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| 805 Third N.Y. LLC v Hui Liu |
| 2022 NY Slip Op 33234(U) |
| September 26, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 154617/2021 |
| Judge: Mary V. Rosado |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO

PART 33

Justice

-----X

805 THIRD NEW YORK LLC

Plaintiff,

- v -

HUI LIU,

Defendant.

-----X

INDEX NO. 154617/2021

MOTION DATE 11/03/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, Plaintiff 805 Third New York LLC's ("Plaintiff") motion for summary judgment is denied without prejudice.

I. Factual and Procedural Background

Plaintiff has brought this action against Defendant Hui Liu ("Defendant") seeking to recover alleged rent arrears and attorneys' fees (NYSCEF Doc. 1). In the instant motion for summary judgment, Plaintiff seeks money judgment in the amount of \$321,939.43, plus interest and attorneys' fees (NYSCEF Doc. 19).

Plaintiff is the landlord of the building located at 805 Third Avenue, New York, New York 10022 (the "Building") (NYSCEF Doc. 7 at ¶ 3). Plaintiff executed a lease on February 16, 2017, with non-party 764 3rd Ave. Liquors, Inc., d/b/a Bona Vinos Wine Shop (the "Tenant") for a portion of the ground floor of the Building (the "Lease") (id. at ¶ 4). The Lease had a term of ten years and three months (NYSCEF Doc. 2). Defendant executed a guaranty wherein Defendant agreed to unconditionally guarantee the payment of rent and additional rent completely independent of the obligations of Tenant (NYSCEF Doc. 3 at ¶ 5(a)).

Plaintiff alleges that Tenant and Defendant defaulted in the payment of rent and additional rent beginning in December 2020 (NYSCEF Doc. 20 at ¶ 11). Plaintiff served a rent demand on April 6, 2021, demanding unpaid base and additional rent then due and owing in the amount of \$146,843.43 (*id.* at ¶ 12). Per the affidavit of Steven M. Cherniak, Chief Operating Officer of Plaintiff, none of the arrears demanded in April of 2021 have yet been paid (*id.* at ¶ 14). The alleged rent arrears led Plaintiff to initiate this action by filing its Complaint on May 12, 2021 (*id.* at ¶ 15).

Defendant failed to file a responsive pleading to Plaintiff's Complaint leading Plaintiff's to move for default judgment on August 17, 2021 (NYSCEF Doc. 6). On September 8, 2021, the motion for default judgment was withdrawn pursuant to stipulation, whereby Defendant was granted an extension of time to file an Answer in return for waiving any defenses related to personal jurisdiction or service of process (NYSCEF Doc. 16). Defendant filed an Answer with affirmative defenses on September 2, 2021 (NYSCEF Doc. 17). Plaintiff then filed this motion for summary judgment shortly after on October 13, 2021 (NYSCEF Doc. 19).

II. Discussion

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980];

Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see *Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

To show prima facie entitled to summary judgment on a breach of contract claim, Plaintiff must prove the existence of a contract, Plaintiff's performance, Defendant's breach, and damages (see *Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]). "On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." (*L. Raphael NYC CI Corp. v Solow Building Company, L.L.C.*, 206 AD3d 590, 592-593 [1st Dept 2022], quoting *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

While plaintiff has shown the existence of an absolute and unconditional guaranty, an underlying debt, and the guarantor's partial failure to perform, the Court finds there are material issues of fact regarding the amount due and the performance owed. On opposition to this motion for summary judgment, it was brought to this Court's attention for the first time that there was an amended lease that provided for rent abatements during the period in which Plaintiff seeks to collect rent (NYSCEF Docs 30 and 38). Moreover, Plaintiff concedes that the amount sought in its original motion papers and Complaint are incorrect given Defendant's \$250,000.00 worth of money wires sent in October and November of 2021 (NYSCEF Docs. 33-34; 36-37).

The evidentiary burden on summary judgment is a heavy one, and all facts must be viewed in the light most favorable to the nonmoving party (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Given Plaintiff's heavy burden, the dispute regarding performance under the amended lease and the actual amount of rent arrears owed raises material issues of fact. Moreover, since ostensibly no discovery has yet taken place since this motion was

filed a little over a month after Defendant filed its Answer, the Court finds summary judgment premature.

Finally, there are procedural infirmities in the moving papers making summary judgment premature. Tenant is a necessary party who has not yet been joined, as any determination here that rent is due, owing, and unpaid may have collateral estoppel effect on any future eviction proceeding against Tenant (see CPLR 1001(a) ["Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants"]).

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied without prejudice with leave to renew upon proper supporting papers; and it is further

ORDERED that non-party 764 3rd Ave. Liquors, Inc., d/b/a Bona Vinos Wine Shop be joined as a defendant no later than sixty (60) days after entry of this decision and order.

This constitutes the decision and order of the Court.

9/26/2022
DATE

Mary V Rosado
MARY V. ROSADO, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE