**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **OLD 875 LLC & NEW 875 LLC** | **:** | **CIVIL ACTION** |
| | **:** | |
| **v.** | **:** | **NO. 04-CV-4154** |
| | **:** | |
| **ANDREW CANTOR** | **:** | |

**MEMORANDUM AND ORDER**

**Kauffman, J.** **January 4, 2005**

Plaintiff Old 875 LLC & New 875 LLC ("Plaintiff") brings this diversity breach of contract action against Defendant Andrew Cantor ("Defendant"). Now before the Court is Defendant's Motion to Dismiss or in the Alternative for a More Definite Statement. For the reasons stated below, the Court will deny the Motion.

## I. Factual Background

The Complaint alleges: Plaintiff is a New York limited liability corporation and citizen of the state of New York, with its principal place of business located there. Complaint ¶ 1-2. Defendant is a resident of Pennsylvania. Id. ¶ 3. On June 25, 1996, Defendant executed a personal guaranty for the performance of Andrew Cantor Design, Inc. as a tenant under a lease agreement with Plaintiff for a property located in Manhattan. Id. ¶ 5. On June 1, 2001, Plaintiff, Defendant and Andrew Cantor Design, Inc. executed an amendment to the lease agreement. Id. ¶ 6. Defendant agreed to personally guarantee the performance of Andrew Cantor Design, Inc. as a tenant under the amendment to the lease, including the payment of rent or the amount of a default under the lease agreement. Id. ¶ 7. Andrew Cantor Design, Inc. defaulted under the terms of the lease agreement and amendment. Id. ¶ 9. Plaintiff alleges that Defendant as guarantor is liable for all damages it sustained as a result of the default. Id. ¶ 10.

Defendant brings this Motion to Dismiss under Rule 12(b)(6) for failure to state a claim on which relief can be granted, and under Rule 12(b)(1) for lack of subject matter jurisdiction alleging the amount in controversy is below the minimum diversity jurisdictional limit. Defendant also moves in the alternative for a more definite statement under Rule 12(e).

## II. Legal Standard

When deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court must distinguish between motions that attack the complaint on its face and those that attack the existence of subject matter jurisdiction in fact. Mortensen v. First Fed. Sav. & Loan Assoc., 549 F.2d 884, 891 (3d Cir. 1977). A facial attack is considered under the same standard as a motion to dismiss under Rule 12(b)(6); all allegations in the complaint are taken to be true. Id. If the attack is factual, however, Plaintiff's allegations are not presumed to be true. Id. The Court may look beyond the pleadings and make its own determination as to whether it has the power to hear the action. Cestonaro v. United States, 211 F.3d 749, 752 (3d Cir. 2000).

Further, the Plaintiff bears the burden of proving that jurisdiction does in fact exist. Mortensen, 549 F.2d at 891.

## III. Analysis

### A. Rule 12(b)(6) Dismissal

Defendant argues that the Complaint fails to state a claim on which relief can be granted because the guaranty executed by him only extends to a guaranty for the payment of rent before the surrender of the premises, and not for any period thereafter or for the other damages sought by Plaintiff. See Defendant's Motion to Dismiss at 2. Defendant claims that the guaranty can not apply to the damages sought by Plaintiff because he surrendered the property, thereby voiding any additional duty on his part as guarantor. See id. However, the language of the guaranty states that a surrender cannot occur if the original tenant is in breach of the terms of the lease agreement.[1] As Defendant was in default under the terms and conditions of the lease there could have been no surrender of the premises by the tenant that would have absolved Defendant as the guarantor. If Andrew Cantor Design, Inc. breached the lease agreement by failing to pay rent due, then no surrender occurred. At a minimum, this is a factual issue for the Court to determine and is not a basis for granting a Rule 12(b)(6) motion.

Defendant also argues that New York law does not permit Plaintiff to pursue the damages sought in the Complaint as Plaintiff chose to accept the tenant's surrender, reentered the premises and relet them, thus releasing Defendant from further liability. Defendant's Motion to Dismiss at

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[1] The guarantee states that the "tenant shall be deemed to have surrendered the premises if and as of the date on which the tenant vacates the premises ..." and "such surrender shall only be effective if tenant is not then in default under the terms and conditions of the lease." Complaint, Exhibit A.

3. However, the case Defendant cites for this principle applies only to *residential* leases. Under New York law, once a *commercial* lease is executed, "the lessee's obligation to pay rent is fixed according to its terms and [the] landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages." Holy Properties, Ltd., LP v. Kenneth Cole Prods., Inc., 661 N.E.2d 694, 696 (N.Y. 1995). When a defendant abandons leased premises prior to the expiration of the lease, the landlord has three options: (1) do nothing and collect the full rent due under the lease; (2) accept the tenant's surrender, re-enter the premises and relet them for the landlord's own account, thereby releasing the tenant from further liability for rent; or, (3) notify the tenant that it is entering and reletting the premises for the tenant's benefit. See id. "If the landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and reletting, and then to pay the tenant's rent obligation." Id.

Plaintiff claims it availed itself of the third remedy, to re-enter the property, relet the property and apportion the rent collected from the new tenant to first repay the landlord's expenses in re-entering and reletting, and then to pay the tenant's rent obligation. Memorandum of Law in Support of Plaintiff's Response to Defendant's Motion to Dismiss at 4. Plaintiff also notified Defendant by letter of this intent on March 2, 2003, the month following the default. See id., Exhibit B. The Complaint specifically states that the damages include unpaid rent, rent due for the time period in which the premises was not relet, expenses of the landlord in paying commissions and construction costs to relet the premises, and the rent differential between the original tenant and the new tenant. Complaint ¶ 10. These are damages that Plaintiff may be entitled to under state law.

Accordingly, Defendant's Motion for a Rule 12(b)(6) dismissal for failure to state a claim upon which relief can be granted will be denied.

**B. Rule 12(b)(1) Dismissal**

Defendant also alleges that the Complaint must be dismissed because the amount in controversy is below $75,000.00. The Complaint clearly sets forth damages amounting to $103,840.43. Id. When damages sought for the breach of a lease agreement exceed the jurisdictional limit, the amount in controversy requirement will be met notwithstanding a challenge to the validity of the agreement. See Berlitz Sch. of Languages of America v. Donnelly & Seuss, 84 F. Supp. 75 (E.D. Pa. 1949) (finding the amount in controversy met the jurisdictional requirement where the payment of the amount hinged on the validity of the lease in question). Here, the lease agreement appears to support a claim for damages in excess of the $75,000.00 jurisdictional prerequisite. This is sufficient notwithstanding Defendant's challenge to the guaranty. Accord id.

**C. The Motion in the Alternative for a More Definite Statement**

Finally, Defendant moves in the alternative that Plaintiff be ordered to provide a more definite statement. Rule 12(e) states in relevant part: "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Fed. R. Civ. P. 12(e); see also Schaedler v. Reading Eagle Publ'n, Inc., 370 F. 2d 795, 798 (3d Cir. 1967) (stating a motion for a more definite statement is appropriate in "the rare case where because of the vagueness or ambiguity of the pleading the answering party will not be able to frame a responsive pleading"). The court finds Plaintiff's Complaint,

including the Exhibits attached thereto, provide sufficient information to give Defendant fair notice as to the factual basis for Plaintiff's claim.

## IV. Conclusion

For the foregoing reasons, the Court will deny Defendant’s Motion to Dismiss or in the Alternative for a More Definite Statement. An appropriate Order follows.

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| **ANDREW CANTOR** | **:** | |

**ORDER**

**AND NOW**, this 4th day of January, 2005, upon consideration of Defendant's Motion to Dismiss or in the Alternative for a More Definite Statement (docket no. 2), and Plaintiff's response thereto (docket no. 3), it is **ORDERED** that Defendant's Motion is **DENIED** for the reasons stated in the accompanying Memorandum.

**BY THE COURT:**

S/Bruce W. Kauffman_____
**BRUCE W. KAUFFMAN, J.**