

**388 Broadway Owners, LLC v Mary McGee, on  
Television, Ltd.**

2019 NY Slip Op 33074(U)

October 16, 2019

Supreme Court, New York County

Docket Number: 653562/2014

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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388 BROADWAY OWNERS, LLC,
Plaintiff,

- v -

MARY MEGEE, ON TELEVISION, LTD.
Defendant.

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INDEX NO. 653562/2014
MOTION DATE 10/16/2019
MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168

were read on this motion to/for PARTIAL SUMMARY JUDGMENT .

Mary Megee and On Television, Ltd. (OTL) move pursuant to CPLR § 3212 for partial summary judgment against 388 Broadway Owners, LLC (388 Broadway) as to 388 Broadway’s claims for rent due for OTL’s month-to-month tenancy in unit 2-W in the property owned by 388 Broadway located at 388 Broadway, New York, New York. For the reasons set forth on the record (10/16/2019) and as otherwise set forth below, the motion is granted.

Ms. Megee is the Executive Director of OTL, a not-for-profit organization focused on public education relating to public interest issues in the media (Megee Aff., ¶ 4). OTL began renting unit 2-W in the late 1980s on a month-to-month basis (id., ¶ 5). Ms. Megee also lives in the same building in unit 4-W (id., ¶ 7). OTL’s rent was initially \$1,000 per month for unit 2-W, increasing to \$1,500 beginning in May 1992 pursuant to a letter, dated April 1, 1992, from the prior landlord, Rubinstein Realty Associates, confirming that the tenancy would otherwise

continue under “[t]he same conditions as the previous agreement, a month-to-month lease” (*id.*, ¶ 8; Megee Aff, Exhibit A).

In May 1999, 388 Broadway acquired the property (*id.*, ¶ 10). Barry Leon, managing member of 388 Broadway, verbally indicated that OTL could continue to rent unit 2-W on a month-to-month basis (*id.*, ¶ 13). The parties dispute whether the rent was initially \$1,500 or \$2,000 per month, but Ms. Megee alleges that after informing 388 Broadway that OTL could not afford the rent, she was told to “pay what you can when you can” (*id.*, ¶ 16). In or around June 2008, 388 Broadway informed Ms. Megee that renovations on the property were going to begin (*id.*, ¶ 18). OTL vacated unit 2-W shortly thereafter (*id.*).

388 Broadway commenced this action to recover unpaid rent in November 2014. Ms. Megee and OTL now move for partial summary judgment to dismiss the claims against Ms. Megee in her individual capacity with respect to the payment of OTL’s rent and also to dismiss claims for unpaid rent prior to June 2014.

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this

showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

Ms. Megee and OTL argue that they are entitled to partial summary judgment as to 388 Broadway's claims against Ms. Megee as guarantor of the obligations of OTL to pay rent because there is no personal guarantee in writing as to OTL's rent.

Pursuant to General Obligations Law § 5-701, a "special promise to answer for the debt . . . of another person" is void unless it is in writing and signed by the party to be charged with the obligation arising thereunder (CPLR § 5-701 [a] [2]). Here, there is no evidence of a writing in which Ms. Megee personally guaranteed OTL's rent, and 388 Broadway admits that no such writing exists. In his deposition testimony, Barry Leon acknowledged that the alleged personal guaranty was based on an oral agreement and was not reduced to a writing (Oksman Aff, Ex H, Leon tr at 26:20-27:8). Without such a writing, any alleged oral agreement in which Ms. Megee personally guaranteed OTL's rent obligations violates the statute of frauds and is therefore unenforceable. 388 Broadway has failed to come forward with evidence to raise an issue of fact as to the enforceability of the purported personal guaranty of OTL's rent. Accordingly, the branch of the motion for partial summary judgment as to Ms. Megee's personal liability for OTL's rent obligations is granted.

The defendants also move for partial summary judgment as to the rent owed by OTL. Here, the defendants argue that the statute of limitations bars claims by 388 Broadway (excluding \$1,610,

which amount the defendants acknowledge is due for OTL's rent for the month of June 2004) as untimely. Pursuant to CPLR § 213, the statute of limitations in an action upon a lease obligation is six years. This action was commenced in November 2014, more than six years after OTL vacated the premises in or around June 2008. Therefore, the defendants argue that 388 Broadway's claims for unpaid rent against OTL are untimely.

In its opposition papers, 388 Broadway argues that by making partial payments, the statute of limitations was tolled. For a partial payment of rent to toll the statute of limitations, there must be "a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder" (*Lew Morris Demolition Co., Inc. v Board of Ed. of City of New York*, 40 NY2d 516, 521 [1976]; *Flynn v Flynn*, 175 AD2d 51, 51 [1st Dept 1991]). 388 Broadway urges the court to apply each payment as a partial payment toward the balance due for each consecutive month. The argument fails.

In the seminal case of *National park Bank v. Seaboard Bank*, 114 NY 28 [1889], the court held that "[w]here a payment is made upon a general account, with no direction as to its application, the law applies it to the oldest items first; that is, the first debts are to be charged against the first credits, and the debt paid accordingly to priority of time." Because it is undisputed that OTL's tenancy was on a month-to-month basis, each month was a separate contract and any payments by OTL or Ms. Megee would be applied toward the oldest amount due. If the parties wanted payments to be applied in a different manner, such as the manner proposed by the plaintiff, they

could have agreed to do so. Absent such an agreement, however, the aforementioned general rule applies.

Simply put, any partial payments by Ms. Megee or OTL would be applied, if at all, to the earliest unpaid balances due for OTL's rent, and there are no circumstances under which any such partial payments would toll the statute of limitations such that that claims for unpaid rent alleged in the first cause of action would be timely for rent due prior to OTL's June 2004 rent.

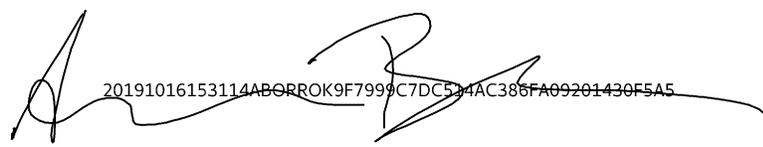
Accordingly, it is

ORDERED that the defendants' motion for partial summary judgment is granted to the extent that and the plaintiff's first cause of action is dismissed in its entirety as against Mary Megee and OTL for any month prior to June, 2004; and it is further

ORDERED that the first cause of action against the defendants is severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Mary Megee and On Television, Ltd. dismissing the first cause of action against them in this action.

10/16/2019  
DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART

APPLICATION:

SETTLE ORDER

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SUBMIT ORDER

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CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE