NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
----------X

MORRISON MANAGEMENT LLC,

Index No. **31041/19E**

Plaintiff(s),

- against -

Hon. **FIDEL E. GOMEZ**
Justice

ABDUL BARI GUL A/A/O SHER M. NOOZY A/K/A SHER M.NOORZY,

Defendant(s).

----------X

The following papers numbered 1 to 1, Read on this motion noticed on 11/24/21, and duly submitted as no. 3 on the Motion Calendar of 2/17/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Plaintiff's petition is decided in accordance with the Decision and Order annexed hereto.

Dated: 3/3/2022

Hon. _____
FIDEL E. GOMEZ, AJSC

1.CHECK ONE — X CASE DISPOSED — ☐ NON-FINAL DISPOSITION

2. MOTION/CROSS-MOTION IS
- X GRANTED
- ☐ DENIED
- ☐ GRANTED IN PART
- ☐ OTHER

3. CHECK IF APPROPRIATE.
- ☐ SETTLE ORDER
- ☐ SUBMIT ORDER
- ☐ DO NOT POST
- ☐ FIDUCIARY APPOINTMENT
- ☐ REFEREE APPOINTMENT
- ☐ NEXT APPEARANCE DATE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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MORRISON MANAGEMENT LLC,

Plaintiff(s),

- against -

ABDUL BARI GUL A/A/O SHER M. NOOZY A/K/A SHER M.NOORZY,

Defendant(s).
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DECISION AND ORDER

Index No: 31041/19E

In this action for breach of contract plaintiff moves seeking an order granting it summary judgment. Plaintiff asserts that defendant breached the lease between the parties in that he failed to pay the rent and fees due thereunder and damaged the instant premises prior to relinquishing possession of the same. Defendant opposes the instant motion asserting that he paid some of the rent alleged to be due and owing. Defendant avers that the foregoing, coupled with the application of his security deposit, fully satisfies all sums alleged to be due. Accordingly, defendant contends that questions of fact preclude summary judgment.

For the reasons that follow hereinafter, plaintiff's motion is granted.

The instant action is for money damages arising from the alleged breach of a lease. The complaint alleges that on October 15, 2012, plaintiff and Sher M. Noozy a/k/a Sher M. Noorzy (Noozy),

defendant's predecessor in interest entered into a commercial lease for the premises located at 263 West Kingsbridge Road, Store, Bronx NY 10463 (263), whose term was from October 1, 2012 to September 30, 2022. The lease mandated that Noozy pay rent, additional rent for water and sewer utilities, and a late fee of 10 percent for any rent not received by the 10th of each month. On August 29, 2013, Noozy assigned the lease to defendant along with all the rights and obligations thereunder. In October 2014, defendant defaulted under the terms of the lease by failing to make the rent payments required thereunder. Defendant prematurely vacated 263 before the end of the lease term, but owes plaintiff $26,052.33, representing rental arrears, $2,600, representing additional rent, and $3,965.66, representing late fees. Based on the foregoing, plaintiff alleges that defendant breached the lease between the parties and seeks money damages in the sums alleged above.

Standard of Review

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief by affirmatively demonstrating, with

evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence when the opponent fails to object to its admissibility and instead relies on the same *(Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1028 [4th Dept 1995]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for

> summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in admissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted

> in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Contract Law and Leases

It has long been held that absent a violation of law or some transgression of public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms

contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (*Vermont Teddy Bear Co., Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

The proscription against judicial rewriting of contracts is particularly important in real property transactions, where commercial certainty is paramount, and where the agreement was negotiated at arm's length between sophisticated, counseled business people (*Vermont Teddy Bear Co., Inc.* at 475). Specifically, in real estate transactions, parties to the sale of

real property, like signatories of any agreement, are free to tailor their contract to meet their particular needs and to include or exclude those provisions which they choose. Absent some indicia of fraud or other circumstances warranting equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck (*Grace v Nappa*, 46 NY2d 560, 565 [1979]).

Leases are nothing more than contracts and are thus subject to the rules of contract interpretation, namely, that the intent of the parties is to be given paramount consideration, which intent is to be gleaned from the four corners of the agreement, and that of course, the court may not rewrite the contract for the parties under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning (*Tantleff v Truscelli*, 110 AD2d 240, 244 [2d Dept 1985]).

In the absence of fraud or other wrongful act, a party who signs a written contract is presumed to know and have assented to the contents therein (*Pimpinello v Swift & Co.*, 253 NY 159, 162 [1930]; *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *Renee Knitwear Corp. v ADT Sec. Sys.*, 277 AD2d 215, 216 [2d Dept 2000]; *Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 493 [2d Dept 1987]; *Slater v Fid. & Cas. Co. of N.Y.*, 277 AD 79, 81 [1st Dept 1950]). In discussing this long-standing rule the court in *Metzger* stated that

> [i]t has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms. This rule is as applicable to insurance contracts as to contracts of any kind.

(*Metzger* at 416 [internal citations omitted]).

Provided a writing is clear and complete, evidence outside its four corners "as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *Mercury Bay Boating Club Inc. v San Diego Yacht Club*, 76 NY2d 256, 269-270 [1990]; *Judnick Realty Corp. v 32 W. 32nd St. Corp.*, 61 NY2d 819, 822 [1984]). Whether a contract is ambiguous is a matter of law for the court to decide (*id.* at 162; *Greenfield* at 169; *Van Wagner Adv. Corp. v S & M Enterprises*, 67 NY2d 186, 191 [1986]). A contract is unambiguous if the language it uses has "definite and precise meaning, unattended by danger of misconception in purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield* at 569;

see Breed v Ins. Co. of N. Am., 46 NY2d 351, 355 [1978]). Hence, if the contract is not reasonably susceptible to multiple meanings, it is unambiguous and the court is not free to alter it, even if such alteration reflects personal notions of fairness and equity (*id.* at 569-570). Notably, it is well settled that silence, or the omission of terms within a contract are not tantamount to ambiguity (*id.* at 573; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Instead, the question of whether an ambiguity exists must be determined from the face of an agreement without regard to extrinsic evidence (*id.* at 569-570), and an unambiguous contract or a provision contained therein should be given its plain and ordinary meaning (*Rosalie Estates, Inc. v RCO International, Inc.*, 227 AD2d 335, 336 [1st Dept 1996]).

Notably, while the parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument, it has no application in a suit brought where there are claims of fraud in the execution of an agreement or to rescind a contract on the ground of fraud (*Sabo v Delman*, 3 NY2d 155, 161 [1957]; *Adams v Gillig*, 199 NY 314, 319 [1910]; *Berger-Vespa v Rondack Bldg. Inspectors Inc.*, 293 AD2d 838, 840 [3d Dept 2002]).

The essential elements in an action for breach of contract "are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her

contractual obligations, and damages resulting from the breach" (*Dee v Rakower*, 112 AD3d 204, 209 [2d Dept 2013]; *Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]; *Brualdi v IBERIA Lineas Aeraes de España, S.A.*, 79 AD3d 959, 960 [2d Dept 2010]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Unless expressly proscribed by the Statute of Frauds (General Obligations Law § 5-701), a contract or agreement need not be in writing (*see generally McCoy v Edison Price, Inc.*, 186 AD2d 442, 442-443 [1st Dept 1992] [Alleged oral agreement which, by its terms, was to last for as long as defendant remained in business was incapable of performance within one year, rendering it voidable under Statute of Frauds.]; *Karl Ehmer Forest Hills Corp. v Gonzalez*, 159 AD2d 613, 613 [2d Dept 1990] ["An oral promise to guarantee the debt of another is barred by the Statute of Frauds."]).

Discussion

Plaintiff's motion seeking summary judgment is granted. Significantly, on this record, plaintiff establishes that defendant was bound by the lease between it and defendant, that defendant breached the same by failing to pay all sums due thereunder while he was in possession of 263, and that as a result, plaintiff has been damaged in the amount of $19,652.33.

In support of its motion, plaintiff submits two affidavits[1] by Roni Mova (Mova), plaintiff's Managing Agent, who states that he is familiar with all the facts and circumstances concerning the instant action, has personal knowledge of plaintiff's business and record keeping practices, including how plaintiff creates and generates computer generated tenant ledgers. Mova states that plaintiff owns 263 and is its landlord. On October 15, 2012, plaintiff and Noozy executed a 10 year lease, whereby Noozy became the tenant at 263 until September 30, 2022, when the lease would terminate. Noozy leased 263 to use as a fast food restaurant. In

[1] Generally, arguments proffered for the first time within reply papers shall not be considered by the court (*Wal-Mart Stores, Inc., v United States Fidelity and Guaranty Company*, 11 AD3d 300, 301 [1st Dept 2004]; *Johnston v Continental Broker-Dealer Corp.*, 287 AD2d 546, 546 [2d Dept 2001]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Moreover, prevailing law makes it abundantly clear that the foregoing prohibition is meant to specifically preclude the consideration of new evidence, submitted for the first time on reply in order to cure deficiencies in the moving papers (*Migdol v City of New York*, 291 AD2d 201, 201 [1st Dept 2002] [Court rejected affidavit submitted with reply papers since it sought to remedy deficiencies in motion rather than respond to arguments made by opponent.]; *Lumbermens Mutual Casualty Company v Morse Shoe Company*, 218 AD2d 624, 625-626 [1st Dept 1995] [Court rejected defendant's reply papers which included two new documents provided to support a new assertion not previously made in initial motion.]; *Ritt v Lenox Hill Hospital*, 182 AD2d 560, 562 [1st Dept 1992] [Court rejected defendant's reply papers which contained a medical affidavit designed to cure the conclusory affidavit submitted with its initial motion.]). Here, although plaintiff submits Mova's second affidavit in reply, it constitutes a permissible use of reply papers because Mova specifically addresses defendant's claims, rebutting the same and thereby establishing that there are no questions of fact which - as urged by defendant - preclude summary judgment.

addition to requiring that Noozy pay rent, the lease also required that Noozy pay additional rent for all water and sewer utilities in connection with 263. On August 29, 2013, Noozy assigned the foregoing lease, along with all rights and obligations therein to defendant. Beyond an amendment to paragraph 6D of the lease, amending the time when the security deposit could be allocated to rent, the lease remained unchanged at the time of its assignment. In September 2014, defendant failed to pay his rent and made no further payments thereafter. On May 31, 2015, plaintiff regained possession of 263. To date, pursuant to the lease, defendant owes $26,052.53, representing rental arrears as follows: $342.89 for September 2014 and $3,213.68 per month for October 2104 through May 2015. Defendant also owes additional rent for water and sewer fees totaling $2,600, representing $325 per month for October 2014 through May 2015. After applying and crediting the $9,000 security deposit, Mova states that defendant owes $19,652.33. Mova states that with regard to an additional $3,000 defendant tendered as additional security, said sum was applied to additional rent arrears, damage to 263 caused by defendant and discovered after he vacated, and a rent credit to the new tenant as a result thereof. With regard to damage to 263, after defendant vacated 263, he entered 263 and noted defendant left furniture and lighting fixtures behind. In addition, plaintiff had to repair the plumbing and the electrical wiring at 263 after defendant vacated. With

regard to the rent credit to the new tenant, Mova states that because defendant left 263 in a condition where it could not be leased, plaintiff was forced to provide a rent credit of $3,000 to the tenant it found to relet 263 in June 2015. With regard to additional rent, defendant accrued $3,965.66 in late fees between October 1, 2014 and May 31, 2015. With respect to defendant's claim that $12,000, as evinced by defendant's receipt, was paid on October 17, 2012, Mova states that said sum represented Noozy's rent for the first month and the $9,000 security deposit, which as per page 1 of the Tenant Statement appended to plaintiff's motion was credited to defendant. With respect to defendant's claim that $7,080, as evinced by defendant's receipt, was paid on August 28, 2013, Mova states that $6,517.50 was applied to rental arrears, $362.50 was applied to late fees and $200 was applied to water and sewer fees. The foregoing, per Mova, is indicated on page 2 of the Tenant Statement. With respect to defendant's claim that $5,000, as evinced by defendant's receipt, was paid on August 29, 2013, $3,000 was credited on September 1, 2013 as an additional security deposit, as noted in the Tenant Statement, and $2,000 was allocated towards upgrading the electric box, as noted in the assignment of lease agreement. With respect to defendant's claim that $3,212, as evinced by defendant's receipt, was paid on October 2, 2013, Mova states that $3,112 was applied towards rent and $100 was applied to water and sewer fees as evinced by page 2 of the Tenant Statement.

With regard to plaintiff's records, Mova states that the records were created contemporaneous with the events reflected therein and that they were made and kept in the regular course of plaintiff's business.

Plaintiff submits a copy of the lease executed by Noozy[2]. The lease indicates that it is for occupancy of 263 beginning on October 1, 2012 and ending on September 30, 2022. Paragraph four indicates that Noozy would be responsible for escalating monthly rent beginning at $3,000 per month in 2012, $3,213.68 per month in 2014 and $3,226.15 per month in 2015. Paragraph five defined any other payments required by the lease as additional rent. Paragraph six, subsection A, states that Noozy paid $9,000 to plaintiff as a security deposit, "receipt of which is hereby acknowledged subject to collection." Paragraph 6,subsection B, states that

> [i]f any of the Rent herein reserved or any other sum payable by Tenant to

[2] Plaintiff's records are admissible insofar as Mova laid the requisite business records foundation. To be sure, the business record foundation only requires proof that (1) the record at issue be made in the regular course of business; (2) it is the regular course of business to make said record and; (3) the records were made contemporaneous with the events contained therein (CPLR § 4518; *People v Kennedy*, 68 NY2d 569, 579 [1986]). Accordingly, "[i]t is well settled that a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files" (*DeLeon v Port Auth. of New York and New Jersey*, 306 AD2d 146 [1st Dept 2003]).

> Landlord shall be overdue and unpaid or should Landlord make payments on behalf of Tenant, or Tenant shall fail to perform any of the terms of this Lease, then Landlord may, at its option, after providing a written default notice to Tenant including the applicable cure period as set forth in Article 21, and without prejudice to any other remedy which Landlord may have on account thereof, appropriate and apply said entire deposit or such portion thereof as may be necessary to compensate Landlord toward the payment of rent or additional rent or loss or damage sustained by Landlord due to such breach on the part of Tenant.

Paragraph 6, subsection D authorizes the use of a portion of the security deposit by plaintiff to satisfy the thirteenth month of rent "[p]rovided that the tenant has not been in default of any of the terms, covenants and conditions of this lease."

Plaintiff submits a document titled Landlord-Tenant Agreement to Assign Commercial Lease executed by the parties herein and Noozy. The document is dated August 29, 2013 and indicates, *inter alia*, that Noozy, with plaintiff's consent, assigned the lease for 263 to defendant. Specifically, the document states that

> Morrison Management LLC, the Landlord, and Sher M. Noorzy, the Tenant, hereby agree to assign the lease dated October 1, 2012 for the business located at 263 West Kingsbridge Road, Bronx, New York. The new Tenant, Abdul Bari Gul, hereby agrees to the assignment. The new Tenant, Abdul Bari Gul has paid an additional $3,000.00 as security deposit to Landlord. Paragraph 6.D of the Lease will

> be amended to deduct from the Security Deposit towards Rent the 25th and 37th month of the Lease rather than the 13th month. Tenant also has paid $2,000.00 to Landlord towards Landlord taking the responsibility to change Tenant's electric box to a maximum of 150 AMPS. All other terms of the Lease dated October 1, 2012 are still in effect and full in force.

Plaintiff submits the Tenant Statement, which with respect to 263, lists all sums due to plaintiff, what said sums are for, and all sums paid to plaintiff by Noozy and/or defendant and whether the same were credited to defendant. The document contains all the information described by Mova in his affidavit relative to the payments defendant alleges to have made and the allocation of those payments as described by Mova.

Based on the foregoing, plaintiff establishes entitlement to summary judgment. It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc.* at 475 [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Leases are nothing more than contracts and are thus, subject to the rules of contract interpretation, namely, that the intent of the parties is to be given paramount consideration, which intent is to be gleaned from the four corners

of the agreement, and that of course, the court may not rewrite the contract for the parties under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning (*Tantleff* at 244).

Here, plaintiff's evidence establishes that defendant assumed the lease to 263, which obligated him to pay rent, additional rent and late fees, and that defendant breached the lease in October 2014 when he failed to pay the rent and the additional rent required by the lease. To be sure, the lease for 263 establishes that it was between plaintiff and Noozy, that Noozy would be responsible for escalating monthly rent beginning at $3,000 per month in 2012, $3,213.68 per month in 2014 and $3,226.15 per month in 2015. The Landlord-Tenant Agreement to Assign Commercial Lease, executed by the parties herein and Noozy establishes that on August 29, 2013, defendant assumed the lease between plaintiff and Noozy and that defendant was bound by all the terms of the lease. The Tenant Statement establishes that as of June 23, 2015, defendant owed rent, additional rent, and late fees totaling $35,386.70. Lastly, Mova's affidavits establish that defendant breached the lease in that he failed to pay all rent, additional rent, and late fees due beginning in October 2014. Mova further states that after crediting defendant for sums tendered and the security deposit tendered by Noozy and then defendant, there is still $19,652.33 due and owing, representing rent, additional rent and late fees.

Accordingly, since the essential elements in an action for breach of contract "are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*Dee* at 209; *Elisa Dreier Reporting Corp.* at 127; *Brualdi* at 960; *JP Morgan Chase* at 803; *Furia* at 695]), here the clear and unambiguous language in the lease obligating that defendant pay rent, additional rent and late fees, coupled with the Tenant Statement and Mova's affidavits establishing defendant's failure to make the payments due, establish that defendant breached the agreement. Hence, plaintiff establishes prima facie entitlement to summary judgment.

Nothing submitted by defendant raises an issue of fact sufficient to preclude summary judgment.

Defendant submits an affidavit, wherein he states that the security deposit memorialized by the lease is $12,000. In addition, defendant states that on August 29, 2013, he gave plaintiff an additional $3,000 to be allocated towards the $12,000 security deposit. As a result, defendant asserts that the total security deposit provided to plaintiff was $15,000 and not $9,000. Defendant also contends that he made rent payments totaling $24,080 which were not credited to him by plaintiff and are not memorialized by the Tenant Statement submitted by plaintiff.

Specifically, defendant states that receipts appended to his affidavit demonstrate that on October 17, 2012, plaintiff was paid $12,000, on August 29, 2013, plaintiff was paid $5,000, and on August 28, 2013, plaintiff was paid $7,080.

Defendant submits four receipts. The first is dated October 17, 2012 and indicates that Noozy paid plaintiff $12,000. The second receipt is dated August 29, 2013 and indicates that Noozy paid plaintiff $5,000. The third receipt is dated August 28, 2013 and indicates that Noozy paid plaintiff $7,080. The fourth receipt is dated October 2, 2013 and indicates that defendant paid plaintiff $3,212.

Based on the foregoing, defendant fails to raise an issue of fact sufficient to preclude summary judgment. To be sure, although defendant states that the security deposit paid by Noozy was larger than that claimed by defendant, such claim is belied by the lease itself. As noted above, paragraph six, subsection A, of the lease clearly and expressly states that Noozy paid $9,000 to plaintiff as a security deposit, "receipt of which is hereby acknowledged subject to collection." As such, defendant's claim has no merit and his unsubstantiated claim - a misreading of the lease - cannot create an issue of fact as to the initial security deposit. This is because, of course, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to

warrant or defeat summary judgement (*Zuckerman* at 562).

Moreover, to the extent that defendant's claim on this issue seeks to alter the terms of the written contract, the parole evidence rule bars the same. Provided a writing is clear and complete, evidence outside its four corners "as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc.* at 162; *see Greenfield* at 569; *Mercury Bay Boating Club Inc.* at 269-270; *Judnick Realty Corp.* at 822). Here, the lease, and more specifically, paragraph 6, subsection A is clear in memorializing the amount of the initial security deposit, noting the same as $9,000. Accordingly, assuming defendant seeks to orally alter the same, the parole evidence rule forbids it.

With regard to defendant's remaining assertions - that he tendered sums - four rent payments and an additional $3,000 towards the security deposit - plaintiff's documentary evidence - the Tenant Statement - establishes that he was given credit for each of the foregoing payments but that thereafter, he still nevertheless owed rent, additional rent, and late fees. As a result, defendant fails to raise an issue of fact so as to preclude summary judgment. Stated differently, defendant's opposition does not establish that he made payments for which he did not receive credit - as urged - and that an objective review of the Tenant

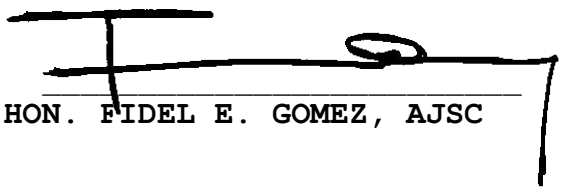
Statement substantiates the same. Instead, as he did with the lease, defendant misrepresents or misreads the Tenant Statement, asserting that same establishes facts that it does not. The former would raise questions of fact sufficient to preclude summary judgment, while the latter cannot. It is hereby

ORDERED that the Clerk enter judgment in favor of plaintiff for the sum of $19,652.33 plus interest, costs and fees. It is further

ORDERED that plaintiff serve a copy of this Order with Notice of Entry upon defendant within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated : March 3, 2022
Bronx, New York



HON. FIDEL E. GOMEZ, AJSC