

*B/P/S*

COUNTY OF KINGS, PART 18

Motion Calendar No:  
Motion Sequence No.:

**JOSEPH BOGATZ,**

*Plaintiff(s),*

**DECISION/ORDER**

*against*

Present: **HON. BERNADETTE F. BAYNE**  
Justice, Supreme Court

**ESTHER HERZ,**

*Defendant.*

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this  
**MOTION FOR SUMMARY JUDGMENT SUBMITTED ON JANUARY 25, 2005**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed.....	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other.....	

**Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:**

This action arises out of a defaulted lease agreement exchanged between the plaintiff as owner and renter of a commercial space to the defendant as the president and sole shareholder of the lessee Extra-Touch International. Plaintiff alleges that the defendant in addition to signing on behalf of the corporation also executed a personal guarantee securing the lease payments on the space. Plaintiff commenced the instant action against the defendant's corporation on or about January 18, 2000.

On September 3, 1999, plaintiff, after trial in the Civil Court Kings County, obtained a judgment in the amount of \$59,400.00 against the corporate lessee representing the balance of the amount owed on the lease. The corporation, unable to pay off some of its debts soon thereafter filed for bankruptcy. The plaintiff was listed as a creditor on the bankruptcy petition. (Exhibit I to

Plaintiff's Motion for Summary Judgment, p. 3) After failed attempts to collect on the judgment, plaintiff, in January 2000 commenced the instant action against the defendant as the sole shareholder/owner, president and guarantor of the debts of the corporation. Plaintiff attaches a copy of the guaranty executed by the defendant in which she promises to personally be responsible to the plaintiff for the lease obligations. On June 18, 2002, plaintiff obtained a judgment against the defendant after an Inquest before JHO Silverman. The defendant in 2004 moved to vacate the inquest decision on the grounds that the defendant was not properly served with the original summons and complaint. The Court facilitated an agreement between the parties which was set forth in the stipulation attached as Exhibit H and which provided for a vacatur of the Inquest judgment and the opportunity for the defendant to defend this action.

In order to obtain summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law (CPLR 3212). The CPLR in pertinent part, states that, "The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Thus the pleadings, affidavits and exhibits must be sufficient to overcome opposing affidavits and justify as a matter of law that there is no defense to the action or relief sought. *See, Tuvim v 10E. 30 Corp.*, 75 Misc.2d 612, 345 NYS2d 258, *modified on other grounds* 38 AD2d 895, 329 NYS2d 275, *affirmed*, 32 NY2d 541, 347 NYS2d 13.

Plaintiff submits to the Court a copy of the decision rendered by Hon. Sidney Goodhearz in the Civil Court, a copy of the Bankruptcy petition listing the plaintiff as a creditor, a copy of the lease agreement with the guaranty executed by the plaintiff and a copy of the JHO Silverman judgment which was vacated in 2004. Plaintiff has clearly met his burden with respect to this summary judgment motion and in fact has shifted the burden to the defendant. Counsel for the defendant has not submitted proof in the alternative to the guaranty to raise any triable issues of fact. Defendant asserts that the signature on the guaranty is not hers; however, defendant has not presented any credible evidence to suggest otherwise. Defendant also asserts that the stipulation entered into by the parties on July 9, 2004 before the Court conditioned the outcome of this case upon a trial. The Court was clear at that time that the action being taken was the vacatur of the Inquest/default judgment along with the agreement to accept service of the counterclaims and answering papers. The Court did not indicate that the case must be resolved by a trial. As a result, the Court ***hereby grants plaintiff's motion for Summary Judgment*** and awards the plaintiff damages in the amount of \$75,500 representing the unpaid rental amount of \$59,400 and \$16,100

and water and sewer charges together with interest from the 9<sup>th</sup> of September 1999 and co  
disbursements.

Defendant, in opposition also argues that there are counterclaims alleged against the plaintiff for damages related to a flood on the premises as well as for the failure to provide specific goods ordered by defendant from the plaintiff's cosmetics' firm. Defendant states that plaintiff has acknowledged liability for some if not all of these claims; however, defendant fails to provide any proof other than her own affidavit detailing these allegations. As a result, defendant's affirmation in opposition to the summary judgment motion and in support of the counterclaims is also denied. *The Counterclaims posed by defendant are hereby dismissed.*

DATED: 4/5/05

Bernadette Bayne  
BERNADETTE F. BAYNE  
Justice, Supreme Court