231/249 W. 39 St. Assoc. v Chan
2023 NY Slip Op 34062(U)
November 15, 2023
Supreme Court, New York County
Docket Number: Index No. 159855/2019
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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231/249 WEST 39 STREET ASSOCIATES,

Plaintiff,

- v -

CLIFF CHAN, GARRICK CHAN and SHERMAN CHAN

Defendants.

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INDEX NO. 159855/2019

MOTION DATE 03/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 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

were read on this motion to/for SUMMARY JUDGMENT.

I. INTRODUCTION

This is a breach of contract action to recover $213,279.97 in unpaid rent and additional rent due under three guaranty agreements executed by the defendants, Cliff Chan, Sherman Chan, and Garrick Chan (the Guarantors), in support of a commercial lease entered between the plaintiff landlord, owner of commercial property at 231 West 39th Street in Manhattan, and non-parties GMC Mercantile Corp. (GMC) and C&H Alliance LLC (C&H), former tenants. The plaintiff moves pursuant to CPLR 3212 for summary judgment on its complaint and pursuant to CPLR 3211(b) for dismissal of the defendants' affirmative defenses. The defendants oppose. The motion is granted.

II. BACKGROUND

On January 23, 2014, the plaintiff landlord entered a lease agreement (Lease) with GMC and C&H (Original Tenants) for Rooms 612-620 of the subject property. The annual rent rate for the first year was $270,000 ($22,500 per month) and increased annually. The Lease expressly provides that there shall be no assignment of the lease without prior written consent of the owner and that any assignment does not release the tenant of its obligations under the lease or constitute a waiver by the owner. (Article 11 of Lease). It further provides that any consent by the owner to an assignment of the lease does not discharge the tenant assignor of its

obligations under the lease in the event of a breach by the assignee and that the owner retains all such rights of the landlord under the lease and at law. (Article 5 of Lease). Similarly, the Lease provides that if the Lease is assigned, the assignment shall not be deemed a waiver of the covenants in this article or deemed a release of tenant from the full performance of all Lease terms, conditions, and covenants. (Article 51[F] of Lease). The Lease requires a notice of default from the landlord before the landlord may terminate the Lease or force the tenant to surrender the Premises. (Articles 17 and 54). The Lease does not otherwise require the landlord to provide notice of default to the tenants.

On January 24, 2014, the day after the lease was executed, defendants Cliff Chan (C. Chan) and Garrick Chan (G. Chan), each executed a separate guaranty for the lease, and on February 19, 2014, defendant Sherman Chan (S. Chan) executed a guaranty (collectively, Guaranties), wherein all three Guarantors, principals or employees of the Original Tenants, GMC and C&H, "unconditionally and irrevocably" guaranteed the obligations of GMC and C&H under the Lease terms. In 2014 C. Chan was the sole shareholder of GMC and sole member of C&H. In 2018, he entered a joint venture agreement with City Cashmere Corporation and non-party Jiangsu Dushimuge Cashmere Industry Co.., Ltd., wherein he agreed to dissolve GMC and C&H by December 31, 2018, and "transfer all of its assets, accounts receivable, customer list, capital and cash in its bank accounts" to Garnietex. Prior to 2018, G. Chan, C. Chan's son, held an unspecified position at both GMC and C&H as well as an ownership interest in GMC. He left those entities in December 2017 to pursue other business interests. S. Chan was employed as an Assistant Manager at GMC and later at Garnietex but was never an officer, director or shareholder.

The Guaranties contain identical terms. Similar to the Lease, the Guaranties provide that "liability hereunder shall in in no way be affected or diminished by any assignment . . . of the Lease." In addition, the Guaranties provide that the "Guarantor[s] shall have no liability or obligation . . . unless and until there is a monetary default under the Lease … and … such default has continued after the giving of any required notice to Tenant beyond applicable grace periods." Further, the Guaranties provide that "[t]he Guarantor agrees to pay Owner any costs and expenses, including without limitation attorneys' fees, incurred in connection with the collection of any amount due or the enforcement of any right under this Guaranty." The Guaranties provide that they may not be terminated without written consent of the owner signed by the owner and guarantor.

By a written assignment dated May 25, 2018 (the Assignment), the Original Tenants assigned the Lease to Garnietex International Group Ltd. (Garnietex) and City Cashmere Corporation (City Cashmere) (collectively, Assignees). The Guarantors were not parties to the Assignment. Similar to the Lease and the Guaranties, Paragraph 5 of the Assignment provides that "Landlord's consent to this Assignment will not discharge the Assignor of its obligations under the Lease in the event of a breach by the Assignee and Lanldlord retains all such right of the landlord under the lease and at law." According to the defendants, the Original Tenants vacated the Premises soon after the date of the Assignment.

At some point thereafter, the Original Tenants defaulted in the payment of rent, and, in 2018, the plaintiff commenced a summary non-payment proceeding against them in the New York City Civil Court (Index No. LT-052624-18/NY). On April 13, 2018, the parties to that proceeding entered into a Stipulation of Settlement (April Stipulation), wherein they agreed to the entry of a $140,188.99 money judgment in favor of the plaintiff, representing past due rent and additional rent through April 2018, and the immediate issuance of a judgment of possession and warrant of eviction to the New York City Marshal, the execution of which would be stayed until October 10, 2019, provided that the Original Tenants paid all arrears in accordance with a monthly payment schedule and complied with all obligations under the 2014 Lease, including the "obligation to pay rent and additional rent when due under the Lease." The Original Tenants agreed to waive "all rights to move this or any other court to vacate, extend or modify in any way the judgment, the warrant and/or this agreement" and also agreed to "be liable for reasonable attorney's fees incurred by the [plaintiff] as a result of respondents' default of this stipulation."

The Original Tenants defaulted on the April Stipulation. The parties agreed to a second Stipulation of Settlement on June 6, 2019 (June Stipulation), this time for a judgment of $270,000.00, representing rent and additional rent due and owing through June 2019, and again secured by a judgment of possession and warrant of eviction. Again, the Original Tenants expressly consented to that relief, including the amount owed, and again waived "all rights to move this or any other court to vacate, extend or modify in any way the judgment, the warrant and/or this agreement." and also agreed to "be liable for reasonable attorney's fees incurred by the [plaintiff] as a result of respondents' default of this stipulation." The execution of the warrant was stayed until August 30, 2019, provided that the Original Tenants paid the judgment amount in full by that date and complied with all obligations of the Lease, as stated in the April Stipulation.

On June 10, 2019, the Civil Court issued a money judgment and judgment of possession, staying the judgment per the June Stipulation. By a decision and order dated June 24, 2019, the Civil Court granted the plaintiff's motion to amend the judgment to include Assignees Garnietex and City Cashmere as respondents in that proceeding.

Several payments were made during 2019 toward the ongoing rent and the arrears of $270,000.00, which the plaintiff attributes to Garnietex. However, all respondents thereafter defaulted in the payments due under the June Stipulation. The Original Tenants and the Assignees were served with Notices of Eviction stating that they would be evicted from the Premises on or after September 4, 2019. On September 13, 2019, before the eviction occurred, the plaintiff entered into a third Stipulation of Settlement (September Stipulation) with the Original Tenants and the Assignees, who warranted that they and the Assignees would vacate the Premises on or before September 19, 2019, and the plaintiff agreed to a stay of execution of the warrant of eviction until on or after September 20, 2019. The Original Tenants and Assignees also agreed that the June Stipulation otherwise remained in full force and effect. The Original Tenants and Assignees failed to vacate as agreed. The stay expired and they were evicted on September 23, 2019. The total arrears at that point were $213,279.97. No amounts were thereafter paid to the plaintiff by any party.

On October 10, 2019, the plaintiff commenced the instant action alleging that $213,279.97 remains due and owing under the Stipulations and the Civil Court judgment after crediting amounts previously paid on the balance. In the complaint, the plaintiff asserts four causes of action – three for breach of the guaranties (against each guarantor separately) and the fourth for contractual attorney's fees.

On December 11, 2019, the defendants filed an answer to the complaint, asserting five affirmative defenses of (1) failure to state a cause of action, (2) failure to provide the Assignees of notice of default, (3) failure to join the Assignees as necessary parties, (4) a "defense founded upon documentary evidence," and (5) waiver and/or estoppel.

Three years ensued without any discovery being conducted. On February 2, 2023, plaintiff filed the instant motion seeking summary judgment on the complaint and dismissal of the defendants' affirmative defenses. The defendants filed opposing papers.

III. DISCUSSION

A. Summary Judgment – Breach of Guaranty

In its first, second, and third causes of action, the plaintiff claims that the Guarantors have breached their Guaranties by failing to pay unpaid rent and additional rent due under the Lease. The plaintiff's proof establishes its *prima facie* entitlement to summary judgment on these causes of action.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

In support of its motion, the plaintiff submits, *inter alia*, the pleadings, the subject Lease and Guaranties, the subject Assignments, the April, June and September Stipulations, and the Civil Court orders and judgment. The plaintiff also submits an affidavit of James Buslik, a member of Adams & Co. Real Estate LLC, the leasing agent for the plaintiff, who alleges that $213,279.97 remained due and owing under the June Stipulation as of September 23, 2019, after subtracting those amounts already paid on the balance. The plaintiff submits a rent ledger showing $230,000.00 due as of June 11, 2019, after crediting a $40,000.00 payment. The same ledger also shows $250,909.82, the last remaining balance on the account as of January 1, 2020, followed by a debit notation of "Bad Debt" and a zero balance.

In opposition to the motion, the defendants submit, *inter alia*, the Lease, the Guaranties, and the Assignment. They also submit eight checks of Garnietex to Schur Management Co., dated in 2018 or 2019, without any indication of what the payment was for, one check from GMC to Adams & Co. Real Estate, dated in 2014, for the security deposit and first month's rent, and one check from C&H to Adams & Co. Real Estate dated in 2014, also indicating it was a security deposit. The defendants also submit a brief affidavit of each of the Guarantors, in which they describe their association to the Original Tenants and Assignees, and purport to make legal arguments.

The plaintiff's proof establishes, *prima facie*, the necessary elements of the first, second, and third causes of action of the complaint. It establishes the Guarantors' liability under the Guaranties by showing "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty." Coop. Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro, 25 NY3d 485, 492 (2015) (internal quotation marks omitted), *citing* Davimos v Halle, 35 AD3d 270, 272 (1st Dept. 2006). It is well settled that "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), *quoting* National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991). The defendant Guarantors do not allege any fraud, duress or other wrongful act on the part of the plaintiff, or otherwise raise any triable issue of fact to warrant denial of summary judgment on these causes of action. See Alvarez, supra; Zuckerman, supra.

Specifically, the parties' Stipulations and the plaintiff's lease ledger are *prima facie* evidence supporting the tenant's debt of $270,000.00 as of June 2019, and the parties agreed that that amount was past due. Buslik's affidavit establishes that, after application of several payments made under the June Stipulation, the tenants still owe $213,279.97 in rent and additional rent. All three Guaranties expressly provide that the Guarantors "unconditionally and irrevocably" guaranteed all amounts due under the subject lease. No monies were paid after the September 2019 eviction and the judgment remains unsatisfied.

There is no merit to the defendants' argument that defendant S. Chan's Guaranty, executed a month after the Lease, is invalid as not supported by consideration. Where, as here, a guaranty explicitly provides that it was issued in order to induce the plaintiff to enter into the lease with the tenant, it is "part of the same transaction" as the subject lease whether it was executed before or after the lease, and there is "no need for new or additional consideration to make the guaranty valid and enforceable." Michelin Mgmt. Co. v Mayaud, 307 AD2d 280, 281 (2nd Dept. 2003). Indeed, even if the guaranty did not include that express provision regarding inducement, that would not be determinative of a lack of consideration. See W.&M. Operating, LLC v Bakhshi, 159 AD3d 520, 521 (1st Dept. 2018). That the tenants were permitted by the plaintiff into the premises and to remain in the space to operate a business is the consideration. See Lexington Owner LLC v Kaplowitz, 149 AD3d 590 (1st Dept. 2017). Nor have the defendants provided any authority for their apparent proposition that a personal guarantor of a lease must hold a particular or special role in the tenant entity for the guaranty to be valid and

enforceable. Indeed, a personal guarantor need not hold any role in the tenant entity. See e.g ULM I Holding Corp. v Corbin-Hillman, 199 AD3d 543 (1st Dept. 2021).

The defendants do not dispute that, by the terms of the June Stipulation, the plaintiff and GMC and C&H consented to a judgment of $270,000.00 in rent and additional rent; and that GMC and C&H failed to make such payments. Rather, the defendants principally argue that, because GMC and C&H assigned the lease and then vacated the leased space, the assignees were subsequently solely responsible for all rent payments to the plaintiff afterwards. The defendants argue that, accordingly, as the Guarantors did not separately guaranty Garnietex and City Cashmere's rent obligations under the Lease, the Guarantors are not liable.

To this extent, the defendants' argument directly contradicts the express terms of the Lease, the Guaranties, and the Assignment itself, which expressly affirm the assignors' liability under the Lease notwithstanding any assignment. The defendants also argue that the Guarantors are relieved of their obligations under the Guaranties because the Amendment altered the Lease without their consent. As explained above, GMC and C&H's obligations under the Lease were in no way altered by the Amendment.

The defendants further argue that G. Chan was no longer liable under the Guaranty once he notified the plaintiff that he was leaving GMC and C&H. However, G. Chan never repudiated or claimed to revoke his Guaranty; and, even if he did, he could not unilaterally terminate the Guaranty. His Guaranty expressly provides that it "may not be … terminated … but only in writing signed by the Owner and the Guarantor." That was not done. "Where a contract provides that a party must fulfill specific conditions precedent before it can terminate the agreement, those conditions are enforced as written and the party must comply with them." Summit Dev. Corp. v Fownes, 74 AD3d 563, 563 (1st Dept. 2010).

Finally, there is no merit to the defendants' argument that the plaintiff's motion is premature due to outstanding discovery. While discovery has yet to commence, the defendants "fail[] to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). '[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421 423 (1st Dept. 2015). It is well settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Alcaron v

Ucan White Plains Housing Dev. Fund Corp., 100 AD3d 431 (1st Dept. 2012). The defendants assert that discovery is necessary in regard to the amount of rent paid by GMC, C&H, Garnietex, or City Cashmere and whether the plaintiff benefited from "writing off" the tenants' obligations for tax purposes. However, the defendant Guarantors' close association with those tenant entities and the checks they submitted in opposition to the motion indicate that they already have knowledge of the amount paid by the tenants. As discussed above, any tax benefit obtained by the plaintiff via the "bad debt" notation in the rent ledger, or otherwise, has no bearing on the defendants' liability under their Guaranties.

For these reasons, the plaintiff has met its burden of demonstrating entitlement to a judgment in the sum of $213,279.97, with statutory interest from September 19, 2019, the date when the tenants defaulted on the September Stipulation. See CPLR 5001.

B. Summary Judgment – Attorney's Fees

In its fourth cause of action, the plaintiff seeks attorney's fees pursuant to the terms of the Guaranties. Attorney's fees are recoverable, where, as here, there is a specific contractual provision for that relief. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). The Guaranties here expressly provide that "[t]he Guarantor agrees to pay Owner any costs and expenses, including without limitation attorneys' fees, incurred in connection with the collection of any amount due or the enforcement of any right under this Guaranty." See Cargill Soluciones Empresariales, S.A. de C.V., SOFOM, ENR v Desarrolladora Farallon S. de R.L. de C.V., 146 AD3d 439 (1st Dept. 2017). Moreover, the plaintiff has submitted invoices and an affirmation of its attorney detailing the fees incurred. The defendants proffer no argument or proof in opposition to an award of attorneys' fees. Thus, the plaintiff establishes its entitlement to attorney's fees in the sum of $11,353.47, an amount this court finds to be reasonable.

C. Dismissal of Affirmative Defenses

The defendants' first affirmative defense of failure to state a cause of action is dismissed since, as discussed above, the plaintiff established its claims as a matter of law. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., supra; Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra.

In their second affirmative defense, the defendants argue that they have no liability or obligation under the Guaranties because the plaintiff failed to provide a notice of default to the Assignees. However, neither the Lease nor the Guaranties contain any such notice provision.

The third affirmative defense of failure to join necessary parties is also meritless. Joinder of Assignees Garnitex and City Cashmere is not necessary to accord complete relief in this action, as the dispute merely concerns the Guarantors' obligation to the plaintiff for rent and additional rent owed by GMC and C&H, which obligation continued after the assignment. See CPLR 1001(a); Huber Lathing Corp. v Aetna Casualty v Surety Co., 132 AD2d 597, 598 (2nd Dept. 1987). Nor have the defendants identified any interest that would be prejudiced by a failure to join Garnitex or City Cashmere. See CPLR 1001(b).

The fourth affirmative defense alleges that the defendants have "a defense founded upon documentary evidence." It states nothing more and does not identify which documents or portions thereof the defendants are relying on. Thus, this defense must be dismissed as improperly asserted in a conclusory manner without any detail or factual allegation. See Comm. of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Manufacturers Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). To the extent the defendants argue that the notations in the plaintiff's rent ledger showing a zero balance and a notation of "bad debt" on January 1, 2020, is sufficient to "resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim." (Fortis Fin. Svcs., LLC v Fimat Futures USA, 290 AD2d 383, 383 [1st Dept. 2002]), the argument is meritless. As explained by Buslik in a reply affidavit, the notations were merely an accounting practice to remove charges considered uncollectible and were not intended as a forgiveness of the debt. Indeed, that the plaintiff commenced this action two months before the date of that notation is a clear indication that it was not forgiving the debt.

The fifth affirmative defense, asserting only that the action "is barred by the doctrines of waiver and estoppel" is dismissed as improperly asserted in a conclusory manner without any detail or factual allegation and is thus dismissed. See Comm. of State Ins. Fund v Ramos, supra; Manufacturers Hanover Trust Co. v Restivo, supra. In any event, the doctrines are inapplicable. The plaintiff did not delay in commencing the action as it was filed on October 2019, and, to the extent they complain of the three-year delay in bringing this motion, the defendants do not demonstrate any prejudice. Indeed, the motion is timely under the court's rules. See CPLR 3212(a). The defendants provide no authority for their argument that the mere

passage of time bars the relief sought. Notably, at no time did the defendants seek dismissal of the complaint for failure to prosecute. See CPLR 3216.

The court has considered and rejected the defendants' remaining contentions.

IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the branch of the plaintiff's motion which is for summary judgment on the first, second, and third causes of action of the complaint is granted, and the Clerk shall enter judgment in favor of the plaintiff, 231/249 West 39 Street Associates, and against the defendants, Cliff Chan, Sherman Chan, and Garrick Chan, jointly and severally, in the sum of $213,279.97, plus costs and statutory interest from September 19, 2019, and it is further

ORDERED that the branch of the plaintiff's motion which is for summary judgment on the fourth cause of action of the complaint is granted, and the Clerk shall enter judgment in favor of the plaintiff, 231/249 West 39 Street Associates, and against the defendants, Cliff Chan, Sherman Chan, and Garrick Chan, jointly and severally, in the sum of $11,353.47, with statutory interest from the date of this order, November 15, 2023, and it is further

ORDERED that the branch of the plaintiff's motion which is to dismiss the defendant's affirmative defenses is granted, and the affirmative defenses are dismissed.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/15/2023
DATE

CHECK ONE:	[X]	**CASE DISPOSED**	[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ]	**DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**			[ ]	**SUBMIT ORDER**		