

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: JOAN M. KENNEY
Justice

PART 8

Index Number : 153988/2013
274 MADISON COMPANY
vs.
SMART APARTMENTS LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: April 3, 2014.


_____, J.S.C.

JOAN M. KENNEY

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
274 Madison Company,

Plaintiff,

-against-

Smart Apartments, LLC and Robert Chan,

Defendants.
-----X

DECISION AND ORDER

Index Number: 153988/2013

Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment.

Papers

Notice of Motion, Affirmation, and Exhibits, Memo of Law

Opposition Affirmations, and Exhibits

Reply Affirmation, Exhibits

Numbered

1-11

12-19

20-27

In this action seeking unpaid rent from an out-of-possession tenant, plaintiff, 27 Madison Company (Madison), moves for an Order, pursuant to CPLR §3212, granting summary judgment in their favor, in the amount of \$401,886.45.

Defendants cross move for an Order granting partial summary judgment dismissing plaintiff's claims as against Robert Chan.

Factual Background

Madison is the owner and landlord of the building located at 274 Madison Avenue, New York, New York. Defendant Smart Apartments, LLC, (Smart Apartments) is the out-of-possession commercial tenant of Unit 1401 (the premises) within the building pursuant to a lease dated June 3, 2011 (the Lease). Defendant Robert Chan (Chan) is the president of Smart Apartments and is the guarantor of the lease. The term of the lease runs from July 1, 2011 through June 30, 2016.

On or about October 22, 2012, the City of New York filed an action against defendants in New York State Supreme Court, entitled *The City of New York v. Smart Apartments, LLC, Robert*

K.Y. Chan, et al., Index Number 402255/2012 (the City Action), alleging that defendants were in violation of the New York City Consumer Protection Law by engaging in the illegal business of operating apartment units for transient use and occupancy. On February 13, 2013, the Court granted the City of New York a preliminary injunction and temporary restraining order enjoining defendants from continuing Smart Apartments' operations, including the leasing, renting, and advertising of residential units for transient occupancy.

Chan signed and executed the Lease for the premises on behalf of Smart Apartments for a term of five years commencing July 1, 2011. Paragraph 18 of the Lease states, in pertinent part:

In case of any such default, re-entry, expiration, and/or dispossession by summary proceedings or otherwise, (a) the rent shall become due thereupon and be paid up to the time of such re-entry, dispossession and/or expiration, (b) Owner may re-let the demised premises or any part or parts thereof, either in the name of Owner or otherwise, for a term or terms, which may at Owner's option be less than or exceed the period which would otherwise constitute the balance of the term of this lease, and may grant concessions or free rent or charge a higher rental than that in this lease and/or (c) Tenant or the legal representatives of Tenant shall also pay to Owner as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease. The failure of Owner to re-let the demised premises, or any part or parts thereof, shall not release or affect Tenant's liability for damages. In computing such liquidated damages there shall be added to the said deficiency such expenses as Owner may incur in connection with re-letting, such as legal expenses, reasonable attorney's fees, brokerage, advertising, and for keeping the demised premises in good order or for prepare the same for re-letting. Any such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in this lease, and any suit brought to collect the amount of the deficiency for any month shall not prejudice in any way the right of Owner to collect the deficiency for any subsequent month by a similar proceeding...Owner shall in no event be liable in any way

whatsoever for failure to re-let the demised premises, or in the event that the demised premises are re-let, for failure to collect the rent thereof under such re-letting, and in no event shall Tenant be entitled to receive any excess, if any, of such net rents collected over the sums payable by Tenant to Owner hereunder, in the event of a breach or threatened breach by Tenant of any of the covenants or provisions hereof, Owner shall have the right of injunction and the right to invoke any remedy at law or in equity as if re-entry, summary proceedings and other remedies were not herein provided for...

Furthermore, Paragraph 25 of the Lease states, in pertinent part:

No act or thing done by Owner or Owner's agents during the term hereby demised shall be deemed an acceptance of a surrender of the demised premises, and no agreement to accept such surrender shall be valid unless in writing signed by Owner. No employee of Owner or Owner's agent shall have any power to accept the keys of said premises prior to the termination of the lease, and the delivery of keys to any such agent or employee shall not operate as a termination of the lease or a surrender of the demised premises.

Paragraph 28 of the Lease further mandates that any and all notices or communications under the Lease must be in writing sent by either certified mail, return receipt requests, or by courier which delivery can guarantee overnight delivery and furnish a receipt of such delivery.

Chan is Smart Apartments' guarantor for the premises, obligating himself to guarantee Smart Apartments' obligations under the lease. The guaranty does include a limitation of liability, which states, in pertinent part:

Anything herein and contained to the contrary notwithstanding upon Tenant's (a) having vacated and surrendered the demised premises to Owner free of all subleases or licenses and in a broom clean condition and as otherwise required by this lease and (b) having notified Owner or Managing Agent in writing and (c) delivered the keys to the demised premises to the Owner or its Managing Agent, all of Guarantor's obligation under this Guaranty shall terminate as of the date of said surrender.

In December 2012, Smart Apartments ceased paying rent. On or about January 3, 2013, Smart Apartments notified one of Madison's managers by email that it was vacating the premises on January 7, 2013 and the keys were returned to the building's superintendent. The premises have not been re-rented since Smart Apartments vacated the premises before the expiration of their Lease.

Arguments

Plaintiff argues that it is entitled to summary judgment for unpaid rent through the term of the Lease because defendants vacated the premises mid-lease without proper notification and surrender.

Defendants maintain that there are issues of material fact which would preclude summary judgment as to the measurement of damages because plaintiff has not re-let the premises.

Defendants also cross-move for summary judgment in favor of Chan as the guarantor because he has satisfied all of his obligations under the Guaranty.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such

judgment without the necessity of a cross-motion.”

The rule governing summary judgment is well established: “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 University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

A written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous. *See e.g., W.W.W. Assoc. v Giancontieri*, 77 N.Y.2d 157, 565 N.Y.2d 440, 566 N.E.2d 639 (1990). A contract is unambiguous if “on its face it is reasonably susceptible of only one meaning.” *Greenfield v. Philles Records*, 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 570, 780 N.E.2d 166, 170-171 (2002). Here, the Lease between plaintiff and defendant is clear and unambiguous that no surrender or termination of the Lease will be accepted unless in writing signed by the Owner. Paragraph 25 of the Lease provides that “no provision...shall be deemed to have been waived by Owner unless such waiver be in writing signed by Owner...and no agreement to accept such surrender shall be valid unless in writing signed by Owner.” Smart Apartments concedes that it vacated the premises prior to the Lease expiring and that it notified plaintiff of its surrender via email to plaintiff’s manager. However, Paragraph 28 of the Lease mandates that any communications by tenant be in writing sent by certified mail or courier service, and Paragraph 25 requires that any acceptance of a surrender be in writing signed by Owner. An email to the plaintiff’s manager, thus, fails to meet the requirements of the Lease that communications be made by certified mail or courier. Additionally, defendant’s cannot provide any signed writing by the plaintiff Owner

accepting their surrender or termination of the Lease.

Once a lease is executed, a tenant's obligation to pay rent is fixed according to its terms and the landlord is under no obligation or duty to re-let the abandoned premises to minimize damages (*see Holy Properties Limited, L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130 [1995]). In this case, the Lease expressly provides that plaintiff is under no obligation or duty to mitigate damages and that upon defendant's abandonment of the premises, defendant is to remain liable for all monetary obligations under the lease.

A landlord and tenant may contract for accelerated rent due upon termination of the landlord-tenant relationship. It is not uncommon for commercial leases to provide that, upon a default in payment of rent, the rent and additional rent for the remainder of the lease term will become immediately due and payable. Such acceleration clauses are considered valid and enforceable in the absence of fraud, exploitative overreaching or unconscionable conduct on the part of the landlord (*see Fifty States Mgmt. Corp. V. Pioneer Auto Parks*, 46 N.Y.2d 573 [1979]). It is well established that no action can be brought for future rent in the absence of a provision permitting acceleration, since the breach of an agreement to pay money in installments is not a breach of the entire agreement, and will not permit a recovery of all the damages in advance. It follows that an action to recover such rent is not barred by the judgment in the previous action. (*Maflor Holding Corp. V. S.J. Blume, Inc.* 308 N.Y. 570, 127 N.E.2d 558 [1955]). Defendants maintain that no acceleration clause existed in the Lease. Yet the Lease does in fact provide an acceleration clause. Paragraph 18 of the Lease states in the case of default "the rent shall become due thereupon and be paid up to the time of such re-entry, dispossession and/or expiration," allowing the landlord to accelerate the rent for the remainder of the lease term.

A movant's failure to sufficiently demonstrate its right to summary judgment requires a denial of the motion, regardless of the sufficiency, or lack thereof, of the opposing papers. (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851; *Zuckerman v City of New York*, 49 NY2d 557; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065; *Lurie v Child's Hosp.*, 70 AD2d 1032; *Cugini v. System Lumber Co.*, 111 AD2d 114 [1st Dept, 1985]). As defendant Chan has not made out a prima facie showing of entitlement to summary judgment that he is not liable as guarantor of the Lease as a matter of law, plaintiff is under no obligation to come forward with evidentiary proof creating a triable issue of fact (see *Marie Christiana v. Joyce International Inc.*, 198 AD2d 690, 691 [3rd Dept, 1993]).

A guaranty is a secondary obligation to answer for the debt or the performance of some obligation of another, in this case the primary obligation of Smart Apartments under the Lease, and upon default, the guarantor becomes primarily liable and indebted (see *Michaels v. Chemical Bank*, 110 Misc2d 74, 441 N.Y.S.2d 638 (Sup. Ct. 1981)). A guaranty must be construed in the strictest manner to assure its consistency with the lease terms (see *White Rose Food v. Saleh*, 99 N.Y.2d 589 (2003); *404 Park Partners, L.P. v. Lerner*, 75 AD3d 270 (1st Dept. 2010)).

It is clear from the language of the Lease and the Guaranty that the purpose of the Guaranty was to induce the landlord to enter the Lease in the first place and to hold Chan liable for any rent and additional rent that might accrue. While the Guaranty provides that the Guarantor's liability is limited up to the point when Tenant vacates and surrenders the premises, the Guaranty signed and executed by Chan explicitly requires that written notice be given to the Owner or Managing Agent for termination and that the keys be delivered to the Owner or its Managing Agent and that the premises be surrendered in broom clean condition. Furthermore,

the Lease specifically mandates that notices or communications under the Lease must be in writing sent by either certified mail, return receipt requests, or by courier which delivery can guarantee overnight delivery and furnish a receipt of such delivery, and that any surrenders or terminations be in writing signed by the Owner accepting the same.

Defendants provide no such written documentation proving a valid termination of the Lease (by them or plaintiff). The only documentation provided is two email correspondences to one of Madison's managers stating that Smart Apartments was vacating the premises on January 7, 2013, and the affidavit of Chan stating that the keys were accepted from Smart Apartments' representatives by plaintiff's "maintenance team." As such, defendants have failed to set forth a prima facie entitlement to the relief sought.

Attached to the complaint is a ledger indicating that the amount due to plaintiff through the end of the Lease term is \$401,886.45. This total sum also includes electric metered charges, late charges, real estate taxes, and interest charges. Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment, is granted, in its entirety; and it is further

ORDERED that the issues of the amount of reasonable attorney's fees recoverable against defendants are severed and such issues are referred to a Special Referee to hear and report with recommendation, unless the parties consent to a determination by the Special Referee, in which case the Special Referee may hear and determine said issues; and it is further

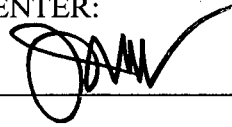
ORDERED that the Clerk is directed to enter judgment in favor of plaintiff 274 Madison Company, LLC and against defendants Smart Apartments, LLC and Robert Chan in the sum of \$401,886.45; and it is further

ORDERED, that defendants' cross- motion is denied is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: April 3, 2014

ENTER:

A handwritten signature in black ink, appearing to read 'JMK', is written over a horizontal line.

Joan M. Kenney, J.S.C.