

Epic W14 LLC v Malter
2020 NY Slip Op 32209(U)
July 8, 2020
Supreme Court, New York County
Docket Number: 150148/2019
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X

EPIC W14 LLC,

Plaintiff,

- v -

STEFAN MALTER, SETH HIRSCHL, MARC MILES,
BARNET LIBERMAN, THE GYM AT UNION SQUARE, LLC
D/B/A CLAY

Defendant.

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INDEX NO. 150148/2019

MOTION DATE 06/04/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 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, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff, Epic W14 LLC, moves for an order: (a) striking defendant’s defenses; (b) dismissing defendants’ counterclaims; (c) granting plaintiff summary judgment pursuant to CPLR 3212; (d) granting judgment in favor of Plaintiff in the amount of \$841,046.10 plus \$240,000.00, for a total of \$1,081,046.10 on the first, second and third causes of action; (e) granting a judgment in the amount of \$393,639.63 on the fourth cause of action; and (f) scheduling this matter for an inquest to determine fair and reasonable legal fees to be awarded to plaintiff with a judgment issued and/or entering judgment for the stated invoices hereto annexed in the amount of \$37,644.20 on the sixth cause of action. Defendants oppose.

For the reasons set forth below, the motion is granted in part and denied in part.

Background

The Gym at Union Square LLC (The Gym) was a commercial tenant in the building located at 25 West 14th Street, New York, New York pursuant to a written lease and subsequent

amendments (plaintiff's exhibits K, Q, S & T). On September 8, 2009, Chip Fifth Avenue LLC assigned the lease to The Gym on consent of the then-landlord (see assignment of leases, plaintiff's exhibits R, X). While there was a guaranty on the initial lease, defendants entered into a "Modification and Reaffirmation of Guaranty" dated September 13, 2011 (plaintiff exhibit W).¹ On January 26, 2012, plaintiff purchased the property and also received an "Assignment of Leases and Rents" (plaintiff exhibit Y).

The Gym, while in possession of the premises, neglected to comply with its financial obligations under the lease and subsequent amendments, bouncing numerous checks and failing to pay rent when due (*see* rent history, plaintiff exhibit J). As a result, plaintiff commenced a summary nonpayment proceeding against The Gym in the Civil Court, New York County (*Epic W 14 LLC v The Gym at Union Square, LLC d/b/a Clay*, index No. L & T 87338/2015). In August 2016, the parties entered into a Stipulation of Settlement withdrawing all claims and defenses and agreeing that \$865,802.00 was owed to Epic at the time (Stipulation) (plaintiff exhibit C). The guarantors signed off on the Stipulation guarantying payment (*id.*).

The Gym, however, was not able to meet its obligations under the Stipulation. On July 16, 2017, the parties agreed to amend the initial Stipulation to modify the amount and duration of monthly payments required in order for The Gym to meet its outstanding debt to Epic (Amended Stipulation) (plaintiff exhibit D). The Amended Stipulation, provides, among other things, that "(t)he Guarantors under the August 2016 Stipulation each individually execute this Agreement to reaffirm their Guaranty of Lease and the Stipulation as set forth in the August 2016 Stipulation" (*id.*).

¹ While plaintiff asserts that the modification of guaranty was an inducement to permit the assignment, the date of the Modification and Reaffirmation of Guaranty, two years after the assignment, coincides with the date of the third amendment to the lease, dated September 13, 2011, which extended the term of the lease for another 10-year term to 2021 (*see* plaintiff exhibit T).

After again allegedly failing to comply with the required payments under the Amended Stipulation, plaintiff, after sending several notices of default, initiated eviction proceedings against The Gym. By decision and order dated January 25, 2019, the Civil Court denied The Gym's motion to vacate the notice of eviction, thereby permitting plaintiff to proceed with the eviction (plaintiff exhibit E). Plaintiff ultimately evicted The Gym on February 5, 2019 (plaintiff exhibits F, G). By letter dated February 7, 2019, The Gym gave notice that it surrendered the premises (plaintiff exhibit M).

According to plaintiff, defendants are responsible to pay \$841,046.10, which represents the amount of monies due through February 2019, when The Gym was evicted (plaintiff exhibit J). In addition, plaintiff seeks the brokerage fees in the amount of \$393,639.63 it incurred in connection with rerenting the premises, as permitted under the lease and guaranty (plaintiff exhibit 2), as well as an additional \$240,000, which was initially abated but the abatement became void once The Gym defaulted under the lease (see Lease, ¶ 1E, plaintiff exhibit K), and attorneys' fees, as permitted under paragraph 3 of the Guaranty.

The Guaranty & Modification

On September 8, 2009, the guarantors executed a guaranty with the former landlord, nonparty Palisades 14th Street LLC, wherein the parties agreed that the guarantors:

“jointly and severally guarantee, absolutely and unconditionally, to Landlord the full and prompt payment performance and observance of all of the terms, covenants and conditions of the Lease to be paid, performed or observed by the tenant . . ., including, without limitation (i) the full and prompt payment of all Rent (as such term is defined in Section 1(A)(xviii) of the Lease) any increases thereof, and all other charges and sums (including, without limitation, Landlord's legal expenses and reasonable attorney's fees and disbursements) payable by Tenant under the Lease . . . Guarantor shall and will forthwith pay, perform or observe such Obligations, all upon demand and irrespective of any defense or any right of setoff, credit or claim that Guarantor may have against the Landlord”

(plaintiff exhibit A). Paragraph 4 of the Guaranty further provides:

“This Guaranty is an absolute and unconditional guaranty of payment (and not of collection) and performance. The liability of Guarantor is co-extensive with that of Tenant and this Guaranty shall be enforceable against Guarantor without the necessity of any suit or proceeding on Landlord’s part of any kind or nature whatsoever against Tenant and without the necessity of any notice of non-payment, non-performance or non-observance or of any notice of acceptance of the Guaranty or of any other notice or demand to which Guarantor might otherwise be entitled, all of which Guarantor hereby waives.”

On July 13, 2011, defendants entered into a “Modification and Reaffirmation of Guaranty” with Palisades in connection with a third amendment of the lease terms which modified the surrender date of the premises, which states, among other things:

“Each Guarantor hereby reaffirms all covenants, waivers and representations and warranties made by him under the Guaranty as modified hereby with respect to the Lease as modified by the Third Amendment, and agrees that all of same remain unmodified and in full force and effect. Each Guarantor further agrees that Landlord has not waived any rights or provisions of the Guaranty and no Guarantor has any setoffs against liability under the Guaranty.”

Discussion

“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, 853 [1985]). The failure to make such a showing requires denial of the motion (*id.*). Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and should be denied if the opposing party presents admissible evidence establishing that a genuine issue of fact exists (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). “In determining whether summary judgment is appropriate, the motion court should draw all

reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]).

Plaintiff has sufficiently demonstrated a prima facie entitlement to judgment on the Guaranty in the instant action. On a motion for summary judgment to enforce an unconditional guaranty, the creditor, Plaintiff, must prove: (1) the existence of the guaranty; (2) the underlying debt; and (3) the guarantor's failure to perform under the guaranty (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006], citing *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). As plaintiff demonstrates a prima facie case, “the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015], quoting *Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc.*, 57 AD3d 708, 710 [2d Dept 2008]).

“A guaranty is a promise to fulfill the obligations of another party, and is subject to the ordinary principles of contract construction” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A.*, 25 NY3d at 492 [internal citation and quotation marks omitted]). “Under those principles, ‘a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms’” (*id.* at 493, quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). “The lease and guarantee are two separate contracts” and the landlord is “not obligated to wait and attempt to receive payment from [the tenant but is] entitled to proceed directly against [the guarantor]” (*APF 286 Mad LLC v Chittur & Assoc., P.C.*, 132 AD3d 610, 610 [1st Dept 2015]).

While defendants raise a number of defense and counterclaims in attempt to defeat summary judgment, the fact remains that defendant guarantors entered into an absolute and

unconditional guaranteeing themselves to directly make payments to the landlord as a result of the tenant's failure or inability to do so. "Guaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guaranties that are 'absolute and unconditional,' have been consistently upheld by New York courts" (*Cooperative Centrale Raiffeisen-Boerenleenbak, B.A.*, 5 NY3d at 943). "Absolute and unconditional guaranties have in fact been found to preclude guarantors from asserting a broad range of defenses" (*id.* [internal quotation marks and citation omitted]; *I Bldg, Inc. v Hong Mei Cheung*, 137 AD3d 478, 478 [1st Dept 2016]). "When a guarantor is sued on the guaranty, . . . 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.*, 137 AD3d at 478 [emphasis supplied]).

However, defendants have established discrepancies as to the amount owed under the guaranty creating an issue of fact as to the amount of damages (*see Jones v Madison Plaza Commercial Owners LLC*, 173 AD3d 599 [1st Dept 2019]; *Moon 170 Mercer, Inc. v Vella*, 122 AD3d 544 [1st Dept 2014]; CPLR 3212 [f]), and have shown "that Plaintiff may be in possession of information to oppose this portion of the motion which [they have] not yet had access to in discovery" (*991 Madison Ave LLC v Perrin Paris Global LLC*, 2019 WL 7212649 [Sup Ct, NY County Dec. 24, 2019, index No. 153187/2019]). For example, it appears The Gym has made a payment in the amount of \$240,000 on January 30, 2019, which is the exact amount of the rent abatement plaintiff now seeks; however, it is unclear from the documents provided to the court, what the \$240,000 payment was actually for (plaintiff exhibit J). With respect to the fifth cause of action for rent monies due through August 2021 in the sum of \$2,816,000, plaintiff agrees to

withdraw this cause of action, as plaintiff has re-let the premises (*see* plaintiff reply at 1 [“Plaintiff only seeks monies due through February 2019”]).

As to plaintiff’s request for summary judgment for attorneys’ fees as provided for under the leases, guaranty and modification of the guaranty, the court finds the plaintiff is entitled to said fees.

Moreover, the court reminds plaintiff of its obligation to comply with discovery, particularly with respect to the amount of monies due and owing, as noted above. Failure to do so may result in preclusion of said evidence with respect to those financial obligations (*Fletcher v Dakota Inc.*, 127 AD3d 626 [1st Dept 2015]). The court considers the remainder of defendant’s arguments and finds them without merit. Therefore, the branch of plaintiff’s motion is granted as to defendants’ liability but is otherwise denied.

Conclusion

Accordingly, it is

ORDERED that the motion by plaintiff, Epic W14 LLC, is granted with respect to defendants’ liability, except that the fifth cause of action is considered withdrawn and the motion is otherwise denied; and it is further

ORDERED that the parties are to draft a proposed preliminary conference order and contact Mr. Saul Stein (Court Attorney) by email at sstein@nycourts.gov to arrange for a telephonic preliminary conference to be held on or before August 5, 2020.

7/8/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: