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Not Everything Is Guaranteed in Landlord-Tenant Guaranties

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Landlords are often insistent on procuring personal or other forms of guaranties[1] when entering into a lease with a tenant. Unfortunately, however, while much time and effort is often spent on securing the form and material terms of the guaranty, landlords and their counsel are well advised to make similar efforts to take the necessary precautionary steps to ensure that the guaranty they worked so hard to acquire can indeed one day be enforced in the event of default by the principal debtor.

The first principal of law that the drafter of the guaranty must keep in mind is that of strictissimi juris, to wit, a guaranty of another person's compliance with his or her contractual obligations is generally interpreted in the strictest manner.[2] In addition, where the guarantor is a private party rather than a commercial entity, the application of this rule in the guarantor's favor is all the more particularly enforced.[3] Thus, if the guaranty does not specifically allow for the recovery being sought by the landlord/creditor, the courts will generally interpret the guaranty in a fashion that is generally favorable to the guarantor in the event of a dispute.

The most common error one comes across in reviewing guaranties is the lack of language that would entitle the landlord to enforce the guaranty once the original lease has lapsed. The most common example would be where a tenant is given a lease for a set term and thereafter enters into a renewal lease with the landlord. Landlords are far too often negligent in attaining new guaranties from the tenant and simply assume that the original guaranty will suffice. In this respect, should they seek to enforce the guaranty on a tenant who renewed the original lease, they will ultimately find, much to their chagrin, that their assumption may have been entirely wrong.

The great majority of renewal leases contain some sort of modification to the original lease, usually in the form of incrementally higher rents. Such higher rent would be deemed by the courts to substantially and impermissibly change the guarantor's obligations under the original agreement and thus impermissibly increase the guarantor's risk without consent.[4] Thus, a guaranty that simply includes the language that the guaranty applies to "any renewal, change, or extension of the lease" would be deemed to lapse and no longer bind the guarantor upon a renewal with modified terms. To counterbalance such a result, best practices would dictate that the landlord obtain a new guaranty upon issuance of the renewal. Too often, landlords fail to take such precautionary measures, and so at the very least it is imperative that the landlord include language in the guaranty that same applies to any modifications of the guaranty. Thus, one would hope to find language that the guaranty not only applies to renewals, but also if the lease is "changed or extended in any way." It is important to remember, however, that if one is going to solely rely on this language, as opposed to obtaining a new guaranty, it is

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advisable that the lease agreement (or any subsequent renewal document) contain an explicit option to renew clause. Absent such a provision, and particularly in light of the judicial mandate to construe a private party's guaranty strictly in the guarantor's favor, a court may very well construe the lease agreement as having expired on its specific ending date and deem any such renewal or extension as a new lease.

Moreover, even if the language of the guaranty is construed in such as fashion such that the guarantor is deemed to have consented to an unlimited number of future lease modifications regardless of their contents, a waiver of express consent for future lease modifications is not equivalent to a guarantor's waiver of *notice* of future lease modifications.[5] Thus, the landlord must ensure that the guaranty additionally includes a waiver of the guarantor's right to notice of subsequent modifications to the lease and that notice to the guarantor of changes to the original guaranty is expressly waived.

If such language was not included in the

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original guaranty, the landlord should ensure that once the lease modification or renewal is about to be executed, notice of same is immediately provided the guarantor. This is because it is well settled that where a guaranteed contract has no definite time to run, an uncompensated guarantor may revoke and end its future liability by reasonable notice to the principal.[6] In other words, such a guaranty with no definite time to run could be read as allowing unilateral revocation by the guarantor at the end of a given renewal period so as to avoid a construction where the guarantor's liability continues for an unlimited and unspecified duration.[7] Without notice that the parties to the original lease intend to renew the lease with modifications, it could be argued that a private guarantor is hardly in a position to assess whether to invoke his or her right to withdraw his or her guaranty. By providing notice of the impending renewal or extension, the guarantor would be hard pressed to argue that it did not have knowledge of the terms and shouldn't be held to the terms included therein. Furthermore, in the event the guarantor seeks to revoke the guaranty upon notice from the landlord, the landlord would at least be in a position to demand from the tenant a new guaranty, the absence of which may lead the landlord to refuse the renewal.

Needless to say, and with all this in mind, while language in the guaranty indicating that said guaranty continues and remains in full force and effect as to any modifications or extensions of the lease, and waivers of any notice to the guarantor of any change to the underlying lease are certainly helpful, there simply is no substitute for adopting a policy that the tenant execute a new guaranty upon the tendering of the renewal and/or modified lease.[8]

Unfortunately, however, the procurement of a new guaranty from the tenant is not always possible or practicable. It is assuredly most feasible when the landlord is in a position of strength and has the leverage over the tenant who is seeking to secure a renewal lease. In such circumstance, and in a strong market, the landlord can generally impose its will and compel the tenant to comply with the landlord's request to proffer a new guarantee. However, even when finding itself in such a position, landlord's too often get complacent and simply allow a tenant to remain in possession on a month-to-month basis, believing the absence of a defined term allows the landlord the luxury of simply terminating the tenancy at the landlord's time of choosing. When this happens, the courts are rather clear that the guarantor will not be liable for any months beyond the term of the lease during which the tenant is holding over since the guarantee is deemed to have lapsed, thereby releasing the guarantor from any liability under the lease.

There is, however, some ambiguity in the case law as to what happens in the event the lease has expired by virtue of the tenant holding over without the landlord's consent at the expiration of the lease. This issue becomes all the more problematic when a warrant of eviction for removal of a tenant issues since said warrant cancels the agreement under which the person removed held the premises and annuls the relationship of the landlord and tenant.[9] The issue has yet to be addressed by an appellate court, but there have been a number of decisions from lower courts that have attached liability to the guarantor under such circumstances on the rational that the tenant's failure to vacate possession upon termination of the lease is a breach of the lease, even if such breach only technically occurred after the lease expired. Thus, in those cases in which the guaranty includes language that the guarantor guarantees the strict performance of and observance by the tenant of all the provisions in the lease, at least one court has held "[t]he risks that the tenant might not [timely vacate possession] were thus among the risk that [the guarantor] agreed to assume in order to induce [the landlord] to lease the apartment to the tenant for whose benefit the guarantee was made."[10]

The guarantor of a tenancy that is holding over should be particularly concerned because many leases contain provision calling for double or even triple rent during a holdover period and the guarantor in such an instance will be held liable for that multiplied rent/use and occupancy.[11] One court has even implied that the guarantor will remain liable for the holdover rent without distinction as to whether the tenant's continued possession was with or without the consent of the landlord.[12] In either event, the best way for a landlord to protect itself in such circumstance is to insert in the guaranty language that obligates the tenant to fully observe all agreements to be performed and observed by the tenant under the lease and that said guaranty shall specifically apply to any holdover period including, but not limited to, termination of the lease caused by issuance of a warrant of eviction. The landlord should additionally include language in the lease that the tenant's obligations survive the expiration or sooner termination of the terms of the lease.

One thing that can certainly be gleaned from a review of the relevant cases is that enforcement of the guaranty as envisioned by the landlord is not always guaranteed and a landlord and/or its counsel would be well advised to both carefully draft and meticulously review the language of the guaranty and make every effort to procure a new guaranty whenever circumstances exist leading to the modification of the underlying lease.

1. As utilized herein, the term "guaranty" shall mean a collateral agreement for performance of another's undertaking.
2. *White Rose Food v. Saleh*, 99 N.Y.2d 589, 591, 788 N.E.2d 602, 758 N.Y.S.2d 253 (2003).
3. *665-75 Eleventh Avenue Realty Corp. v. Schlanger*, 265 A.D.2d 270, 271, 697 N.Y.S.2d 270 (1st Dept. 1999).
4. *Dime Savings Bank of New York v. Montague St. Realty Assoc.*, 90 N.Y.2d 539, 542-543, 686 N.E.2d 1340, 664 N.Y.S.2d 246 (1997).
5. *White Rose*, 99 N.Y.2d at 591.
6. *Levine v. Segal,* 256 A.D.2d 199, 200, 682 N.Y.S.2d 375 (1st Dept. 1998).
7. However, in most commercial cases where a lease is renewable only for a fixed period, thereby defining at the outset the potential scope of the guarantor's obligation, such a guaranty of payment would continue into the renewal term and the guarantor would not be allowed to simply give notice for purposes of unilaterally revoking the guaranty. See e.g., *Jones & Brindisi v. Breslaw,* 250 N.Y. 147, 164 N.E. 887 (1928).
8. *Schlanger*, 265 A.D.2d 271.
9. *Fisk Building Associates v. Shimazaki II*, 76 A.D.3d 468, 469, 907 N.Y.S.2d 2 (1st Dept. 2010).
10. *131 Seventh Avenue South v. Young*, 6 Misc.3d 804, 807, 791 N.Y.S.2d 303 (Civ. Ct., N.Y. Cty. 2004).
11. See, e.g., *Country Glen v. Himmelfarb*, 4 Misc. 3d 1015(A); 798 N.Y.S.2d 344 (Sup. Ct., N.Y. Cty. 2004).
12. *Clark, Wilie & Mayer v. Kewalaramani*, 2008 N.Y. Misc. LEXIS 8254 (Sup. Ct., N.Y. Cty. 2008).