

LAW CURRENTS An informational newsletter from Richard A. Klass, Esq.

**“If you want a guarantee,
buy a toaster.”**

— Clint Eastwood in *The Rookie*

It is very common in commercial leasing that the landlord will insist that the owner of the tenant’s business provide a “Good Guy Guaranty.” This limited guaranty promises the landlord that, in exchange for releasing the business owner from liability for future rent obligations, the tenant promises to provide sufficient notice to the landlord as to when the tenant will be leaving the premises and will leave it in the same condition as it was given with all rent paid up through the surrender date.

Office tenant moved out owing rent arrears

An office tenant of a construction business in a Manhattan office building decided to move out during the COVID-19 pandemic. Upon renting the office, the tenant’s principal signed a good guy guaranty which allowed her to terminate her liability upon surrender of the premises according to its specific terms.¹ The landlord’s attorney retained **Richard A. Klass, Esq., *Your Court Street Lawyer***, to sue the former tenant and guarantor for breach of contract for rent arrears and other charges due and owing.

Guarantor’s Motion to Dismiss Complaint

The individual guarantor filed a motion to dismiss the landlord’s complaint. In opposing the motion, it was urged by the landlord that, based upon the documentary evidence (namely: the lease agreement and the personal guaranty) and relevant statutory and case law, the landlord asserted a valid cause of action against the Guarantor and the motion should be denied.

As stated in *Sokol v Leader*, 74 AD3d 1180, 1180-81 [2d Dept 2010]: When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Foley v. D’Agostino*, 21



A.D.2d 60, 64–65, 248 N.Y.S.2d 121). In considering such a motion, the court must “ ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ” (*Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720, quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26).

The terms of the Good Guy Guaranty must be strictly followed

The guarantor claimed that she provided proper notice under the terms of the limited personal guaranty; however, the landlord argued the notice was defective given as of the “Surrender Date,” there remained a substantial amount of rent arrears due and owing. Thus, the guarantor did not satisfy the conditions set forth in the guaranty itself to revoke her personal guaranty. See,

month in which the Surrender Date shall occur and an effective instrument of surrender of the demised premises has been signed and delivered by Tenant to Landlord (without prejudice to Landlord’s right to recover from Tenant the Annual Base Rent and any and all additional rent for the unexpired balance of the term of the Lease as provided in the Lease) in form reasonably satisfactory to Landlord on at least seventy-five (75) days prior notice.”

¹ The limited guaranty provided as follows: “The “Surrender Date” means the date on which the Tenant has given Landlord possession of the demised premises broom clean and free of all liens, claims, damages, trash, occupants and personal property and otherwise in the condition required under the Lease required as if it was the date of expiration of the term of the Lease and Tenant has paid all Annual Base Rent and additional rent for any and all other charges then accrued under the Lease through the last day of the

63 N.Y. Jur. 2d Guaranty and Suretyship § 154. “A guaranty is not effectively terminated where the guarantor fails to comply with the termination provisions of the guaranty. Thus, if the guaranty provides that it is to continue until revoked by notice in a specified manner, it may be revoked only by a notice which complies with the contract provision.”

The guarantor further argued that NYC Administrative Code §22-1005² (which allowed those individuals who provided personal guarantees of commercial leases to restaurants and similar retail businesses to cancel them) permitted her to cancel her liability. In response, it was argued that the defendants had the onus to prove that defense somehow applied, given the nature of its business being an office tenant in the construction industry on the 14th floor of the building.

Documentary evidence contradicts the motion

Based upon the arguments put forth in opposition, the judge denied the motion. Specifically, she determined that the documentary evidence put forth contradicted the motion to dismiss. Accordingly, the defendants were directed to file their answer to the complaint.

Once the defendants were directed to file their answer, the lawsuit settled, given the written lease agreement and limited guaranty. Liability under the limited guaranty was fairly straightforward. See, *City of New York v. Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept. 1998] (“all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.”); see also, In *HSBC Bank USA, Nat. Ass’n v Laniado*,

² § 22-1005 Personal liability provisions in commercial leases.

A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):

(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;



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72 AD3d 645 [2d Dept 2010], in which the Second Department held that, “the plaintiff bank made a prima facie showing of entitlement to judgment as a matter of law against the defendants, ... by submitting proof of the underlying credit agreement, Laniado's personal guaranty of the company's obligations under that agreement, and the company's failure to make payment in accordance with the terms of the credit agreement (see *North Fork Bank Corp. v Graphic Forms Assoc., Inc.*, 36 AD3d 676 [2007]; *JPMorgan Chase Bank v Gamut-Mitchell, Inc.*, 27 AD3d 622, 623 [2006]; *Ceglia v Marine Midland Bank*, 296 AD2d 473, 474 [2002]; see also *North Fork Bank v ABC Merchant Servs., Inc.*, 49 AD3d 701 [2008]).

— Richard A. Klass, Esq.

Your Court Street Lawyer in the News Fans sue Madonna for lateness. Could this case change the live music industry?

Richard A. Klass is representing plaintiffs in this high-profile case. He has been interviewed on CNN, BBC, Fox and CBC and the news has been covered in *Forbes*, *New York Times*, *Variety*, *Billboard*, *Los Angeles Times* and other outlets. Click over to our [blog on CourtStreetLaw.com](http://blog.onCourtStreetLaw.com) to read more.

Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court St., 28th Fl., Brooklyn, NY. He may be reached at (718)COURT•ST or RichKlass@courtstreetlaw.com with questions. Prior results do not guarantee a similar outcome.

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(b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

(c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive.

