ORIGINAL

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Mattone Group Raceway, LLC, Gart Roosevelt Associates, LLC and JMM Raceway, LLC,

Plaintiffs

-against-

Scotto's Westbury, NY LLC f/k/a Luzzo's Westbury, NY LLC and Vincent Scotto,

Defendants.

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Index No.: 703278/12
Motion Date: 7/22/13
Motion Cal. No.: 97
Motion Seq. No.: 3

The following papers numbered 1 to 17 read on this motion for an order (a) on the first and third causes of action for pre-vacatur base and additional rent through November 2012 totaling $252,065.26 ; (b) on that portion of the fourth cause of action for post-vacatur rent as liquidated damages totaling $265,347.19; (c) on that portion of the fourth causes of action for re-letting and other expenses as liquidated damages totaling $322,807.54; (d) on the fifth cause of action for attorneys' feed incurred in this action and an underlying nonpayment proceeding in the sum of $18,424.69 through May 20, 2013, or setting a hearing date for determining fees; and (e) awarding plaintiffs' costs and disbursements per statute and post-judgment interest.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Memorandum of Law in Support of Summary Judgment.....	5 - 9
Notice of Cross-Motion.....	10 - 12
Reply Affidavit in Support of Motion and in Opp to X-motion.	13 - 15
Memorandum of Law in Support of Motion and Opp to X-Motion.	16 - 17

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff moves for an Order granting Summary Judgment as against the Defendants for all

base and additional rent and liquidated damages totaling $840,219.99 through April of 2013 plus attorneys' fees.

Facts

Plaintiff, Mattone Group Raceway, LLC, Gart Roosevelt Associates, LLC and JMM Raceway, LLC (the "Plaintiffs") are owners of a shopping center at 1195 Corporate Drive, Westbury New York (the "Shopping Center"). The subject premises is located within the Shopping Center.

Plaintiffs entered into a lease with the Tenant, Scotto's Westbury, NY LLC ("Tenant" or "Scotto's Westbury") for the Premises for a ten year term commencing April 15, 2009 through April 14, 2019.

Pursuant to the terms of the Lease, base rent was $36,750 per month with the Tenant agreeing to pay its proportionate share of real estate taxes on the Shopping Center and common area maintenance expenses as additional rent. The Lease also provides that Tenant is also responsible for all costs and expenses relating to the premises during the terms of the Lease.

Pursuant to the Lease, interest and late charges were to be imposed if rent is not paid within five days of the due date. In addition, the Tenant is liable for all rent accruing through the term of the Lease without regard to whether the Premises is Vacated prior to the expiration of the Lease.

Furthermore, Plaintiffs were not obligated to re-let the Premises if the Tenant vacated during the term of the Lease.

On or about August 13, 2012, Plaintiff commenced a nonpayment proceeding against the Tenant in Nassau District Court. After the Tenant failed to appear, plaintiff obtained a default judgment of possession on October 1, 2012. On November 28, 2012, the Tenant was evicted.

Defendant, Vincent Scotto ("Scotto") signed a Guaranty whereby he agreed to be personally

liable for Tenant's payments and performance due under the Lease. The Guaranty states that Scotto's liability terminates upon Tenant's surrender and delivery of possession and keys to the plaintiff. However, Plaintiffs contend that since Tenant was evicted, and did not surrender, he remains liable. (Seems like bullshit).

In February of 2013, Plaintiffs re-let the Premises to another Tenant.

Scotto submits the affidavits of Gino Scotto, the Principal of Scotto's Westbury and Frank Cavarra ("Cavarra"), Scotto Westbury's Executive Chef, who state that Scotto surrendered the premises in broom clean condition in August of 2012. Furthermore, Plaintiff submits an invoice from Five Star Mechanical, Inc wherein the invoice notes that there was no electric or gas service on August 23, 2012. Gino Scotto also states that Defendant and Plaintiff agreed to close down the business and deliver possession to the Plaintiff, thereby invoking the protections of the "Good Guy" guarantee for the benefit of Scotto.

The court notes that the Cross-motion is solely as to Scotto and that the Tenants do not submit opposition to Plaintiff's motion.

Plaintiff's motion for summary judgment is granted in its entirety and defendant's cross-motion for summary judgment is denied in its entirety as more fully set forth below.

Discussion

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. (*See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 [1978].) As such, the function of the court on the instant motion is issue finding and not issue determination. (*See S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974].) The party moving for summary judgment must tender admissible evidentiary proof that eliminates any material

issues of fact from the case. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].) If the movant succeeds, the burden shifts to the party opposing the motion, who must show issues of material facts sufficient to require a trial. (*Id.*)

Pre-Vacatur Rent and The Guaranty

Plaintiff has established its prima facie entitlement to Summary Judgment with respect to pre-vacatur rent. "A guaranty is a collateral promise to answer for the payment of a debt or obligation of another, in the event the first person liable to pay or perform the obligation fails." (*New York City Dept. of Finance v. Twin Rivers, Inc.*, 920 F.Supp. 50, 52 [S.D.N.Y. 1996].) "A guaranty may be either a guaranty of payment or of collection." (Id.) "A court must look to the language of the specific guaranty to determine the nature of the guaranty." (Id.)

A guaranty is a contract that must be construed "in the strictest manner and a guarantor should be bound to the express terms of the written guaranty." (*Wider Consol., Inc. v. Tony Melillo*, LLC, 107 A.D.3d 883, 884 [2nd Dept 2013]; citing *Louis Dreyfus Energy Corp. v. MG Refining and Marketing, Inc.*, 2 N.Y.3d 495 [2004]; *Arlona Ltd. Partnership v. The 8th of January Corp.*, 50 A.D.3d 933 [2nd Dept 2008]; *665-75 Eleventh Ave. Realty Corp. v. Schlanger*, 265 A.D.2d 270 [1st Dept 1999].) Herein, the Tenant has failed to oppose the within motion and the attorney for Scotto concedes that Scotto owes pre-vacatur rent.

Plaintiff met their prima facie burden with respect to pre-vacatur rent as Mattone, in his affidavit, set forth that Scotto entered into a Guaranty whereby he agreed to be personally liable for all of the tenant's obligations under the Lease up until the vacatur.[1]

[1]In opposition, Scotto concedes that he is liable for the rent up until August 23, 2012.

Post Vacatur Rent

Plaintiff also seeks summary judgment with respect to post-vacatur rent from December 21, 2012 through April of 2013. Article 21(B)(1) and (2) of the Lease provides that the Tenant remains liable for all rent throughout the term without regard to whether the premises are vacated prior to the Lease's expiration. "Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease." (*Holy Props. v Cole Prods.*, 87 N.Y.2d 130 [1995]; *Johnston v MGM Emerald Enters., Inc.*, 69 A.D.3d 674 [2nd Dept 2010].) The critical issue before this court is whether Scotto's "Guaranty" was terminated in August of 2013 when Scotto contends they surrendered the premises or if Scotto failed to surrender the premises to the Landlord in accordance with the terms of the Guaranty.

The Guaranty provides in pertinent part that "[t]he obligations of Guarantor shall cease to accrue on the date ... that Tenant (I) surrenders the Premises free and clear of all liens and encumbrances... (iii) delivers the keys to the Demised Premises to Landlord; and (iv) delivers possession of the Demised Premises to Landlord in accordance with the other requirements of Paragraph 25 of the Lease."

The court notes that the Article 32(A)(1) of the Lease provides that the Lease can only be amended or modified by a writing signed by the parties. Cavarra and Gino Scotto contend that there were multiple in-person and telephone conversations with an "unnamed" person who was allegedly the managing the premises. Scotto contends that the "unnamed" employee waived Tenant's breach because he did not object to the Tenant's vacatur. Defendants also allege that Plaintiffs waived Tenant's obligation to deliver the keys because the "unnamed" employee never asked for the keys.

As the alleged modifications were done in writing, and they are therefore not effective.

The written contract between the parties was unambiguous and therefore, parol evidence with respect to a contrary intent is not admissible. (*Bond Safeguard Ins. Co. v. Forkosh*, 107 A.D.3d 750 [2nd Dept 2013].)

In addition, if the "lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable. (*Holy Props. v Cole Prods.*, at 134.) It is undisputed that the Tenant vacated the premises before the Lease expired and without delivering the keys and the Plaintiffs were forced to bring a non-payment action against the defendants, which resulted in a judgment of possession in October of 2012 and upon which the marshal executed a warrant on November 28, 2012.

In opposition, defendant contends that the Tenant's surrender should be deemed to have occurred by reason of the parties' conduct and operation of law. A surrender by operation of law "occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated." (*Riverside Research Institute v. KMGA, Inc.*, 68 N.Y.2d 689, 692 [1989]; *Chestnut Realty Corp. v. Kaminski*, 95 A.D.3d 1254 [2nd Dept 2012].) "A surrender by operation of law is inferred from the parties' conduct." *(Ford Coyle Properties, Inc. v. 3029 Avenue V Realty, LLC*, 63 A.D.3d 782 [2nd Dept 2009].) "Whether a surrender by operation of law has occurred is a determination to be made on the facts" (*Riverside Research Institute v. KMGA, Inc.*, at 692.) Here, Scotto failed to submit evidence that there was a surrender by operation of law. Scotto references an estimate from Five Star Mechanical which indicates that the gas and electric were turned off. Scotto contends that the invoice evidences a surrender by operation of law since the gas and electric were turned off and Plaintiff had access to the premises. However, the invoice is merely for "3 roof top units at The Raceway" and Article 32(c)

of the Lease provided for access to the premises for inspections and repairs.

In addition, Scotto's contention that he is entitled to use the security deposit as "set off" is without merit. (See *Medallion Funding Corp. v Norrito*, 272 A.D.2d 218 [1st Dept 2000] citing *Marcus Dairy v Jacene Realty Corp.*, 225 A.D.2d 528 [2nd Dept 1996].)

Finally, Scotto argues that Defendants contends that discovery is not complete. It has been well settled, that a party may not "rely upon mere hope that evidence sufficient to defeat summary judgment may be uncovered during the discovery process." *(Piltser v. Donna Lee Management Corp.*, 29 A.D.3d 973 [2nd Dept 2006]; *Baron v. Newman*, 300 A.D.2d 267 [2nd Dept 2002].) In the within action, the court has the affidavit of the Plaintiff and various other evidence, including the Lease and Guaranty. Defendants failed to submit an affidavit from Scotto or supply the court with any admissible evidence that would refute, in any way, Plaintiff's prima facie case.

Accordingly, Plaintiff is entitled to summary judgment as against the Tenant and Scotto on the issue of post-vacatur damages.

Rent Concession and Re-Letting Expenses

Article 21(B) of the Lease provides, that in the event the Tenant defaults, Plaintiff is entitled to recover rent concessions to the Tenant and the costs of re-letting the Premises. At the commencement of the Lease, the Tenant was given a four month base rent concession totaling $126,666.68. Plaintiffs have established their prima facie entitlement to summary judgment on this issue based on the terms of the Lease.

Conclusion

Plaintiff's motion for summary judgment is granted in its entirety and Scotto's cross-motion for summary judgment is denied in its entirety. The issue of damages, with respect to expenses

related to re-letting and attorney's fees is set down for a hearing on December 4, 2013 at 11:00AM in Part 19, Courtroom 48.

Dated: October 16, 2013

Bernice D. Siegal, J. S. C.