

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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INDEX NO. 654424/2018

GOODWOOD REALTY LLC

MOTION DATE 3/27/18

Plaintiff,

MOTION SEQ. NO. 001

- v -

HARVEY S. MARCUS,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35

were read on this motion to/for JUDGMENT - SUMMARY

In this breach of contract action seeking damages for unpaid rent and additional rent, the plaintiff property owner moves pursuant to CPLR 3212 for summary judgment against the defendant guarantor on the complaint and dismissal of the defendant's affirmative defenses. The defendant opposes the motion. The motion is granted.

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, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra, at 324; Zuckerman, supra, at 562. 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).

Here, the plaintiff has met its burden on the motion by submitting, *inter alia*, the subject lease and guaranty agreements, the summons and complaint, verified by Remy Issembert, managing member of the plaintiff LLC, an affidavit of Issembert and property tax bills. By this proof, the plaintiff established, *inter alia*, that the non-party former tenant, Buy-Time, Inc, failed to timely and fully pay base rent and additional between August 1, 2018 and December 31, 2018, as required by the subject lease, and vacated the premises on October 31, 2018, eight months prior to the expiration of the lease, with unpaid arrears. Specifically, the tenant paid only a portion of the rent due for August 2018, and paid no rent for September, October, November and December 2018, for a total of \$27,140.00. The plaintiff's proof further establishes that the tenant failed to pay its proportionate share of the real estate taxes as required by the lease, leaving an outstanding balance of \$12,300.25. The tenant was charged and failed to pay the late fees authorized by the lease, which totaled \$5,830.00.

The plaintiff's proof also establishes that the defendant guarantor was liable for all unpaid rent and additional rent under the terms of the separate guaranty signed by him, and that the guaranty was clear, unambiguous, absolute and unconditional. The defendant has failed to show any fraud, duress or other wrongful act on the part of the plaintiff, or otherwise raise any triable issue of fact as to the guaranty. See Alvarez, supra, at 324; Zuckerman, supra, at 562.

Nor is there any merit to the defendant's contention that summary judgment should be denied as premature under CPLR 3212(f) since he "fails 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). The plaintiff failed to do so and 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., *supra*; Kent v 534 East 11th Street, *supra*; Flores v City of New York, 66 AD3d 599 (1st Dept. 2009).

For these reasons, the plaintiff's motion for summary judgment on the complaint is granted to the extent that it may enter judgment in the sum of \$45,270.25 plus costs and statutory interest from August 1, 2018.

In his answer, the defendant asserts twelve affirmative defenses in the most conclusory fashion, most consisting of just two or three words, e.g. "improper venue", "statute of frauds" and "unjust enrichment", with nothing further. This is clearly insufficient, even for pleading purposes. As such, the defendant's affirmative defenses are dismissed.

Finally, the plaintiff also seeks contractual attorneys fees, or an inquest to determine attorneys fees. While the plaintiffs' entitlement to contractual attorney's fees is established, no documentation or affirmation supporting any particular award is submitted. Thus, that portion of the motion is denied without prejudice to renew upon proper papers within 30 days of the date of this order, after the filing of a Note of Issue.

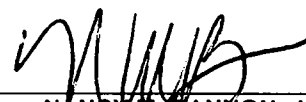
Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted to the extent indicated; and otherwise denied without prejudice. and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendant in the principal sum of \$45,270.25 plus costs and statutory interest from August 1, 2018.

This constitutes the Decision and Order of the court.

10/15/2019
DATE


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

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: