

Judge Berman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

09 CIV 5001

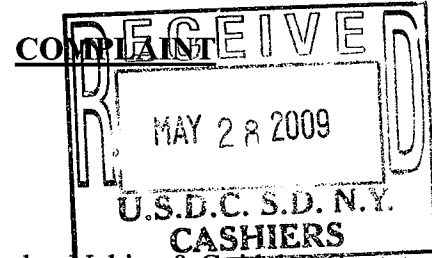
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WEBWAY ASSOCIATES LLC,

Plaintiff,

- against -

DAVID BOULEY,

Defendant.
-----x



Plaintiff, by its attorneys Borah, Goldstein, Altschuler, Nahins & Goldel, P.C., states

as and for its complaint as follows:

1. Plaintiff brings this action upon a lease guaranty given by defendant to secure performance by Brush Strokes Real Estate, LLC, plaintiff's tenant under a written lease agreement for commercial premises in New York County, New York. As shown below, the tenant breached the lease agreement by failing to pay rent and additional rent, plus additional damages including attorneys' fees.

THE PARTIES

2. WEBWAY ASSOCIATES LLC ("plaintiff" or the "landlord") is a domestic limited liability company duly organized and existing pursuant to the laws of the state of New York, having a place of business at c/o Century Realty, Inc., 140 Fulton Street, New York, New York.

3. DAVID BOULEY ("defendant" or the "Guarantor") is a natural person residing, upon information and belief, at 16 Longview Road, South Kent, Connecticut.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action, pursuant to 28 U.S.C. § 1332, because the parties are citizens of different states and the amount of damages sought herein exceeds \$75,000.

5. Venue is proper in the Southern District of New York, pursuant to 28 U.S.C. § 1391(a)(2), because this is the judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.

BACKGROUND

6. Plaintiff is the owner and landlord of the property known as and located at 109-111 West Broadway, New York, New York (the "building").

7. Pursuant to a written commercial lease agreement, dated as of October 16, 2007 (the "Lease"), plaintiff leased to Brush Strokes Real Estate, LLC (the "tenant"), a domestic limited liability company duly organized and existing pursuant to the laws of the state of New York, the ground floor and second floor, and basement and sub-basement of the building (the "subject premises").

8. Defendant, in his individual capacity, also executed Article 56 of the Lease encaptioned Possession Guaranty (the "Guaranty"), whereby he personally guaranteed to plaintiff, in pertinent part, as follows:

(A) Guarantor, jointly and severally guarantees to Landlord, its successors and assigns, that he shall pay to Landlord all base rent and additional rent payable hereunder, and the satisfaction of all liens affecting the Demised Premises, that have accrued or may accrue (disregarding any acceleration of rent provisions) under the terms of the herein lease (hereinafter referred to as "Accrued Rent"), to the latest date that Tenant and its assigns, licensees and sublessees, if any, shall have completely performed all of the following:

- (i) Vacated and surrendered the Demised Premises to Landlord;
- (ii) Delivered the keys to the Premises to Landlord;
- (iii) Paid to Landlord all Accrued Rent to and including the date which is the later of (a) the actual receipt by Landlord of said Accrued Rent; (b) the surrender of the Premises, or (c) receipt by Landlord of the keys to the Premises; and

- (iv) The date which is one hundred twenty (20) days after the date Tenant advises Landlord, in writing, that it is vacating the Demised Premises.

It is agreed that any security deposited pursuant to this lease shall not be computed as a deduction from any amount payable by Tenant or Guarantor under the terms of this guaranty or the lease.

(B) Guarantor unconditionally guarantees that all work performed by or on account of Tenant shall be fully completed, free and clear of all liens, violations and encumbrances, and fully paid for by Tenant. If Tenant shall default in payment, or does not timely and fully complete free and clear of all liens, violations and encumbrances the undersigned will well and truly perform said payment and/or completion and/or discharge any lien, violation or encumbrance upon thirty (30) days notice from Landlord. Guarantor hereby agrees to indemnify and hold Landlord harmless from any and all damages, including, but not limited to, legal fees and costs incurred by Landlord, arising from said failure to pay or the occurrence of said lien, violation or encumbrance. Notwithstanding the foregoing, Tenant shall be entitled to finance FF&E as provided in Article 82 hereof and Guarantor shall have no liability in respect of such liens.

(C) This guaranty is absolute and unconditional and is a guaranty of payment and not of collection. The parties hereto waive all notice of non-payment, non-performance, non-observance or proof, or notice, or demand, whereby to charge the undersigned therefor, all of which the undersigned expressly waived and expressly agree that the validity of this agreement, and the obligation of Guarantor hereto shall in no wise be terminated, affected or impaired by reason of the assertion by Landlord against Tenant of any of the rights or remedies reserved by Landlord pursuant to the terms of this Lease. The undersigned further covenants and agrees that this guaranty shall remain and continue in full force and effect, as to any renewal, modification or extension of this lease to which Guarantor has consented and during any period when Tenant is occupying the Premises as a "statutory tenant". As a further inducement to Landlord to make this lease and in consideration thereof, Landlord and the undersigned covenant and agree that in any action or proceeding brought by either Landlord or the undersigned against the other on any matters whatsoever arising out of, under, or by virtue of the terms of this lease or of this guaranty that Landlord and the undersigned shall and do hereby waive trial by jury. It is further understood and agreed by and between the Landlord and Guarantor that upon ten (10) days' prior written request of Landlord, Guarantor shall provide Landlord (but not more often than one (1) time every two (2) years with Guarantor's most recent financial statements and the most recent federal income tax return filed with the governmental authorities; any failure to provide such documentation within such ten (10) day period shall constitute a material default by Tenant under this lease.

(D) Further, Guarantor hereby agrees that Guarantor shall (i) not interpose any counterclaim of whatever nature or description whatsoever in any proceeding under the terms of this lease or this guaranty (ii) pay any and all reasonable attorneys' fees and expenses incurred by Landlord in enforcing Guarantor's obligations under this Article 56.

* * *

9. Pursuant to Article 41(A) of the Lease, the tenant is liable to plaintiff for the payment of the base annual rent in accordance with the following schedule:

Lease Year	Base Annual Rent	Per Month
First (1 st)	\$285,000.00	\$23,750.00
Second (2 nd)	\$285,000.00	\$23,750.00
Third (3 rd)	\$285,000.00	\$23,750.00
Fourth (4 th)	\$310,650.00	\$25,887.50
Fifth (5 th)	\$310,650.00	\$25,887.50
Sixth (6 th)	\$310,650.00	\$25,887.50
Seventh (7 th)	\$338,608.50	\$28,217.38
Eighth (8 th)	\$338,608.50	\$28,217.38
Ninth (9 th)	\$338,608.50	\$28,217.38
Tenth (10 th)	\$369,083.26	\$30,756.94
Eleventh (11 th)	\$369,083.26	\$30,756.94
Twelfth (12 th)	\$369,083.26	\$30,756.94
Thirteenth (13 th)	\$402,300.75	\$33,525.06
Fourteenth (14 th)	\$402,300.75	\$33,525.06
Fifteenth (15 th)	\$402,300.75	\$33,525.06

10. Pursuant to Article 93(A) of the Lease, the Commencement Date of the Lease Term was October 16, 2007, the date upon which plaintiff tendered to tenant the keys to, and possession of, the subject premises.

11. Pursuant to Article 41(C) of the Lease, Rent Commencement Date, the date when the tenant's obligation to pay base annual rent commenced, would be 270 days after the Commencement Date, or July 16, 2008, provided that the tenant is not in default under the Lease.

12. Plaintiff caused a written Notice of Default, dated April 23, 2009, to be served upon the tenant and upon defendant as Guarantor seeking, *inter alia*, payment of rent and

additional rent arrears due and owing to plaintiff for the period July 2008 through April 2009, totaling \$244,527.15.

13. Nevertheless, the tenant and Guarantor have continued in their defaults in the payment of the rent and additional rent due and owing to plaintiff.

14. By virtue of the foregoing, the tenant has forfeited the 270 days of free rent provided for by Article 41(C) of the Lease.

15. To date, the tenant has failed and refused to pay to plaintiff the whole or any portion of the base annual rent or of the additional rent which has become due and owing under the Lease for the period October 16, 2007, through May 2009, totaling \$622,827.41, as set forth in the Tenant Ledger annexed hereto as Schedule "A" and made a part hereof as if fully set forth herein.

16. Neither the tenant nor the Guarantor have paid any portion of said sum.

AS AND FOR A FIRST CAUSE OF ACTION

17. Plaintiff incorporates by reference the allegations set forth in ¶¶ 1 through 16 above as if fully set forth herein at length.

18. Pursuant to the terms of the Guaranty, defendant, as Guarantor, is obligated to pay the rent and additional rent arrears due and owing by the tenant under the Lease.

19. Defendant, as Guarantor, is therefore liable to plaintiff in an amount equal to the tenant's rent and additional rent arrears that have become due and owing under the Lease for the period from October 16, 2007, through May 2009, totaling \$622,827.41.

20. Plaintiff requests judgment against defendant in the sum of \$622,827.41, plus interest at the legal rate from the reasonable intermediate date of August 1, 2008, to the date of the judgment herein.

AS AND FOR A SECOND CAUSE OF ACTION

21. Plaintiff incorporates by reference the allegations set forth in ¶¶ 1 through 20 above as if fully set forth herein at length.

22. Defendant, as Guarantor, is therefore liable to plaintiff in an amount equal to the tenant's rent and additional rent that will become due and owing under the Lease each month from June 2009 to the latest date that tenant and its assigns, licensees and sublessees, if any, shall have completely performed all of the following: (i) Vacated and surrendered the Demised Premises to Landlord; (ii) Delivered the keys to the Premises to Landlord; (iii) Paid to Landlord all Accrued Rent to and including the date which is the later of (a) the actual receipt by Landlord of said Accrued Rent; (b) the surrender of the Premises, or (c) receipt by Landlord of the keys to the Premises; and (iv) The date which is one hundred twenty (20) days after the date Tenant advises Landlord, in writing, that it is vacating the Demised Premises.

23. Plaintiff requests judgment against defendant, as Guarantor, for damages in an amount equal to the rent and additional rent that will become due and owing under the Lease each month from June 2009 to the date of the judgment herein without prejudice to plaintiff's claim for damages which may continue to accrue until the foregoing conditions have been satisfied, plus interest at the legal rate from a reasonable intermediate date to the date of the judgment herein.

AS AND FOR A THIRD CAUSE OF ACTION

24. Plaintiff incorporates by reference the allegations set forth in ¶¶ 1 through 23 above as if fully set forth herein at length.

25. Pursuant to the Guaranty, defendant is obligated to pay plaintiff's attorney's fees, expenses, costs and disbursements in connection with instituting and prosecuting an action or proceeding against the Guarantor to enforce plaintiff's rights thereunder.

26. Defendant is, therefore, liable to plaintiff for the attorney's fees, expenses, costs and disbursements incurred by plaintiff in connection with instituting and prosecuting this action.

27. Plaintiff has incurred, and will continue to incur, attorney's fees, expenses, costs and disbursements in connection with instituting and prosecuting this action.

28. Plaintiff requests judgment against defendant for the fair and reasonable value of the attorneys' fees, expenses, costs and disbursements incurred by plaintiff in this action in an amount to be determined by the Court.

WHEREFORE, plaintiff demands judgment against defendant as follows:

On the First Cause of Action

- (a) that plaintiff recover from defendant the sum of \$622,827.41, plus interest at the legal rate from the reasonable intermediate date of August 1, 2008, to the date of the judgment herein;

On the Second Cause of Action

- (b) that plaintiff recover from defendant damages in an amount equal to the rent and additional rent that will become due and owing under the Lease each month from June 2009 to the date of the judgment herein without prejudice to plaintiff's claim for damages which may continue to accrue until the conditions in the Guaranty have been satisfied, plus interest at the legal rate from a reasonable intermediate date to the date of the judgment herein;


On the Third Cause of Action

- (c) that plaintiff recover from defendant the fair and reasonable value of the attorneys' fees, expenses, costs and disbursements incurred by plaintiff in this action in an amount to be determined by the Court;

together with the costs and disbursements of this action, and such other, further and different relief as is just and proper.

Dated: New York, New York
May 27, 2009

BORAH, GOLDSTEIN, ALTSCHULER,
NAHINS & GOIDEL, P.C.

By: 

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Attorneys for Plaintiff
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New York, New York 10013
(212) 431-1300, Ext. 600

SCHEDULE "A"

Tenant Ledger

Brush Stroke Real Estate LLC (10000211)

109 West Broadway

Date	Description	Charges	Payments	Balance
	Balance Forward			-
10/23/2007	chk# 102 Move-In: 1st Month Rent Reversed by ctrl		23,750.00	(23,750.00)
10/23/2007	chk# 101 Move-In: Security Deposit Reversed by ct		71,250.00	(95,000.00)
10/26/2007	chk# 102 NSF receipt Ctrl# 20381		(23,750.00)	(71,250.00)
10/26/2007	chk# 101 NSF receipt Ctrl# 20382		(71,250.00)	-
10/16/2007	Rent for 15 Days(move in 10/16/09)	11,875.00		11,875.00
11/1/2007	Retail Rent (11/2007)	23,750.00		35,625.00
11/1/2007	Security Deposit(3mon)	71,250.00		106,875.00
11/1/2007	chk# wire Replace NSF Checks		95,000.00	11,875.00
11/1/2007	Late Fee 4 % of amount owed (total)	475.00		12,350.00
12/1/2007	Retail Rent (12/2007)	23,750.00		36,100.00
12/1/2007	Late Fee 4 % of amount owed (total)	1,425.00		37,525.00
1/1/2008	Retail Rent (01/2008)	23,750.00		61,275.00
1/1/2008	Late Fee 4 % of amount owed (total)	2,375.00		63,650.00
2/1/2008	Retail Rent (02/2008)	23,750.00		87,400.00
2/1/2008	Late Fee 4 % of amount owed (total)	3,325.00		90,725.00
3/1/2008	Retail Rent (03/2008)	23,750.00		114,475.00
3/1/2008	Late Fee 4 % of amount owed (total)	4,275.00		118,750.00
4/1/2008	Retail Rent (04/2008)	23,750.00		142,500.00
4/1/2008	Late Fee 4 % of amount owed (total)	5,225.00		147,725.00
5/1/2008	Retail Rent (05/2008)	23,750.00		171,475.00
5/1/2008	Late Fee 4 % of amount owed (total)	6,175.00		177,650.00
5/20/2008	Installation from water pipe to 200amp s	2,557.65		180,207.65
6/1/2008	Retail Rent (06/2008)	23,750.00		203,957.65
6/1/2008	Late Fee 4 % of amount owed (total)	7,125.00		211,082.65
7/1/2008	Retail Rent (07/2008)	23,750.00		234,832.65
7/1/2008	Real Estate Tax 2008/2009 (07/2008)	2,324.37		237,157.02
7/1/2008	Late Fee 4 % of amount owed (total)	8,167.97		245,324.99
7/28/2008	Block 146 Lot 11 Permit/Inspection	787.50		246,112.49
8/1/2008	Retail Rent (08/2008)	23,750.00		269,862.49
8/1/2008	Electric Meter 11/7/07-6/25/08	2,155.83		272,018.32
8/1/2008	Late Fee 4 % of amount owed (total)	9,235.71		281,254.03
8/22/2008	Violations E148 790 227 Improper recepta	100.00		281,354.03
8/22/2008	Violations E 161 006-946 Improper Dispos	100.00		281,454.03
8/25/2008	Electric Meter 6/25/08-7/31/08	144.78		281,598.81
9/1/2008	Retail Rent (09/2008)	23,750.00		305,348.81
9/1/2008	Late Fee 4 % of amount owed (total)	10,199.50		315,548.31
9/18/2008	Electric	215.16		315,763.47
10/1/2008	Retail Rent (10/2008)	23,750.00		339,513.47
10/1/2008	Late Fee 4 % of amount owed (total)	11,158.11		350,671.58
11/1/2008	Retail Rent (11/2008)	23,750.00		374,421.58
11/1/2008	Late Fee 4 % of amount owed (total)	12,526.24		386,947.82
12/1/2008	Retail Rent (12/2008)	23,750.00		410,697.82
12/1/2008	Late Fee 4 % of amount owed (total)	13,058.11		423,755.93
1/1/2009	Retail Rent (01/2009)	23,750.00		447,505.93
1/1/2009	Late Fee 4 % of amount owed (total)	14,008.11		461,514.04
1/13/2009	E 170 294 154 Snow/ice sidewalk	100.00		461,614.04
1/26/2009	Additional Real Estate Tax 2008/2009	483.59		462,097.63
2/1/2009	Retail Rent (02/2009)	23,750.00		485,847.63
2/1/2009	Late Fee 4 % of amount owed (total)	14,981.45		500,829.08
3/1/2009	Retail Rent (03/2009)	23,750.00		524,579.08
3/1/2009	Late Fee 4 % of amount owed (total)	15,931.45		540,510.53
4/1/2009	Retail Rent (04/2009)	23,750.00		564,260.53
4/1/2009	Late Fee 4 % of amount owed (total)	16,881.45		581,141.98
4/29/2009	Violations E 171 243 766 Dirty area	100.00		581,241.98
5/1/2009	Retail Rent (05/2009)	23,750.00		604,991.98
5/11/2009	Late Fee 4 % of amount owed (total)	17,835.45		622,827.43

late fees as of dec 11, 2007

Arrears with no free rent

Retail Rent Nov 15, 2007-May 31, 2009 @ \$23,750 per	439,375.00
Real Estate Tax 2008/2009 (07/2008)	2,807.96
Electric 11/07 - 7/31/08	2,515.77
Violations	400.00
NYC Permit/Inspection 7/28/08	787.50
Install water pipe to 200amp switch, 5/20/08	2,557.65
Late Fee 4 % Nov 2007 - May 2009	174,383.53

622,827.41

SCHEDULE "A"