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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ **PART** _____

Index Number : 107300/2004

TRADERS COMPANY

VS

AST SPORTSWARE, INC.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted with prejudice and denied pursuant to attached decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/15/05

HON. MARILYN SHAFER, JSC

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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TRADERS COMPANY,

Plaintiff,

-against-

Index No.: 107300/04

AST SPORTSWEAR, INC. and PEI CHEN YING
a/k/a PATRICK PEI CHEN YING,

Defendants.

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Shafer, J.:

Motion sequence numbers 001 and 002 are consolidated for decision.

In this action, plaintiff, Traders Company, a commercial landlord (Landlord), seeks to recover damages from its former tenant, defendant AST Sportswear, Inc. (Tenant), pursuant to a lease, and from Pei Chen Ying a/k/a Patrick Pei Chen Ying (Ying or Guarantor), who guaranteed Tenant's lease obligations by written guarantee executed on December 16, 1996 (the Guarantee).

Landlord moves here for summary judgment against Tenant and Guarantor (collectively, Defendants), on the first and second causes of action of Landlord's complaint (CPLR 3212). In its first cause of action, Landlord seeks damages for unpaid base rent and additional rent. In its second cause of action, Landlord seeks attorneys' fees, costs and disbursements for this action based, respectively, on the lease and Guarantee. Landlord also moves for a reference to a Special Referee to determine the total attorneys' fees, costs and disbursements.

In its complaint, dated May 12, 2004, Landlord alleges it is the fee owner of a building located at 135 West 30th Street in New York City. Landlord leased part of this building (the

Premises) to the Tenant, by written agreement (the Lease). The Lease's term commenced on December 1, 1996 and ended on January 31, 2004. Landlord alleges that Tenant stopped paying rent for the Premises, in or around October 2003, but thereafter remained in possession until approximately February 28, 2004. Landlord claims that Tenant owes it $94,858.18, for base and additional rent due pursuant to the Lease, for the period ending February 28, 2004, and bases its claim against Guarantor on this alleged obligation.

Defendants' answer, dated May 27, 2004, contains twelve affirmative defenses and two counterclaims. In their first counterclaim, Defendants allege that Landlord violated a provision of the Lease by "willfully failing, refusing, and neglecting to provide services to the Defendants," including not providing proper heating (Lofton Aff., Exh. E, ¶ 17). In the second, Defendants allege that Landlord is in default of the Lease, which has caused them to have to "retain the services of an attorney to render services on its behalf" (Lofton Aff., Exh. E, ¶ 23).

On a summary judgment motion, the movant bears the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]), "by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], quoting CPLR 3212 [b]). If the moving party establishes a basis for a grant of summary judgment, then to defeat the motion, the opposing party must present evidence that there is a triable material issue of fact (*Zuckerman*, 49 NY2d 557, *supra*). Thus, on a motion for summary judgment, the court's function is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.* 3 NY2d 395, 404 [1957]).

To enforce a written guaranty on a motion for summary judgment "all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*Kensington House Co. v Oram*, 293 AD2d 304, 304 [1st Dept 2002]).

To establish its prima facie case, Landlord submits the affidavit of Tyrone Lofton who states that he is the collections manager for Landlord's managing agent. Annexed to Lofton's affidavit is a copy of the Lease and the Guarantee.

Among other things, the Guarantee provides:

> "[Guarantor] absolutely, unconditionally and irrevocably guarant[ies] to Landlord all rent and additional rent and other charges payable by Tenant under the Lease (hereinafter collectively referred to as "Accrued Rent"), up to the "Surrender Date." The "Surrender Date" means the date that Tenant shall have performed all of the following: (a) vacated and surrendered the demised premises to Landlord of all subleases or licensees and in broom clean condition, and Tenant has so notified Landlord or such agent in writing and (b) delivered the keys to the doors to the demised premises to Landlord (or its managing agent).
>
> . . .
>
> Guarantor shall not be liable under this Guarantee for any rent, additional charges or other charges or payments accruing under the Lease after the Surrender Date. Any security deposit under the Lease shall not be credited against amounts payable by Tenant, or by Guarantor under the terms of this Guarantee.
>
> . . .
>
> Guarantor agrees that this Guarantee shall remain in force and effect as to any assignment, transfer, renewal, modification or extension of the Lease whether or not Guarantor shall have received any notice of or consented to such renewal, modification, extension, assignment or transfer."

(Lofton Aff., Exh. B, at 1, ¶¶ A, B, D).

Defendants argue that summary judgment should be denied because the moving papers do not set forth the "Surrender Date," which, Defendants claim, "is an essential element and condition of the personal guarantee" (Defendants' Memo. of Law in Opposition, at 1). According to the Guarantee's "good guy" clause,[1] in the event that Tenant surrendered the Premises pursuant to the terms of the Guarantee, Guarantor, although still liable for Tenant's obligations for charges and rents accruing under the Lease prior to the surrender date, would not be liable for charges and rents accruing thereafter (Lofton Aff., Exh. B, at 1, ¶ B). Thus, in the event that Tenant had, pursuant to the terms of the Guarantee, "surrendered" the Premises before the expiration of the Lease term, then under the Guarantee's good guy clause, Guarantor would have been relieved of any obligations for charges and rents accruing under the Lease after the "Surrender Date."

Defendants are correct in stating that Landlord does not discuss the surrender date in its moving papers. Nevertheless, Defendants' argument that such omission properly serves as the basis for denial of Landlord's request for summary judgment is misplaced for several reasons. First, Landlord provides admissible evidence, through affidavits, that Tenant either remained in possession of the Premises until the end of February 28, 2004, or abandoned the Premises in mid- to late-February after a default judgment against Tenant was entered in favor of Landlord in a non-payment proceeding commenced in Civil Court. Neither of these situations constitutes a surrender pursuant to the terms of the Guarantee. In addition, Defendants have not provided

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[1]A "good guy" clause limits a guarantor's liability for the principal's obligations (*see e.g.* 7A Rohan Current Leasing § 7B.05, at 7B-7). Here, paragraph B of the Guarantee limits Guarantor's liability for charges accruing under the Lease after Tenant's surrender of the Premises pursuant to the Guarantee's terms.

admissible evidence that there exists an issue of fact as to whether Tenant surrendered the Premises according to the terms of the Guarantee. Finally, the cases to which Defendants cite do not support their argument that it is the movant's burden to provide the surrender date as a condition to recovery on a guarantee.

To prove the underlying debt, collections manager Lofton swears that Tenant did not pay rent or additional rent due for the Premises for any period after October 1, 2003, and that the total due from Tenant through February 28, 2004 is $94,858.18. In further support, Lofton annexes to his affidavit an itemized printout of charges from Landlord's accounting/billing system.

Defendants' answer contains an affirmative defense stating that at a previous Landlord/Tenant proceeding[2] "this matter has been fully settled and the case dropped" (Lofton Aff., Exh. E ¶ 15). Furthermore, although not annexed to its moving papers, with its reply, Landlord submits to the court a "Decision and Judgment of Possession," dated February 5, 2004, from the Civil Court of the City of New York, New York County (Civil Court), pursuant to which Landlord was awarded possession of the Premises and a money judgment in the amount of $49,827.74 against Tenant for rent. Judgment was entered by the Clerk of the Civil Court on February 5, 2004 (the Civil Court Judgment). The Landlord has provided copies of the pleadings from the Civil Court proceeding.

The doctrine of res judicata provides that a valid final judgment bars future actions between the same parties "on the same cause of action" (*Matter of Reilly v Reid*, 45 NY2d 24, 27 [1978]). Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred (*O'Brien v City of Syracuse*, 54 NY2d 353, 357

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[2]Traders Company v AST Sportwear, Inc., Index No. L&T 050768/04.

[1981]).

As noted above, in one of their affirmative defenses, Defendants assert that there was a final resolution of this matter through the prior Civil Court action. Pleadings shall be liberally construed, and a court may deny summary judgment on an unpleaded affirmative defense if the respondent is not prejudiced by surprise (*Brodeur v Hayes*, 305 AD2d 754, 754 [3d Dept 2003]; Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3212:10, at 318; *see generally* 2 Byer's Civil Motions, § 72:07 [Leventhal Revised Edition]). Here, Landlord may not be heard to argue surprise or prejudice as it entered the Civil Court Judgment against Tenant less than four months before commencing this action, submits it before this court and argues based on it (*see* discussion *infra*, at 12).

The Civil Court Judgment, and the associated pleadings from the Civil Court action demonstrate that Landlord has previously adjudicated its claim for rent and additional rent against Tenant for the period from October through December 31, 2003. Thus, Landlord is barred from re-litigating that claim against Tenant here.

As with the doctrine of res judicata, collateral estoppel is based upon the notion that a party, or one in privity to a party, should not be permitted to re-litigate an issue already decided on its merits (*Zimmerman v Tower Insurance Company*, 13 AD3d 137 [1st Dept 2004]). "In order to invoke the doctrine of collateral estoppel, two prongs must be satisfied: (1) the identical issue was necessarily decided in the prior proceeding and is decisive of the present action; and (2) there was a full and fair opportunity to contest that issue in the prior proceeding" (*id.* at 139). "The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate. . . . Collateral estoppel is grounded on concepts of fairness

and should not be rigidly or mechanically applied" (*D'Arata v New York Central Mutual Fire*, 76 NY2d 659, 664 [1990]).

Landlord chose to adjudicate the issue of the amount of rent and additional rent owed by Tenant under the Lease for the period from October through December 2003 in the Civil Court, and was there afforded a full and fair opportunity to litigate that issue, which was necessarily decided. Landlord obtained and entered a judgment in the Civil Court action, and is now barred from re-litigating that issue again here against Guarantor.

Landlord's submission of the Civil Court Judgment, however, establishes the underlying debt and Landlord's entitlement to partial summary judgment, on the Guarantee, in the sum of $49,827.74, for the rent and additional rent due from Tenant for the period from October through December 2003.[3] Accordingly, summary judgment as to that portion of Landlord's claim as against Guarantor is granted.

Although the issue of the amount of rent due through December 2003, and thus the underlying debt for that period, is established by the Civil Court Judgment, the court's review of the Lease reveals that Tenant paid rent in installments. Thus, although the Civil Court Judgment would preclude re-litigation here of its claim for damages for those rents or additional rents that were due as of the time the action was commenced (*see* 3 Dolan, Rasch's Landlord and Tenant–Summary Proceedings § 39:9, at 496; Siegel, NY Prac § 220, at 347 [3d ed]), an action for unpaid rent that became due after commencement of the action is not barred. As neither party has

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[3]Although the Civil Court Judgment was not annexed to the moving papers, as would normally be the case, Defendants are obviously not prejudiced by the submission of same on reply as they have been afforded the opportunity to submit a sur-reply on the motion, in which they base there arguments on that judgment.

addressed nor provided evidence of the commencement date of the Civil Court action, however, whether the Landlord is entitled to recover rent and/or additional rent as against the Tenant for the period after December 2003 can not be resolved at this time (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d at 404).

Moreover, the Guarantee provides for the recovery of "other charges payable by the Tenant under the Lease" (Lofton Aff., Exh. B, ¶ A). Reviewing the printout provided by the Landlord and the Lease, it appears that the charges under the Lease through the end of December 2003 were recoverable as rent or additional rent thereunder and, consequently, either were previously brought, or could have been during the Civil Court action (3 Dolan, Rasch's Landlord and Tenant–Summary Proceedings § 39:9, at 496; *see* Lofton Aff., Exh. A, Rider to Lease, ¶ R16, at 12, ¶ R28, at 15). However, if this is not the case, Landlord is free to seek leave to amend its complaint to add the "other charges" not recoverable in the Civil Court action.

In addition, Landlord seeks a judgment in the instant case against Tenant and Guarantor "jointly and severally." However, Landlord already holds the Civil Court Judgment against Tenant for rent and additional rent for October through December. Consequently, without an appropriate set off, a second judgment against Guarantor for the same amount, for that same time period, would result in an unjust windfall, or double recovery, to Landlord.[4] Accordingly, to the extent that the Civil Court judgment is satisfied as against Tenant, any judgment obtained herein on this motion is properly reduced by an equal amount. Of course, in the event Landlord obtains complete satisfaction of the judgment rendered through this motion, the Civil Court Judgment against

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[4]Without an appropriate set off, the Landlord would hold two separate judgments for $49,827.74, which together would total $99,655.48, for Tenant's obligations under the Lease for rent and additional rent from October through December 2003.

Tenant is properly extinguished.

Landlord also seeks summary judgment on its second cause of action for attorneys' fees in prosecuting this action based on the respective "attorneys' fees" clauses in the Lease and Guarantee. Pursuant to the Guarantee, Guarantor is liable to Landlord for the reasonable value of attorneys' fees, costs and disbursements incurred by Landlord in enforcing the Guarantee (Lofton Aff., Exh. B, ¶ G). As only partial summary judgment has been granted here, however, and the action continues, reference to a Special Referee to hear and report on reasonable attorneys' fees, and the determination of attorneys' fees before the conclusion of the action would be piecemeal, and would not be a conservative use of judicial resources. Thus, the motion is denied without prejudice to renew at the conclusion of this action.

In motion sequence 002, Defendants seek leave to supplement their papers with a sur-reply memorandum of law. Landlord opposes the motion, arguing that Defendants were afforded more than adequate time to respond, and that they were, or should have been aware, of the relevant facts upon which they base the arguments in their sur-reply before the date when their opposition papers were due. Landlord has addressed the merits of Tenant's contentions in the sur-reply, and thus is not prejudiced by the court's acceptance of both parties' additional submissions. Furthermore, the policy of this court is to decide issues on the merits. Therefore, the court grants Defendants' request.

In their supplemental papers, Defendants point out that the Landlord has only mentioned in passing that Tenant gave it a $64,000.00 security deposit, and questions why Landlord commenced this action where it holds a security deposit that exceeds the amount of the $49,827.74 Civil Court Judgment. Defendants argue that the Guarantee provision which prohibits the crediting of Tenant's security deposit under the Lease as against amounts payable by Tenant, or by Guarantor

under terms of this Guarantee (Lofton Aff., Exh. B, ¶ B), is an unenforceable penalty or forfeiture. They further contend that "statutory authority bars forfeiture of trust funds that can only be used accordingly [*sic*] to the terms of the trust" and that Landlord's "duty to account is clear, unmistakenly [*sic*] and must be complied with" (Defendants' Sur-Reply Memorandum of Law, at 4-5).

Landlord argues that its obligation under the Lease to return the security deposit does not accrue until Defendants have fully complied with all of their obligations under the Lease. In support of its argument, Landlord quotes part of the Lease's standard security deposit provision which provides that in the event that Tenant fully and faithfully complies with the Lease's terms, provisions, covenants and conditions, then after the date fixed as the end of the Lease and delivery of the Premises to Landlord, Tenant is entitled to the return of the security deposit.

Landlord omits the part of the security deposit provision that states that Landlord may apply or retain the security deposit for the payment of any rent, additional rent or other sums as to which Tenant is in default. Of course, unless the funds are applied pursuant to the Lease provisions, they remain the Tenant's property (General Obligations Law § 7-103 ["such money . . . until repaid or so applied, shall continue to be the money of the person making such deposit . . . and shall be held in trust by the person with whom such deposit . . . shall be made . . .]"; *see Gerel Corp. v Prime Eastside Holdings, LLC*, 12 AD3d 86, 94 [1st Dept 2004], citing *Glass v Janbach Props. Inc.*, 73 AD2d 106, 108 [2d Dept 1980]). However, Defendants' arguments for denial of summary judgment based on the Guarantee's provision are still misplaced.

First, unlike the circumstances in the cases it cites,[5] there are no allegations of

[5]For example Landlord cites to *L & B 57th Street, Inc. v E.M. Blanchard, Inc.* (143 F3d 88 [2d Cir 1998]), in which the court states "[o]nce [Landlord] had used the funds for its own

commingling here. In addition, despite that Landlord has neither applied nor returned Tenant's security deposit, Tenant does not indicate that it has commenced an action to recover it, and certainly has interposed no counterclaim for the deposit here.

Finally, as previously mentioned, Tenant challenges that provision of the absolute and unconditional Guarantee which states that "[a]ny security deposit under the Lease shall not be credited against amounts payable by Tenant, or by Guarantor under terms of this Guarantee" as an unenforceable liquidated damages provision, penalty or forfeiture that violates public policy (Lofton Aff., Exh. B, ¶ B). However, provisions precluding set offs or defenses in guarantees are not void as against public policy (*see e.g. Rusch Factors, Division of BVA Credit Corp. v Sheffler*, 58 AD2d 557, 558 [1st Dept 1977]). Moreover, the provision does not effect a forfeiture of the security deposit under the Lease, because the provision goes to obligations under the Guarantee, and not the Lease.

Defendants make other arguments in opposition to summary judgment including that service was improper, that the parties made an agreement to surrender the Premises in exchange for a waiver of rent, and that they do not recognize some of the charges. To support these arguments, Defendants submit an attorney's affidavit and an unsigned document that is labeled as the affidavit of Pei Chen Ying. Of course, it is beyond cavil that the affidavit of an attorney, who has no personal knowledge of the facts, is insufficient to create an issue of fact to defeat summary judgment (*see Farragut Gardens No. 5 Inc. v Milrot*, 23 AD2d 889 [2d Dept 1961]). Furthermore, the unsigned document is not a sworn affidavit, and certainly can not serve as evidence that a

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general purposes in July, 1995 and the funds were no longer segregated in a security deposit account, the funds should have been credited to [Tenant] as payment" (*id.* at 91).

triable issue of fact exists with respect to a bona fide defense.[6] Thus, Defendants have failed to submit admissible evidence demonstrating that a triable issue of fact exists as to these defenses (*Zuckerman*, 49 NY2d 557, *supra*).

Defendants have interposed two counterclaims. Landlord argues for dismissal of these claims because they were the subject of the Civil Court action. That portion of the Civil Court order that deals with counterclaims does not contain sufficient information for this court to make a definitive determination as to the final disposition of the counterclaims, if any. In any case, there is no request for such relief in Landlord's notice of motion or moving papers and Landlord's request for dismissal is denied.

In summary, Landlord's motion is granted in part by awarding summary judgment as against the Guarantor in the amount of $49,827.74 for damages for the rent and additional rent due for the period from October through December 2003, plus interest, from the date of entry of the Civil Court Judgment, and is otherwise denied. Moreover, in the event that the Landlord is able to obtain satisfaction of the Civil Court Judgment, or any part thereof, against the Tenant, the Guarantor may make an appropriate application to this court for a modification of the Judgment to be entered herein. The Landlord's motion for reference to a Special Referee is denied without prejudice, in accordance with the decision above, and its request to dismiss the counterclaims is denied.

The Defendants' application to expand the record to include their Sur-Reply Memorandum

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[6]In its opposition to the Tenant's sur-reply papers, Landlord attaches a signed and notarized copy of an affidavit of Ying that is different from the unsigned document submitted by Tenant to this court. Landlord submits it only to demonstrate that, among other things, Ying had executed an affidavit on the return date for its opposition, but Defendants chose not to serve it. Landlord does not address the affidavit on its merits and as Defendants failed to put the affidavit before this court as part of its opposition papers, or at all, the court will disregard its contents.

of Law is granted to the extent that the Memorandum, and Landlord's opposition to same are deemed submitted on the summary judgment motion herein.

The parties are directed to settle an order providing for the immediate entry of a money judgment in accordance with this decision and the severance of the remaining claims and counterclaims (*see* CPLR 5012), reflecting the decision of the court herein. That order shall provide that enforcement of the judgment is stayed for 90 days during which time AST Sportswear, Inc., may amend its answer to assert a counterclaim directing the Landlord to apply the security deposit to the outstanding Civil Court Judgment and towards any additional amounts found due in this action.

Dated: 11/15/05

Enter:

J.S.C.

HON. MARILYN SHAFER, JSC