guaranty of payment and not of collection. *Guarantor hereby waives any right to require that any legal action be taken by Landlord against Tenant before enforcement of Landlord's rights under this Guaranty*"

(*id.*).

When this action was commenced in September 2010, the tenant owed at least $250,000 to plaintiff in past due base minimum rent and additional rent (complaint, ¶ 10). Because of the guaranty, the guarantors likewise owed plaintiff more than $250,000 (*id.*, ¶ 11). Plaintiff elected to proceed solely against the guarantors under the guaranty, as was its right.

In lieu of answering the complaint, defendants move to dismiss under CPLR 3211 (a) (10) on the ground that "the court should not proceed in the absence of a person who should be a party" (Alonso affirmation, ¶ 1 [a]). Defendants do not identify any prejudice to them, but rather argue that the tenant has an "inherent interest" in assuring that the action "is properly defended," and express concern about the potential collateral estoppel effects to the tenant (*see* defendants' memorandum at 2-3).

The day after defendants moved to dismiss, the tenant, represented by the same attorney, moved to intervene under CPLR 1012 (as of right) or CPLR 1013 (discretionary). The tenant asserts that it "possesses defenses" to plaintiff's claims, which it describes as "concessions of and changes of operations by Tenant granted to Landlord," "estoppel," and "representations" made by plaintiff to the tenant (aff of Daniel Hannagan, ¶ 6). The tenant argues that because a judgment against the guarantors may be "res judicata" against it, it has a right to intervene (*see* Tenant's memorandum at 2-3). In the alternative, it argues that, because of the existence of common questions of law and fact, it should be permitted to intervene (*id.* at 3).

Both motions are denied, as, under the terms of the guaranty, the landlord is free to sue the guarantors without first taking any action against the tenant, and the intervenor has not demonstrated that its interests would not be adequately protected by an existing party, and that it may be bound by the judgment.

The Motion to Dismiss (Motion Sequence No. 001)

The guaranty specifically provides that "[g]uarantor hereby waives any right to require that any legal action taken by Landlord against Tenant before enforcement of Landlord's rights under this Guaranty." Defendants nevertheless argue, without citing any applicable authority, that this action must be dismissed because the tenant is not a party. But consistent with the guaranty itself, the law is clear that a creditor need not proceed against the obligor, but may sue only the guarantor (*see News Ltd. v Australis Holdings Party. Ltd.*, 293 AD2d 276, 277 [1st Dept 2002] [rejecting argument that obligor's affiliates were necessary parties when guarantee itself provided that suit may be brought against guarantors alone]; *accord Congress Factors Corp. v Meinhard Commercial Corp.*, 129 Misc 2d 726, 728-729 [Sup Ct, NY County 1985] [holding that principal debtors are not necessary parties in action to enforce guaranty against factor, as "the specific purpose of a guarantee is to give the beneficiary recourse separate from any action against the principal debtor and it is not usual for the beneficiary of a guarantee to sue a guarantor alone"]).

Thus, courts routinely grant summary judgment to landlords in actions brought against guarantors where the tenants were not defendants (*see e.g. Thor Galaxy At South Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498-499 [1st Dept 2016]; *accord Bank of Am., N.A. v Solow*, 59 AD3d 304, 304-305 [1st Dept 2009]; *Samsung Am. v Noah*, 209 AD2d 367, 367 [1st Dept 1994]).

Accordingly, the motion to dismiss is denied (*see Stonehill Institutional Partners, L.P. v Frac Diamond Aggregates, LLP*, 2014 NY Slip Op 33037 [U], *2, 2014 WL 6769900, at *2

[Sup Ct, NY County 2014] [denying motion by borrower to intervene in lawsuit between lender and guarantor on ground that "[i]t would be contrary to the very purpose of a guarantee if the lenders did not have the ability to seek collection from the guarantors, separate and apart from their ability to bring a claim against the borrowers"]; *see also 500 Eighth Ave. Ltd. v Tsang*, 2016 WL 930130, *1 [Sup Ct, NY County 2016] [denying motion of principal debtor for leave to intervene in action against guarantor]).

The Motion to Intervene (Motion Sequence No. 002)

CPLR 1012 (a) (2), the basis for the tenant's intervention as of right, requires the movant to satisfy two prongs: (1) risk of inadequate representation by an existing party; and (2) the non-party may be bound by the judgment. Whether the entity seeking intervention will be bound by the judgment within the meaning of CPLR 1012 (a) (2) is determined by its res judicata effect (*Vantage Petroleum, Bay Isle Oil Co. v Board of Assessment Review of the Town of Babylon*, 61 NY2d 695, 698 [1984] [holding that Board of Education was denied intervention in tax certiorari proceeding as judgment fixing value of property for taxation purposes in one year is not res judicata]; *accord Matter of Tyrone G. v Fifi N.*, 189 AD2d 8, 17 [1st Dept 1993]). "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire Corp.*, 93 NY2d 343, 347 [1999]; *accord Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485 [1979] [noting that doctrine of res judicata holds that "as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action"]).

As to the first prong of CPLR 1012 (a) (2), no dispute exists that the tenant is owned and controlled by the guarantors (*see* Lease, § 47 [c]). Defendants and the proposed intervenor are represented by the same law firm, and these actions, filed one day apart, were part of an organized strategy by defendants and Liberty Knights. The interest of the tenant is being carefully protected by defendants. Accordingly, intervention as of right must be denied because the tenant's interests are adequately represented by defendants (*see Quality Aggregates v Century Concrete Corp.*, 213 AD2d 919, 920 [3d Dept 1995] ["When the rights of the prospective intervenors are already adequately represented . . . intervention should not be permitted"]).

In any event, even if there were a question about whether the tenant's rights were adequately safeguarded, the lack of res judicata effect of a judgment defeats intervention as of right. Because the tenant may have defenses that are unavailable to defendants as guarantors, a judgment against the latter cannot be enforced against the former. Also, no claims are asserted against the tenant. As such, no possibility exists that the tenant will be "bound the judgment."

"Guaranties and leases are separate documents; the former impose obligations on the guarantors and the latter impose obligations on the landlord and 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" (*I Bldg., Inc. v Hong Mei Cheung*, 137 AD3d 478, 478 [1st Dept 2016] [internal citations omitted]; *accord*

Royal Equities Operating, LLC v Rubin, 154 AD3d 516, 517 [1st Dept 2017] [holding that guarantors' "liability can be greater than that of the obligor tenant, as the lease and guaranties were separate undertakings, and the latter are enforceable without qualification or reservation"]; *Moon 170 Mercer, Inc. v Vella*, 122 AD3d 544, 545 [1st Dept 2014] [finding that guarantor could not "avail himself of breach of the contract and fraud claims asserted by the tenant . . . because they are independent causes of action that may only be asserted by the tenant"]; *Marcus Dairy Inc. v Jacene Realty Corp.*, 225 AD2d 528, 528-529 [2d Dept 1996] ["[A] guarantee agreement is separate and distinct from the contract between lender and borrower, and thus a party who enters into an unconditional guarantee of payment may not assert setoffs or defenses which arise independently from the guarantee"]).

The Guaranty itself provides that it is "absolute and unconditional" and is fully enforceable against the guarantors, even if the tenant if discharged, or has a defense. Also, plaintiff has not sued the tenant under the lease, but only defendants under the guaranty. Because there is no action under the lease against the tenant, tenant has no "defenses" to raise. If plaintiff decides, in the future, to sue the tenant for money damages, then tenant can raise all of its available defenses that are not available to defendants here. Thus, because the tenant may have defenses in a lease action that are not available to defendants in the present case, a judgment here against defendants will not be res judicata against the tenant (*see Griffin v Manning*, 2004 WL 5109379 [Sup Ct, NY County 2004] [denying insurer's motion to intervene in plaintiff's motion for entry of judgment pursuant to jury verdict in personal injury action; judgment would not have res judicata effect on insurer's defense based on fraud and collusion in direct action by plaintiff against insurer pursuant to Insurance Law § 3420]).

Accordingly, the tenant may not intervene as of right.

As to discretionary intervention, CPLR 1013 provides:

> "Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. *In exercising its discretion, the court shall consider whether intervention will unduly delay the determination of the action or prejudice the substantial rights of any party*"

(CPLR 1013 emphasis added]).

Although Liberty Knights argues that it is entitled to discretionary intervention because common questions of law and fact exist, plaintiff would be prejudiced if Liberty Knights were allowed to intervene. In the guaranty, plaintiff specifically bargained for the right to proceed solely against defendants. The guaranty is absolute and unconditional, and is expressly enforceable against defendants, despite any defenses the tenant may have to sums due under the lease, or even if the tenant has been entirely absolved from liability.

Also, plaintiff asserts that, once defendants have answered, it intends to file a summary-judgment motion without the need for any discovery, as an action to enforce a guaranty is

"particularly amenable to resolution on summary judgment" (*Aersale Inc. v Ibrahim*, 2013 WL 5366384, *4, 2013 US Dist LEXIS 137764, *10 [SD NY 2013, No. 13-Civ-713 (KBF)]). If the tenant were allowed to intervene, it would clearly "unduly delay the determination of the action," as there are no claims against the tenant in this action. Thus, discretionary intervention must be denied (*see e.g. Bache Commodities Ltd. v Garcia*, 28 Misc 3d 1222 [a], 2010 NY Slip Op 51429 [U], *3-4, 2010 WL 3211863, at *3-4 [Sup Ct, NY County 2010] [denying mandatory and discretionary intervention when obligor's participation "would inherently delay and complicate determination of the action" to enforce a guaranty, as allowing obligor to assert its defenses and potential claims "would raise arguments not otherwise available to" guarantors]; *accord Matter of Pier v Board of Assessment Review of Town of Niskayuna*, 209 AD2d 788, 789-790 [3d Dept 1994] [affirming denial of motion to intervene when any benefit to be gained from intervention would be more than offset by resulting delay and obfuscation of core issue in dispute]; *Osman v Sternberg*, 168 AD2d 490, 491 [2d Dept 1990] [denying motion to intervene when inclusion of intervenors would contribute nothing to resolution of controversy, and would only serve to delay outcome of matter]).

The court has considered the parties' remaining arguments and finds them without merit.

Accordingly, it is hereby

ORDERED that the motion to dismiss (motion sequence no. 001) and the motion to intervene (motion sequence no. 002) are both denied; and it is further

ORDERED that defendants have 20 days from service with notice of entry of this decision and order to file an answer; and it is further

ORDERED that the parties appear for a preliminary conference on August 1, 2018, at 11:00 a.m., in Part 7, room 345, at 60 Centre Street.

Dated: May 8, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.