

**AK Props. Group LLC v Bivona**

2019 NY Slip Op 33538(U)

November 26, 2019

Supreme Court, New York County

Docket Number: 161507/2018

Judge: Lynn R. Kotler

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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. LYNN R. KOTLER, J.S.C.

PART 8

AK PROPERTIES GROUP LLC

INDEX NO. 161507/2018

- v -

MOT. DATE

PETER J. BIVONA

MOT. SEQ. NO. 001

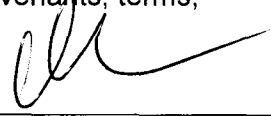
The following papers were read on this motion to/for <u>SJ</u>	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

This action arises from a personal guaranty executed by defendant in connection with a commercial lease. Plaintiff now moves for summary judgment. Defendant opposes the motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The motion is decided as follows.

The relevant facts are largely undisputed. Plaintiff entered into a commercial lease with non-party Harlem Market Inc. (the "tenant") on or about April 13, 2015 for the premises located at 2005-2007 Third Avenue, New York, New York, 10029 (the "premises"). Defendant unconditionally guaranteed the tenant's performance thereunder. Copies of the lease and the guaranty have been provided to the court. Specifically, the guaranty provides:

("Guarantor"), hereby unconditionally, irrevocably guarantees to Lessor, its successors and assigns the full and prompt: (i) payment of Base Rent, additional rent (as same are defined in the Lease) and all other charges payable by Lessee, its successors and assigns under or in any way relating to the Lease through and including the Vacate Date (as hereinafter defined); ... and Guarantor hereby covenants and agrees to and with Lessor that if default shall at any time be made by Lessee or its successors or assigns, in the payment of any Base Rent, additional rent or other charges due in respect of any time periods occurring on or prior to the Vacate Date or if Lessee or its successors or assigns should in any manner default in the performance and observance of any of the covenants, terms, conditions and agreements contained in the Lease that are to be performed or observed in respect of any time periods occurring on or prior to the Vacate Date, Guarantor, in each and every instance, shall and will forthwith pay such Base Rent, additional rent and other charges to Lessor and any arrears thereof. and shall and will forthwith faithfully perform and fulfill all of such covenants, terms,

Dated: 11/26/19

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one:  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST
- FIDUCIARY APPOINTMENT  REFERENCE

conditions and agreements, and will forthwith pay to Lessor all damages and expenses of any kind or nature that may arise in consequence of any such default by Lessee or its successors or assigns under the Lease, including without limitation, all reasonable attorneys' fees and disbursements incurred by Lessor or caused by or in any way related to any such default and/or the enforcement of this Guaranty.

The guaranty contains a "good guy" clause limiting the amount of the guaranty depending on the vacate date. Specifically:

For purposes hereof, the term "Vacate Date" shall mean the date that Lessee actually vacates the Premises, removes all of its property therefrom and lawfully surrenders possession thereof to Lessor (free of all sub-Lessees, occupants and encumbrances whatsoever) in the condition (and otherwise in the manner) required by the Lease regardless of whether such date is prior to, during or after the stated term of the Lease or renewal period; provided, however, that Lessee and Guarantor **shall have (as a condition to the occurrence of the Vacate Date) given Lessor written notice ("Vacate Notice") not less than one hundred eighty (180) days in advance of the Vacate Date (time being of the essence) specifying with certainty when that date is to be. To receive the release from obligations subsequent to the Vacate Date Guarantor has to pay to Lessor prior to the Vacate Date a sum equal to (a) one year's then current fixed rent that would have been paid had the Lease not ended and (b) a sum equal to one's years then current real estate taxes..** (sic) If either Guarantor or Lessee give a Vacate Notice that specifies a date for Lessee to vacate the Premises that is before the expiration of the Lease or any renewal period and, for any reason whatsoever, Lessee fails to vacate the Premises and surrender possession thereof to Lessor in the manner specified herein on or before such date (time being of the essence), the Vacate Date shall, notwithstanding anything herein above specified, mean the later to occur of: (i) the date Lessee actually vacates the Premises and surrenders possession thereof to Lessor in the manner specified herein; or (ii) the expiration date of the Lease, and Guarantor shall (notwithstanding anything to the contrary set forth herein) not be relieved of any of their obligations hereunder in respect of any period prior thereto. Provided all base rent, additional rent and other charges due under the Lease have been paid up to the Vacate Date Guarantor shall not be liable for the accelerated rent provided for in Article XIII, paragraph 13.04(a).

Plaintiff has provided the affidavit of Joseph Karten, a member of plaintiff, stating that in 2016, the tenant breached the lease by failing to pay sums due for rent and other charges. This breach was informed by the tenant's petition for Chapter 11 bankruptcy protection. At the time the petition was filed, the tenant owed \$214,912.85 to plaintiff. Plaintiff has provided a copy of proof of claim filed in the subject bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of New York, docket number 18-10754.

The tenant ultimately vacated the premises prematurely on or about October 31, 2018. Plaintiff maintains that the tenant left the premises in disrepair, "causing the plaintiff to be unable to relet the premises without performing serious remedial work." Through the vacate date, the tenant owed plaintiff \$548,887.74. Plaintiff has provided a breakdown of this amount. To date, neither the tenant nor defendant have made any payments to plaintiff in connection with the subject debt. In this action, plaintiff seeks a money judgment against defendant for \$548,887.74 for breach of the guaranty.

Defendant opposes the motion. Defense counsel notes that "[i]nterestingly, from the time [the tenant] stopped paying rent through the time of the bankruptcy filing... the plaintiff DID NOTHING to demand or collect the rent, but let it continue to accrue" (emphasis in original). Defense counsel com-

plains that the plaintiff did not commence a "lawsuit or eviction proceedings... all to the possible detriment of the Defendant." Defense counsel argues that plaintiff's motion is premature. Defense counsel further argues that defendant should be protected by the "onerous and unconscionable second paragraph" because "Plaintiff had notice at the time that [the tenant] filed for bankruptcy, on March 19, 2018, that it would eventually be terminating the Lease and vacating the Premises." Defense counsel points to an order by Judge Michael E. Wiles in the bankruptcy proceeding dated September 25, 2018 which directed tenant to, *inter alia*, vacate the premises on or before October 31, 2018. Defense counsel therefore argues that the lease was terminated as of the vacate date, plaintiff accepted the keys to the premises, and therefore the guaranty was also terminated. Defense counsel otherwise argues that triable issues of fact preclude summary judgment, without specifying what those issues are.

Defendant has submitted his own affidavit wherein he states the following. He was the President of the tenant. He invested \$1.2 million into the premises, but "the amount of money generated from operating the supermarket was not enough to pay the rent and other creditors. and Harlem Market was eventually compelled to file for bankruptcy." He claims that plaintiff knew well before the tenant filed for bankruptcy on March 19, 2018 that the tenant could not pay its rent. He also claims that Karten told him that if the tenant was evicted, the premises would remain vacant till plaintiff demolished the building. Defendant disputes the condition of the premises after the tenant vacated same. Otherwise, defendant asserts that "the required 180 days' notice contained in the Guaranty was more than satisfied since the Bankruptcy was filed on March 19, 2018. and Plaintiff accepted the surrender and termination of the Lease on November 1, 2018."

On reply, plaintiff's counsel points to the no waiver clause contained in the lease:

Any action taken by Lessor under this Article shall not operate as a waiver of any right which Lessor would otherwise have against Lessee for rent hereby reserved or otherwise, and Lessee shall remain responsible to Lessor for any loss and damage suffered by Lessor by reason of Lessee's default or breach.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

A lease is a contract. Contracts must be enforced according to their express terms in the absence of any ambiguity (see *Ashwood Capital, Inc. v. OTG Management, Inc.*, 99 AD3d 1 [1st Dept 2012]). "[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (*W.W.W. Associates, Inc. v. Giancontieri*, 77 NY2d 157 [1990]).

The four elements required of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]).

At the outset, defense counsel's arguments on behalf of the tenant will not be considered by the court. The tenant is not a party to this proceeding. The balance of defendant's arguments are unavailing

for the reasons that follow. Summary judgment is not premature (CPLR § 3212[f]) since defendant has not identified what documents or information is in plaintiff's exclusive possession which would enable him to successfully oppose the motion. Indeed, as plaintiff's counsel points out, defendant has not even served discovery demands.

Substantively, plaintiff has demonstrated that defendant contractually agreed to honor the tenant's financial obligations under the lease and that defendant breached the guaranty by failing to do so. Therefore, plaintiff is entitled to summary judgment on liability on its sole cause of action for breach of contract against the defendant.

In turn, defendant has failed to raise a triable issue of fact. Defendant's argument that the good guy clause was triggered because plaintiff knew the tenant would vacate and/or when the tenant would vacate is rejected. There is no dispute on this record that the tenant did not comply with the express terms of the subject provision. Therefore, defendant's reliance on it is misplaced.

The court also rejects defendant's waiver argument. Plaintiff's failure to bring an eviction proceeding against the tenant after it stopped paying rent in 2016 and for approximately eighteen months thereafter cannot be construed as a waiver under the express terms of the lease. Defendant has not even offered any caselaw to support his position.

The parties arguments as to the condition of the premises after the tenant vacated is not relevant to defendant's liability for unpaid rent and additional rent. Finally, it is of no moment whether plaintiff intends to relet the premises, since the landlord of a commercial premises is not required to do so.

Plaintiff has, however, not established its damages on this record. Plaintiff's proof is a copy of its notice of claim filed in the Chapter 11 bankruptcy proceeding and a statement for amounts due between then and October 2018. Plaintiff has not provided a full statement of the tenant's account showing when it failed to pay rent and additional rent. Therefore, plaintiff is only entitled to summary judgment on liability. The court will grant plaintiff leave to renew its motion for summary judgment on damages or plaintiff may file note of issue on or before January 31, 2020 and proceed to trial.

## CONCLUSION

In accordance herewith, it is hereby

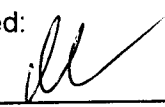
**ORDERED** that plaintiff's motion for summary judgment is granted only to the extent that plaintiff is granted summary judgment on liability against defendant; and it is further

**ORDERED** that plaintiff may renew its motion for summary judgment on damages or file note of issue on or before January 31, 2020 and proceed to trial; and it is further

**ORDERED** that the parties are directed to appear for a status conference on January 21 2020 at 9:30am.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 11/26/19  
New York, New York

So Ordered:   
\_\_\_\_\_  
Hon. Lynn R. Kotler, J.S.C.