

New Gold Equities Corp. v He Lin

2024 NY Slip Op 34427(U)

December 10, 2024

Supreme Court, New York County

Docket Number: Index No. 655619/2023

Judge: Suzanne J. Adams

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SUZANNE J. ADAMS PART 39M

Justice

-----X

NEW GOLD EQUITIES CORP.,
Plaintiff,

- v -

HE LIN,
Defendant.

-----X

INDEX NO. 655619/2023
MOTION DATE N/A
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 43, 44, 45, 46, 47, 48

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that plaintiff's motion is granted. Plaintiff BLDG 760-768 Eighth Avenue LLC¹ is the landlord of the land and building located at 762-766 Eighth Avenue in Manhattan. By written lease dated May 5, 2022, plaintiff's predecessor, New Gold Equities Corp., leased certain portions of the premises to non-party Jiasheng Group NYC Inc., as tenant. Defendant entered into an unconditional guaranty of the lease dated May 2, 2022. (NYSCEF Doc No. 20) By agreement dated October 31, 2023, New Gold Equities Corp. assigned its interest in the lease to plaintiff, "together with all guarantees of tenant's obligations thereunder by third parties . . ." (NYSCEF Doc No. 52) The instant action was commenced in October 2023 to enforce the unconditional guaranty. Plaintiff now moves for an order: (1) pursuant to CPLR 3212, granting summary judgment on its first cause of action against defendant in the amount of

¹ This entity has been substituted as the plaintiff in this action by the decision and order of this court dated October 4, 2024.

[*1]

arrears sought in the complaint or \$641,600.09; (2) pursuant to CPLR 3211(b), dismissing defendant's affirmative defenses as a matter of law; (3) pursuant to CPLR 3025(c), deeming the complaint amended to conform to the proof, reflecting damages in the amount of \$808,326.41, and pursuant to CPLR 3212, granting a judgment in favor of plaintiff for said amount, plus interest thereon from the date that each payment obligation accrued; and (4) pursuant to CPLR 3212, awarding plaintiff summary judgment on its second cause of action for attorney's fees and expenses. Defendant opposes the motion.

As a preliminary matter, plaintiff moves to amend the complaint to conform to the proof. Plaintiff seeks \$808,326.41 for rent and additional rent arrears through January 31, 2024, even though the complaint sought \$641,600.09 (NYSCEF Doc No. 14, Starkman aff, ¶ 7). "Leave to conform a pleading to the proof pursuant to CPLR 3025 (c) should be freely granted absent prejudice or surprise resulting from the delay" (*Matter of Hersh*, 198 AD3d 766, 768 [2d Dept 2021], *lv denied* 37 NY3d 919 [2022] [internal quotation marks and citation omitted]; *see also Murray v City of New York*, 43 NY2d 400, 405 [1977], *rearg dismissed* 45 NY2d 966 [1978]). Defendant did not specifically address this branch of plaintiff's motion, and thus has failed to demonstrate any prejudice or surprise. However, to the extent that plaintiff seeks to amend the complaint to reflect that the arrears total \$891,659.74 in reply, the motion is denied. Defendant did not have an opportunity to respond to this calculation (*see Matter of Kennelly v Mobius Realty Holdings, LLC*, 33 AD3d 380, 381-382 [1st Dept 2006]). Thus, the branch of plaintiff's motion seeking to amend the complaint to reflect rent arrears of \$808,326.41 is granted.

"On a summary judgment motion to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the failure to perform under the guaranty" (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]; *see also Winegrad v New York*

Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once the creditor meets its prima facie burden, “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]). Here, plaintiff has demonstrated that defendant executed an unconditional guaranty of the tenant’s obligations under the lease in which he waived the right to assert any defenses except for payment by defendant under the guaranty (NYSCEF Doc No. 20). This language is sufficiently specific to constitute a valid waiver of the right to plead defenses (*Sterling Natl. Bank v Biaggi*, 47 AD3d 436, 438 [1st Dept 2008]). Plaintiff has also submitted an affidavit from its vice president of commercial property management and a ledger demonstrating that, as of January 25, 2024, rent arrears total \$808,326.41, and that neither the tenant nor defendant have made a single payment since signing the lease (NYSCEF Doc No. 14, Starkman aff, ¶¶ 7, 14; NYSCEF Doc No. 21). In addition, plaintiff has demonstrated that the affirmative defenses lack merit. The lease and guaranty are separate contracts (*APF 286 Mad LLC v Chittur & Assoc. P.C.*, 132 AD3d 610, 610 [1st Dept 2015], *lv dismissed* 27 NY3d 952 [2016]), and defendant waived any defense available to the tenant (NYSCEF Doc No. 20).

Defendant has failed to raise an issue of fact. Defendant has failed to refute plaintiff’s calculations as to the amount owed (*see Royal Equities Operating, LLC v Rubin*, 154 AD3d 516, 517 [1st Dept 2017]). Defendant asserts that a summary nonpayment proceeding brought by the landlord against the tenant and an action for damages brought by the tenant against the landlord have not been resolved yet.² However, as noted above, these issues are irrelevant to defendant’s

² On March 9, 2024, Justice Lyle E. Frank partially dismissed the tenant’s claims against landlord for declaratory relief and an abatement of rent (*Jiesheng Group NYC Inc. v New Gold Equities Corp.*, 2024 NY Slip Op 31656[U], *2 [Sup Ct, NY County 2024]).

liability under the guaranty. Pursuant to the express terms of the guaranty, defendant waived any defense affecting tenant's liability to the landlord (*see Chip Fifth Ave. LLC v Quality King Distributions, Inc.*, 158 AD3d 418, 418 [1st Dept 2018], *lv dismissed* 32 NY2d 947 [2018]).

Plaintiff also requests attorney's fees pursuant to the guaranty. Defendant did not oppose this branch of the motion. Pursuant to the guaranty, defendant agreed to pay "Landlord's reasonable attorneys' fees . . . and all other reasonable costs and expenses reasonably connected with [Landlord's efforts] to enforce Guarantor's obligations pursuant to this Guaranty or any part thereof" (NYSCEF Doc No. 20). It is well settled that such provisions are enforceable (*International Bus. Machs. Corp. v Murphy & O'Connell*, 183 AD2d 681, 682 [1st Dept 1992], *appeal dismissed* 81 NY2d 783 [1993]). The court refers the issue of reasonable attorney's fees to a referee to hear and report with recommendations.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on its complaint is granted, defendant's affirmative defenses are dismissed, and the complaint is deemed amended to conform to the proof to reflect that the amount of rent arrears is \$808,326.41; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff BLDG 760-768 Eighth Avenue LLC and against defendant He Lin in the amount of \$808,326.41, together with statutory interest thereon from the date of this order until the date of entry of judgment, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the amount of attorneys' fees to be assessed as against defendant is referred for determination to a Special Referee, and that within 60 days from the date of this order plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to

be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) to arrange a date for a reference to determine pursuant to CPLR § 4317(b); and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff BLDG 760-768 Eighth Avenue LLC and against defendant He Lin in accordance with the aforesaid award of damages with interest, costs, and disbursements, and the report of the Special Referee, without any further application.

This constitutes the decision and order of the court.

SA

12/10/2024
DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE