| **Lenox NY LLC v Goldman** |
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| 2018 NY Slip Op 30932(U) |
| May 14, 2018 |
| Supreme Court, New York County |
| Docket Number: 655585/2017 |
| Judge: O. Peter Sherwood |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**LENOX NY LLC,**

**Plaintiff,**

**-against-**

**JAMES GOLDMAN,**

**Defendant.**

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**DECISION AND ORDER**
**Index No.: 655585/2017**

**Motion Sequence No.: 001**

**O. PETER SHERWOOD, J.:**

Under motion sequence 001, plaintiff seeks an order, pursuant to CPLR 3213, granting summary judgment in lieu of complaint against defendant as the guarantor of an instrument for payment of money only. Defendant cross-moves to dismiss for lack of personal jurisdiction or, in the alternative, for a stay pursuant to CPLR 2201.

CPLR 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *Interman Indus. Products Ltd. v R.S.M. Electron Power*, 37 NY2d; 151, 155 [1975]). Plaintiff seeks, through its motion, to enforce two guarantees defendant executed relating to two separate leases plaintiff, as landlord, had with non-party tenants 171 Lenox Restaurant, LLC and 175 Lenox Restaurant, LLC (collectively, the "Tenants") (*see* NYSCEF Doc. Nos. B [171 Lenox Guarantee], E [175 Lenox Guarantee], collectively "Guarantees"). In the Guarantees, defendant "unconditionally and absolutely guarantees to" plaintiff various obligations, including the "full, prompt, and complete payment of all rent and additional rent due" under the tenants' respective leases, and "all monetary obligations of [the respective] Tenant to which the Tenant has received prior written notice and remains unpaid to Landlord" (Guarantees). Critically, under the Guarantees, defendant also guaranteed:

> "[t]hat if any mechanic's lien is filed against the Real Property for work claimed to have been done for or materials furnished to Tenant, its principals, agents or subtenants, the same shall be discharged within the time required under the Lease by filing the bond required by law or otherwise"

(*id.*). Accordingly, because the Guarantees cover non-financial obligations that pertain to more than the payment of money, neither constitutes an "instrument for the payment of money only" under CPLR 3213 (*see Times Sq. Assoc. v Grayson*, 39 AD2d 845, 845 [1st Dept 1972] [guaranty which "goes beyond merely guaranteeing payment of rent . . . possesses characteristics quite different from one for the payment of a sum of money only" and does not qualify for accelerated judgment under CPLR 3213]; *Beach Lane Mgt., Inc. v Wasserman*, 13 Misc 3d 1217(A) [Sup Ct, NY County 2006]; *cf. Hess Corp. v Magnone*, 27 Misc 3d 1220(A) [Sup Ct, NY County 2010] [CEO's guarantee of corporation's "performance of any and all agreements" to plaintiff's predecessor-in-interest qualified for resolution under CPLR 3213 where those "obligations pertained only to the payment of money"]).

Defendant seeks dismissal based on plaintiff's purported failure to serve process. Plaintiff has made a prima facie showing of proper service pursuant to CPLR 308 (2) through its process server affidavit, which attests to delivering, on September 29, 2017, a copy of the summons and notice of plaintiff's motion to a "Bill 'Doe' (friend/refused last name) a person of suitable age and discretion" (NYSCEF Doc. No. 13; *see Simonds v Grobman*, 277 AD2d 369, 369 [2d Dept 2000]). Defendant's affidavit in opposition contains only the bare, unsubstantiated assertions that "neither I, nor any member of my family, nor any of my friends, were present [at the address of service] on August 29, 2017" that "I do not know who 'Bill Doe' refers to, but it is certainly not me, a member of my family, nor any of my friends, nor anyone employed by me" and that "I was never contacted by a person named 'Bill' about this action" (NYSCEF Doc. No. 26 ¶¶ 6-8). The forgoing fails to rebut plaintiff's prima facie showing in that defendant "fails to swear to detailed and specific facts to rebut the statements in the process server's affidavit" (*Hayden v S. Wine & Spirits of Upstate New York, Inc.*, 126 AD3d 673, 673 [2d Dept 2015]). Not only does defendant's affidavit fail for lack of factual specificity – defendant's statement that "no one was home" at the address of service speaks to a different date than the date of service. Defendant's "bald assertion that [he] never received process [is] insufficient to dispute the veracity or content of the affidavit[]" of service (*Fairmount Funding Ltd. v Stefansky*, 235 AD2d 213, 214 [1st Dept 1997]).

Defendant also argues that plaintiff failed to provide him with the statutorily required time to oppose the motion under CPLR 3213, which would also warrant dismissal (*see Goldstein v Saltzman*, 13 Misc 3d 1023, 1027 [Sup Ct, Nassau County 2006]). However, as defendant concedes, a return date of November 15, 2017 would satisfy this requirement (*see* NYSCEF Doc. No. 36 ["def's opp"] at 12). As plaintiff's amended notice of motion provided for a November 30, 2017 return date, this argument fails as well.

Finally, defendant contends that this court should issue a stay under CPLR 2201 on the basis that plaintiff's claims for rent are currently being litigated in bankruptcy proceedings filed by the Tenants, and that proceeds from a planned bankruptcy sale of Tenants' business may go to settle the lease arrears sought in this action (def's opp at 13-14, citing *Brusco v Koff*, 35 Misc 3d 1212(A) [Sup Ct 2012] [staying action seeking to enforce defendants' guarantees of corporation's obligations pending resolution of that corporation's bankruptcy proceedings]). In reply, plaintiff notes that the arrears on the lease for 171 Lenox Restaurant, LLC has already been fixed by a stipulation so-ordered by the bankruptcy court (*see* NYSCEF Doc. No. 11), and urges that a stay should not be entered on account of 175 Lenox Restaurant, LLC since the planned bankruptcy sale of that business will likely be insufficient to cure the outstanding arrears. At oral argument, plaintiff's counsel represented that the amount of the deficiency has been determined but no documentary evidence thereof was presented. Based on that representation, the amount paid upon assignment of the lease was insufficient to completely cure the outstanding arrears. In any event, the outcome of the bankruptcy proceedings has not been established in this court but a final determination appears to be imminent and its affect on the extent of defendant's liability under the Guarantees should be known shortly. Accordingly, defendant's motion for a stay is granted.

Accordingly, it is hereby

**ORDERED** that plaintiff's motion for summary judgment in lieu of complaint is DENIED. Pursuant to CPLR 3213, the memorandum of law in support of the motion (NYSCEF Doc. No. 21) will be deemed the complaint in this action and the memorandum in opposition (NYSCEF Doc. No. 36) will be deemed the answer; and it is further

**ORDERED** that further proceedings in this action are stayed for thirty (30) days, pending determination of the proceedings now pending before the Bankruptcy Court for the Southern District of New York under case numbers 17-11344-mew and 17-11345-mew; and it is further

**ORDERED** that, within fifteen (15) days from a decision in the aforementioned bankruptcy proceedings or June 19, 2018, whichever is sooner, the parties shall inform the court of any such development, including documentary evidence of the decision of that court via letter.

This constitutes the decision and order of the court.

**DATED: May 14, 2018**

**E N T E R,**

**O. PETER SHERWOOD J.S.C.**