Caprice Assoc. v Abbott
2019 NY Slip Op 33040(U)
October 8, 2019
Supreme Court, New York County
Docket Number: 655983/2018
Judge: Debra A. James

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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CAPRICE ASSOCIATES,

Plaintiff,

- v -

ELLIOT ABBOTT,

Defendant.

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INDEX NO. 655983/2018

MOTION DATE 06/18/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff's moving papers, consisting of plaintiff's Notice of Motion for Summary Judgment in Lieu of Complaint and the affidavit and reply affidavit of John Chadrjian in support of the motion and the exhibits annexed thereto, are hereby deemed the complaint in this action, and defendant's answering papers, consisting of the affirmation of Glenn Spiegel and the affidavits of Elliott Abbott and Liza Abbott and the exhibits annexed thereto, are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 331, 60 Centre Street, on October 29, 2019, at 9:30 AM.

DECISION

Plaintiff Caprice Associates (Caprice) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendant Elliot Abbott (Abbott) for a money judgment of $20,591.92, representing unpaid rent due through November 30, 2018, pursuant to a lease that Abbott allegedly guaranteed (the Guaranty).

By affidavit of its principal Chadrjian, Caprice alleges that on December 29, 2016, as landlord of the building located at 320 East 58th Street, New York, New York, it entered into a lease agreement with Liza Abbott as tenant (the Tenant) with respect to Apartment 6C (the Apartment), "for a term, as renewed, which was due to expire on March 31, 2019." According to Caprice, as inducement for it to enter into the lease, defendant Abbott agreed to guaranty Liza Abbott's compliance with the obligations of the lease.

Caprice further alleges that since December 2017 the Tenant has been in arrears in the sum of $20,591.92. Caprice submits a copy of the rent ledger for the Tenant, kept by Caprice in the regular course of its business, which reflects the amounts billed to and payments made by the Tenant, and which reflects

the arrears. Caprice alleges that defendant Abbott failed and refused to pay the Tenant's rent and that on September 25, 2018, the Tenant prematurely vacated the Apartment. Caprice further alleges that it was able to re-rent the Apartment as of October 21, 2018 for a monthly rental that is $150 per month less than the Tenant's monthly rent due on the lease. Such rent differential is included by Caprice in the amount of rent allegedly owed by the Tenant and by Abbott, as guarantor.

Caprice contends that the Guaranty is an instrument for the payment of money only and is precisely the type of instrument that CPLR 3213 contemplates as appropriate for summary treatment. See e.g. Bank of Am., N.A. v Solow, 59 AD3d 304, 304 (1st Dept 2009)("Plaintiff demonstrated its entitlement to summary judgment by establishing the existence of a guaranty and submitting an affidavit of nonpayment"). Caprice further contends that although the Guaranty relates to an underlying obligation and therefore references another document, the use of summary judgment in lieu of complaint is still appropriate. See Manufacturers Hanover Trust Co. v Green, 95 AD2d 737, 737 (1st Dept 1983)("The need to refer to the underlying promissory notes to establish the amount of liability does not affect the availability of CPLR 3213" [citation omitted]). Finally, Caprice seeks attorneys' fees, and asks the court to hold a hearing to determine the amount of fees. Premium Assignment

Corp. v Utopia Home Care, Inc., 58 AD3d 709, 709 (2d Dept 2009)("Since, the instrument did not provide for a sum certain with respect to the recovery of an attorney's fee in the event of a default in payment on the instrument, a hearing must be held to determine the amount of such award" [citation omitted]).

In opposition, Abbott states that the Tenant, who is his daughter, first entered into a lease for the Apartment for a lease term of April 1, 2016 through March 31, 2017, and that he did enter into a Guaranty for that lease. On December 29, 2016, Tenant's lease was renewed for a lease term of April 1, 2017 through March 31, 2018. Abbott also signed a guaranty of his daughter's first renewal lease. Finally, the Tenant entered into a second renewal lease for a term from April 1, 2018 through March 31, 2019. No guaranty was signed in connection with that second renewal lease. Abbott contends that because he did not guaranty the second renewal lease that his obligations as a guarantor terminated as of March 31, 2018.

Abbott first argues that the Guaranty is not "an instrument for payment of money only" (CPLR 3213), because it guarantees not merely the payment of rent by the Tenant but also "guarantees, absolutely and unconditionally, the full and timely performance and observance of all of the covenants, terms, conditions and agreements provided to be performed and observed by Tenant ... pursuant to the Lease." Quoting Technical Tape v

Spray Tuck (131 AD2d 404, 406 [1st Dept 1987]), Abbott contends that "[w]hen the instrument itself calls for something more than the payment of money, however, a CPLR 3213 motion will be denied. ... Documents which set forth more than the simple promise by the obligor to pay a sum of money may not be sued upon by way of CPLR 3213." Abbott argues that the Guaranty contains obligations more than merely guaranteeing the Tenant's rent, and therefore, does not qualify as an instrument for paying money only, and the application of CPLR 3213 is not appropriate. Beach Lane Mgt., Inc. v Wasserman, 13 Misc 3d 1217(A), 2006 NY Slip Op. 51883(U)(Sup Ct, NY County 2006)

Abbott next contends that there are issues of fact that preclude an award of summary judgment regarding the amount of rent owed by the Tenant, if any. Liza Abbott submits an affidavit in support of her father's opposition to Caprice's motion. She states, in detail, that the landlord failed to deal with her complaints regarding the noise of loud music coming from the apartment below hers at unreasonable hours that forced her to leave the Apartment at various times and interfered with her quiet enjoyment of the Apartment. She also states that a gut renovation of the apartment above hers, caused both excessive noise and the accumulation of dust and debris in her apartment. She states that the landlord failed to have a tenant protection plan in place regarding the renovation and refused to

provide her with an air purifier to ameliorate the health problems caused by the dust. She contends that, as a result, she had to move to Los Angeles, California from June 2018 through July 2018. She contends that, because of all of the ongoing issues, she was unable to continue living in the Apartment and vacated it as of September 25, 2018. On March 12, 2019, the Tenant and her father filed a civil action against Caprice seeking, among other things, a declaration that she did not owe any rent for the Apartment, and damages for breach of the warranty of habitability and the covenant quiet enjoyment of her lease. Abbott contends that as guarantor, he can assert the Tenant's defenses of constructive eviction and breach of the covenant of quiet enjoyment. See Mid-Island Shopping Plaza Co. v Cutler, 112 AD2d 405 (2d Dept 1985); Durable Group v De Benedetto, 85 AD2d 524 (1st Dept 1981)

Finally, Abbott argues that, even assuming that he and the Tenant do not prevail on the Tenant's claim of actual and/or constructive eviction, he never signed a guaranty in connection with the second renewal lease and that he has no liability for any rent due under that lease. Abbott contends that, therefore, there are questions of fact regarding the limit of his liability under the Guaranty, which, he contends is limited to the period up until March 31, 2018.

In reply, Caprice argues that a lease guaranty constitutes an instrument for the payment of money only and the fact that reference to the underlying lease may be required to determine the amount of rent due does not remove it from the purview of CPLR 3213. See European Am. Bank v Cohen, 183 AD2d 453 (1st Dept 1992). Caprice further argues that Beach Lane Mgt., Inc., relied on by Abbott for the principal that the rent guaranty is not an instrument for payment of money only because it guarantees obligations in the lease in addition to payment of rent, has been overruled. See Noah Trading Co., Inc. v Bell, 2017 WL 2226358, Index No. 655088/2016, *1 (Sup Ct, NY County May 18, 2017)("[To] the extent that Beach Lane states that a guaranty does not qualify as an instrument for money only, it has clearly been overruled by the subsequent decision in [Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., 'Rabobank Intl.,' N.Y. Branch v Navarro, 25 NY3d 485 (2015)]").

Caprice also argues that guarantors are foreclosed from raising defenses to the lease that are personal to the Tenant. Royal Equities Operating, LLC v Rubin, 154 AD3d 516 (1st Dept 2017).

Finally, Caprice contends that the Guaranty signed by Abbott does cover the period of the second lease renewal (April 1, 2018 through March 31, 2019), because the Guaranty covering the first lease renewal specifically provides that

> "Guarantor's obligations under this Guaranty shall remain in full force and effect without regard to, and shall not be impaired or affected by: any amendment, extension or modification of, or addition or supplement to any terms, conditions or provisions of the Lease."

Caprice contends that such language means that, absent specific action by Abbott to revoke his obligations, he is bound for the Tenant's entire tenancy, regardless of lease extensions or modifications.

Conclusions of Law

It is clear that "[a] guarantee may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain." Manufacturers Hanover Trust Co. v Green, 95 AD2d 737, 737 (1st Dept 1983). Here, however, questions of fact exist concerning whether Abbott's Guaranty of the first renewal lease applies to the second renewal lease as well. Caprice does not contest Abbott's assertion that he never signed a document expressly guaranteeing the lease covering the term from April 1, 2018 to March 31, 2019. Caprice, nonetheless, contends that as a result of the language in paragraph 5 of the Guaranty of the first renewal lease, Abbott was bound throughout his daughter's tenancy, and not merely for the duration of the renewal lease.

The very cases cited by Caprice, however, suggest a contrary conclusion. Firstly, "the terms of [a] guarantee ...

are to be strictly construed in favor of the private guarantor." Levine v Segal, 256 AD2d 199, 200 (1st Dept 1998). Moreover, the guaranty at issue in *Levine*, unlike the Guaranty that was signed by Abbott, expressly stated that it "shall remain in full effect even if the lease is renewed, changed or extended in any way ...." Levine v Segal, 174 Misc 2d 998, 999 (App Term, 1st Dept 1997), affd 256 AD2d 199 (emphasis supplied). Here, renewal is not mentioned in the language of paragraph 5 (a) of the Guaranty relied on by Caprice. Where a landlord seeks to bind a guarantor for lease renewal, and not merely for the lease that is subject to the guaranty, the term renewal can be included in the guaranty. See, 665-75 Eleventh Ave. Realty Corp. v Schlanger, 265 AD2d 270 (1st Dept 1999)("Guarantor further agrees that this guaranty shall remain and continue in full force and effect as to any renewal, change or extension of the Lease").

As the Court of Appeals has stated, a "guarantor should not be bound beyond the express terms of his guarantee." Wesselman v. Engel Co., 309 NY 27, 30 (1955). "Consequently, New York law has been viewed as holding that unless the terms of the guaranty clearly import a continuing liability, it will be held limited to the transaction for which it was given." Trump Mgt. v Tuberman, 163 Misc 2d 921, 923 (Civ Ct, Kings County 1995)(internal quotation marks and citation omitted).

The language contained in paragraph 5 (a) of the Guaranty covering the Tenant's first renewal lease is also contained in an identical paragraph in the Guaranty covering her initial lease. Nonetheless, Caprice had Abbott sign a Guaranty for the first renewal lease. That fact, along with the absence of the word "renewal" in paragraph 5 (a) of both the initial Guaranty and the first renewal Guaranty, raise sufficient questions of fact as to whether Abbott's obligation terminated on March 31, 2018, the end of the Tenant's first renewal lease, to require denial of Caprice's motion for summary judgment in lieu of complaint. It is, therefore, unnecessary for the court to reach the additional arguments raised by Abbott.

10/08/2019
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE