

**Sportswear Realties Assoc. v Greenberg**

2008 NY Slip Op 31861(U)

June 24, 2008

Supreme Court, New York County

Docket Number: 0114469/2006

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III  
*Justice*

PART 56

Index Number : 114469/2006  
SPORTSWEAR REALTIES ASSOCIATES  
vs  
GREENBERG, MAURICE  
Sequence Number : 001  
SUMMARY JUDGEMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 11/4/08  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

**FILED**  
JUL 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 6/24/08

HON. RICHARD B. LOWE, III

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 56

-----X  
SPORTSWEAR REALTIES ASSOCIATES,

Plaintiff,

-against-

Index No.  
114469/06

MAURICE GREENBERG and BON JOUR  
GROUP SERVICES, LTD.,

Defendants.

-----X

**Richard B. Lowe, III, J.:**

Plaintiff Sportswear Realities Associates (Sportswear) moves for an order, pursuant to CPLR 3212: (i) granting summary judgment on the first and second causes of action; (ii) granting summary judgment on the issue of liability as to the third cause of action, and setting it down for a hearing to fix the amount of damages; and (iii) dismissing defendants' affirmative defenses. Defendant Bon Jour Group Services, Ltd. (Bon Jour) cross-moves for summary judgment dismissing the complaint, and to strike the complaint for failure to comply with discovery.

**Background**

This is an action on guarantees of obligations on a lease, in which the defendants guaranteed the tenant's obligations with regard to a commercial lease with plaintiff Sportswear, the landlord. Sportswear contends that the tenant defaulted, and that the defendants are liable under their guarantees for rent and additional rent due under the lease. Defendant Maurice Greenberg claims that when the tenant surrendered the premises to Sportswear, no rent or additional rent was due, and, therefore, that he has no liability under his guaranty. Defendant Bon Jour asserts that it was released under the terms of its guaranty.

**FILED**

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COURT CLERK  
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Sportswear owns the premises known as the ninth floor (the Premises) in the building located at 141 West 36<sup>th</sup> Street, New York, New York (the Building) (Affidavit of Kaye Kroken, dated September 28, 2007, ¶ 3). Defendant Greenberg is the principal of a limited liability company known as Sales Aware LLC (Sales Aware). Defendant Bon Jour is a New York corporation.

On December 4, 2003, Sportswear entered into a lease with Sales Aware with regard to the Premises for a term of five years, expiring on December 31, 2008 (the Lease) (Exhibit D to Notice of Motion). On that same date, defendant Greenberg guaranteed to Sportswear that if Sales Aware, as the tenant, defaulted under the Lease, Sales Aware and all other occupants would vacate the demised premises, in which case Greenberg would have no obligation or liability under the guaranty (Exhibits E and F to Notice of Motion). Specifically, Greenberg agreed that until Sales Aware and all other occupants vacated the entire demised premises, he guaranteed to plaintiff Sportswear “the payment and performance of [Sales Aware’s] obligations under and in accordance with the Lease, including, without limitation, the payment of fixed and additional rent (the ‘Obligations’)” (the Greenberg Guaranty) (Exhibit E to Notice of Motion, at 1). The Greenberg Guaranty also provided that the obligations were unconditional, and not subject to any setoff or defense based upon any claim Greenberg may have against Sportswear (*id.* at 1-2).

In defendant Bon Jour’s guaranty, Bon Jour

absolutely, unconditionally and irrevocably guarantee[d] to [Sportswear] the timely and complete payment of all fixed rent, additional rent and other charges under the Lease, and timely and complete performance of all other obligations of [Sales Aware] under the Lease (including, without limitation, the vacating of the Premises (as required by the Lease) at the expiration or sooner termination of the Lease and the payment of all losses, costs,

liabilities and damages which [Sportswear] may incur by reason of failure to so vacate) . . . .

Exhibit F to Notice of Motion, at 1. Like the Greenberg Guaranty, the Bon Jour Guaranty provided that the obligations were absolute, unconditional, and not subject to any counterclaim, setoff, deduction or defense based upon any claim Bon Jour may have against Sportswear (*id.* at 1). In addition, the Bon Jour Guaranty provided that it remained in effect throughout the Lease term unless (a) Sales Aware was not then in default under the Lease, (b) one calendar year had passed since the commencement of the Lease, (c) Sales Aware had deposited at least \$40,000 with Sportswear as an additional security deposit, in which event, Bon Jour would be released from all liability under the Guaranty accruing after these conditions were met (*id.* at 2, ¶ 6).

In 2004, with Sportswear's knowledge, Sales Aware had subleased part of the Premises to various entities known as 237 East LLC, Ultimate Realty NY LLC, Ultimate Realty LLC, Joseph Sabbagh Realty, and Sabbagh Gotlieb Realty III LLC (Greenberg Aff., ¶ 7; Kroken Aff., ¶ 14). Sales Aware occupied the Premises and paid the rent from December 2003 until at least December 2005 (Kroken Aff., ¶¶ 10-12).

On or about May 8, 2006, Sportswear commenced a Summary Non-Payment Proceeding in New York City Civil Court, New York County, entitled Sportswear Realities Assocs. v Sales Aware LLC, Index No. L&T 071024/06 (Exhibit H to Notice of Motion), seeking rent payments from December 2005 through May 2006. Sales Aware defaulted in that proceeding, and a judgment of possession was entered against it (*id.*; Kroken Aff., ¶ 11). According to the Occupant Ledger submitted by Sportswear, as of May 1, 2006, Sales Aware failed to pay \$53,898.17 in rent, additional rent and other charges, which amount included a charge on

December 1, 2005 of \$40,000 for the additional security deposit (Exhibit G to Notice of Motion, at 8-9). Sales Aware then vacated the Premises. According to Greenberg, Sales Aware properly paid its rent through at least June 2006, and vacated the Premises then (Affidavit of Maurice Greenberg, dated November 29, 2007, ¶¶ 5-6). Sportswear contends that Sales Aware vacated the Premise in July 2006, and continued to default on its rent obligations in the amount of \$181,797.75, with legal fees incurred by Sportswear of \$12,536.88 (Kroken Aff., ¶¶ 10, 13; Exhibit G to Notice of Motion, at 11).

On September 21, 2006, Sportswear commenced a Summary Holdover Proceeding in New York City Civil Court, New York County, entitled Sportswear Realities Assocs. v 237 East LLC, Ultimate Realty NY LLC, Ultimate Realty LLC, Joseph Sabbagh Realty, and Sabbagh Gotlieb Realty III LLC and "XYZ Corp.", Index No. L&T 091680/06, in which Sportswear sought to remove the subtenants of Sales Aware (Kroken Aff., ¶ 15; Exhibit I to Notice of Motion). Sabbagh Gotlieb Realty III LLC defaulted, and a judgment of possession was entered against it (Kroken Aff., ¶ 16; Exhibit J to Notice of Motion). The nondefaulting sublessees entered into a Stipulation of Settlement, dated November 22, 2006, with Sportswear, in which the judgment of possession was stayed against them on condition that they pay use and occupancy for October through February 2007 in the amount of \$6,000 per month, for a total of \$30,000, which amount has been paid (Kroken Aff., ¶ 17; Exhibits K and L to Notice of Motion). The sublessees vacated the Premises on February 28, 2007 (Kroken Aff., ¶ 18).

On October 6, 2006, Sportswear commenced this action asserting three causes of action (Complaint, Exhibit A to Notice of Motion). The first and second causes of action seek recovery on the guarantees by Greenberg and Bon Jour (*id.*, ¶¶ 14-21). The third claim seeks reasonable

[\* 6 ]

attorneys' fees and expenses under the guarantees in connection with their enforcement (id., ¶¶ 22-24). Both defendants answered the complaint, denying the material allegations and asserting various affirmative defenses (Exhibits B and C to Notice of Motion). Bon Jour asserted defenses of lack of personal jurisdiction based on improper service; failure to state a cause of action; the damages are speculative; failure to mitigate damages; the premises have been re-rented; failure to exhaust remedies against Sales Aware; laches; and plaintiff received the security deposit and applied it to satisfy the guaranty obligations (Exhibit B to Notice of Motion). Greenberg asserted defenses of failure to state a claim; that the tenant vacated and surrendered the premises, which surrender was accepted by Sportswear, relieving Greenberg from any liability; outstanding rent is Bon Jour's responsibility; the subtenant was liable for use and occupancy once Sales Aware vacated; equitable estoppel; course of parties' conduct modified lease and guaranty; Greenberg's acts were ratified by Sportswear; rent has been paid; if rent is outstanding, it is because Sportswear has misappropriated payments made by Sales Aware; and failure to mitigate damages (Exhibit C to Notice of Motion).

On November 29, 2006, Sportswear entered into a lease with Style Master Fashion, Inc. (the Style Master Lease), as a new tenant for a portion of the Premises (Kroken Aff., ¶ 19; Exhibit M to Notice of Motion). The lease term commenced on March 1, 2007 and extended through February 29, 2008, at a monthly rent amount of \$7,750.00, with a rent-free period from March 1, 2007 to May 31, 2007 (Kroken Aff., ¶ 19).

On February 10, 2007, Sportswear entered into a lease with Cintas Corporation for a portion of the Premises, known as the Ninth Floor North, commencing on April 24, 2007 through November 30, 2007, at a monthly rent of \$6,750.00 (id., ¶ 20).

Sportswear asserts that it was able to partially mitigate damages as to the Lease defaults by Sales Aware by obtaining payments from the non-defaulting sublessees in the total amount of \$30,000.00, and in re-letting portions of the Premises to Style Master in the amount of \$15,500.00, and Cintas Corporation in the amount of \$13,427.39.

Sportswear contends that Greenberg is liable under his guaranty for all unpaid rent and additional rent that accrued under the Lease through February 28, 2007, when Sales Aware's subtenants actually vacated the Premises. It contends that after crediting Greenberg with the \$30,000.00 paid by the subtenants (237 East LLC, Ultimate Realty NY LLC, Ultimate Realty LLC, and Joseph Sabbagh Realty), Greenberg still owes Sportswear \$108,341.87 pursuant to the Greenberg Guaranty, and has failed to make payments thereunder. With regard to the Bon Jour Guaranty, Sportswear urges that Sales Aware failed to forward any security deposit of \$40,000.00, and therefore, the conditions for the release of the Bon Jour Guaranty were never met, and it is obligated under that guaranty until expiration of the Lease on December 31, 2008. Sportswear asserts that Bon Jour has failed to make any of the payments it remains obligated to pay pursuant to the Bon Jour Guaranty. Sportswear also seeks the costs it incurred in re-letting the Premises to Style Master and Cintas in the total amount of \$43,386.50 which Sales Aware was liable for under the Lease, and which Bon Jour is liable for pursuant to the guaranty. On its third claim for reasonable attorneys' fees and expenses, Sportswear contends that it is entitled to judgment of liability based on paragraph 4 (Exhibit E to Notice of Motion) of the Greenberg Guaranty and paragraph 8 (Exhibit F to the Notice of Motion) of the Bon Jour Guaranty with regard to such costs and fees.

Sportswear further maintains that the defendants' affirmative defenses must be dismissed.

It argues that it was never paid any security deposit so that Bon Jour was never released from its guaranty. It contends that, under Article 55 of the Lease, it was not required to apply Sales Aware's payments for ongoing rent and additional rent to satisfy the security deposit obligations. It further contends that Bon Jour's guaranty is not limited to the amount of the security deposit of \$40,000, but, rather, extended to guaranteeing the "timely and complete payment of all fixed rent, additional rent and other charges under the Lease" (Bon Jour Guaranty, Exhibit F, paragraph C.1).

Sportswear asserts that Greenberg's defenses also are meritless. It argues that it never accepted any surrender of the Premises, which surrender was required by the Lease to be in writing and signed by Sportswear (Exhibit D to Notice of Motion, Lease Article 25, at 4). It contends that Greenberg's defense that Bon Jour was in control of Sales Aware, and, therefore, is responsible for any unpaid rent is contrary to the Greenberg Guaranty. It urges that Greenberg's reliance on the subleasing of the Premises to Ultimate Realty to release him from liability on the Greenberg Guaranty is misplaced, because the Lease bars such defense in Articles 73 (d) and 25. It also urges that paragraph C.2 of the Greenberg Guaranty provides that Greenberg's obligations are unconditional, also barring this defense. Further, Sportswear points to the Lease provision entitling it to mitigate its damages without releasing the tenant from its obligations under the Lease (Exhibit D to Notice of Motion, Lease Article 18, at 3). It argues that the defense of equitable estoppel is unsupported by factual allegations and fails as a matter of law. Sportswear asserts that Greenberg's defense of Lease modification is barred by Article 21 of the Lease, and paragraph C.9 of the Greenberg Guaranty. As to Greenberg's Seventh Affirmative Defense, Sportswear urges that Greenberg fails to identify any act of his that Sportswear ratified, and that

[\*9]

there is no factual support of any ratification of Sales Aware's failure to pay rent. Greenberg's Eighth Affirmative defense is insufficient, according to Sportswear, because it just alleges that the rent has been paid, and it is undisputed that the rent has not been paid. Sportswear counters that any defense that it has misappropriated rent paid by Sales Aware lacks any supporting facts. Finally, Sportswear asserts that Greenberg's Tenth Affirmative Defense for failure to mitigate damages is insufficient, because, with respect to a commercial lease, it had no obligation to mitigate, and, in any event, it has submitted proof of partial mitigation.

In its cross motion for summary judgment, Bon Jour asserts that, under the Bon Jour Guaranty, it is relieved of its obligations, because the three conditions in paragraph 6 of that guaranty were met on May 12, 2006. On that date, Bon Jour contends that (a) Sales Aware was not then in default under the Lease, (b) at least one calendar year had passed since the commencement of the Lease on December 4, 2003, and (c) Sales Aware had deposited at least \$40,000.00 with Sportswear as an additional security deposit to be held in accordance with the terms of the Lease. Bon Jour submits the affidavit of Charles B. Dayan, its treasurer, who attests that, on May 12, 2006, "there was no legal determination in place holding Sales Aware in default of the lease" (Affidavit of Charles B. Dayan, dated November 12, 2007, ¶ 11). Mr. Dayan also states that more than a year had elapsed since December 2003 (*id.*, ¶ 12). He further asserts that the payments for the security deposit were made to satisfy the Bon Jour Guaranty (*id.*, ¶ 15). Dayan points to Sales Aware's Account Statements regarding the Premises (Exhibits 7-10 to Notice of Cross Motion), reflecting payments that he claims went toward the \$40,000.00 security deposit in the amounts of \$14,059.83 and \$13,408.83 (*id.*, ¶¶ 16-17). He states that there was no charge description for the security deposit balance on the Account Statement for June 2006, and,

therefore, full payments have been made (Dayan Aff., ¶ 19). Mr. Dayan further submits copies of the negotiated checks reflecting payments in the amounts of \$14,410.03, \$13,408.83, and \$13,054.09 dated June, May, and April 2006, respectively. This, Bon Jour argues, demonstrates that the security deposit has been paid, and its obligations under the Bon Jour Guaranty have been satisfied. Thus, it seeks summary judgment dismissing the complaint.

In opposition to Sportswear's motion, Bon Jour contends that there are numerous fact issues. It asserts that the Occupant Ledger provided in support of Sportswear's motion was prepared on 7/27/07 in anticipation of litigation, but that the Account Statements sent to Sales Aware, attached to Bon Jour's cross motion, were prepared in the ordinary course of business. Thus, it argues that only the Account Statements should control. It contends that these documents conflict, demonstrating that there are factual issues, and summary judgment to Sportswear is not appropriate.

Bon Jour also moves to strike the complaint, or for an order compelling compliance, on the ground that Sportswear failed to respond to Bon Jour's Combined Demand for Discovery and Inspection and Notice to Take Deposition served on or about November 8, 2006. It contends that Sportswear's failure to comply has prejudiced Bon Jour's ability to defend this action.

Greenberg opposes Sportswear's motion, arguing that under his guaranty, any liability for rent was suspended when Sales Aware vacated and surrendered the Premises to Sportswear in June 2006. He argues that the surrender was by operation of law based on Sportswear's actions in renting the Premises to Style Master and Cintas. He contends that the delay in securing the sublessee's vacatur was the result of Sportswear's negotiations with the sublessee. Thus, he asserts that Sportswear should be equitably estopped from recovering damages because it had the

11 ]

means to evict the sublessees, but it chose to negotiate with them. Greenberg claims that he should not be liable for legal fees incurred by Sportswear in the non-payment and the holdover proceedings, which he asserts were unnecessary. He contends that he should not be liable to Sportswear for the shortfall between the rent due under the Lease and the nominal amount Sportswear agreed to accept from the sublessees for October 2006 through February 2007. Greenberg urges that he is also entitled to a credit for the rent paid under the Style Master and Cintas leases. He claims that he needs discovery and that he has not had a fair chance to challenge and disprove Sportswear's contentions as to how much rent it collected, and whether it incurred leasing commissions and other expenses in re-letting the Premises.

In reply, Sportswear argues that both defendants have admitted to the Lease and their guarantees, that Sales Aware has failed to pay rent after June 12, 2006, and that they have paid nothing under their guarantees. It urges that if the payments made by Sales Aware in April, May, and June 2006, relied upon by Bon Jour, are credited toward the security deposit, then they cannot be credited toward those month's rent charges, resulting in Sales Aware being in default in paying the ongoing monthly rent due under the Lease, in violation of subparagraph a of paragraph 6 of the Bon Jour Guaranty. With respect to defendant Greenberg, Sportswear contends that Sales Aware's subtenants remained in possession until February 28, 2007, and, thus, a specific condition for the cut off of the amount of liability of Greenberg's Guaranty, that all other occupants vacate the entire Premises, did not occur until February 28, 2007. Sportswear asserts that it is seeking recovery only for sums that accrued pursuant to the Lease through February 28, 2007. It contends that Greenberg's argument that Sportswear accepted a surrender of the Lease is completely unsupported by any factual proof, is vitiated by the provision in the

Lease requiring such surrender to be in a writing signed by Sportswear, which did not occur here, and that, upon entry of the judgment of possession against Sales Aware in the first Summary Holdover Proceeding, there was no leasehold interest for Sales Aware to surrender.

### DISCUSSION

On the first cause of action against defendant Greenberg, Sportswear has presented a prima facie case of liability as to the Greenberg Guaranty, by presenting undisputed proof of Sales Aware's failure to pay under the terms of the Lease, Greenberg's Guaranty agreement, and Greenberg's failure to pay under the guaranty. The guaranty at issue is to be strictly construed (U.S.B.M. Realty Co. v Studio MacBeth, Inc., 46 AD3d 317, 317 [1<sup>st</sup> Dept 2007], citing White Rose Food v Saleh, 99 NY2d 589, 591 [2003]). It unambiguously provided that Greenberg "guarantee[d] to [Sportswear] that if [Sales Aware] defaults under the Lease, [Sales Aware] and all other occupants will vacate the Demised Premises" (Exhibit E to Notice of Motion, ¶ B). Therefore, if Sales Aware and all occupants vacated at the time of default, then Greenberg would have no liability under the guaranty. Greenberg agreed that, until Sales Aware and all other occupants vacated the entire Premises, he guaranteed the payment and performance of Sales Aware's obligation under the Lease, including the payment of fixed and additional rent (id., ¶ C.1).

It is undisputed that by June 2006, Sales Aware was in default in the payment of rent and additional rent, and that it vacated the Premises at that time. It is also undisputed that Sales Aware's subtenants, various entities known as 237 East LLC, Ultimate Realty NY LLC, Ultimate Realty LLC, Joseph Sabbagh Realty, and Sabbagh Gotlieb Realty III LLC (the sublessees), did not vacate the Premises until February 28, 2007, after Sportswear had commenced a summary

holdover proceeding against them. This summary proceeding ended in a Stipulation of Settlement, under which the sublessees paid amounts for use and occupancy during the holdover totaling \$30,000.00. Upon the termination of a lease, it is the obligation of the tenant to remove the subtenant (Stahl Assocs. Co. v Mapes, 111 AD2d 626, 629 [1<sup>st</sup> Dept 1985]). Moreover, the wrongful holdover by the subtenant is deemed the same as the wrongful holding over by the tenant (*id.*).

Under the unambiguous language of the Greenberg Guaranty, Greenberg is liable for all rent and additional rent that accrued until Sales Aware and all other occupants (i.e., the sublessees of Sales Aware) vacated the Premises on February 28, 2007. Greenberg admits that the Lease was entered into, he signed and agreed to the Greenberg Guaranty, Sales Aware was in default under the Lease, the sublessees did not vacate the Premises until February 28, 2007, and that he made no payments under the guaranty.

Greenberg's only defense on liability relates to his argument that there was a surrender by operation of law when Sales Aware vacated the Premises in June 2006, and that, upon that surrender, he was relieved of all liability under his guaranty. This defense fails as a matter of law. First, this defeats the purpose of the Greenberg Guaranty, which was to guaranty the payments due under the Lease until the Premises was entirely vacated. It is contrary to the guaranty provisions specifically stating that he was guaranteeing to Sportswear that if Sales Aware defaults, "[Sales Aware] and all other occupants will vacate the Demised Premises," and that he is liable for Sales Aware's "obligations and performance under and in accordance with the Lease," including the payment of rent until Sales Aware "and all other occupants vacate the entire Demised Premises" (Exhibit E to Notice of Motion, ¶¶ B, C.1). Greenberg's interpretation

renders the terms “all other occupants” meaningless.

In addition, a “surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated . . . .” (Brock Enters., Ltd. v Dunham’s Bay Boat Co., 292 AD2d 681, 682 [3d Dept 2002], quoting Riverside Research Inst. v KMGA, Inc., 68 NY2d 689, 691-692 [1986]). It occurs where a tenant abandons possession, and the landlord re-lets or uses the premises for its own benefit (see id.; see also Stahl Assocs. Co. v Mapes, 111 AD2d at 628). In this event, the tenant is generally relieved from any further liability under the lease (Gotlieb v Taco Bell Corp., 871 F Supp 147,152 [ED NY 1994]). While Sales Aware’s return of the keys in June 2006 demonstrates its intent to deem the lease terminated, Greenberg fails to demonstrate, or even raise an issue of fact, that Sportswear intended to terminate the lease by re-letting or using the premises for its own benefit (see Manheim v Seitz, 21 App Div 16 [2d Dept 1897] [where tenant merely removes itself from premises and leaves subtenant in possession, no surrender by operation of law demonstrated]; cf. Stahl Assocs. Co. v Mapes, 111 AD2d at 629-30 [triable issue as to whether landlord accepted control and possession of premises upon termination of lease term]). Rather, Sportswear demonstrates that it sought to remove Sales Aware’s subtenants during the term of the Lease by commencing the summary holdover proceeding. It was not until after February 28, 2007 that Sportswear obtained possession and control over the Premises, and re-let the Premises. Sportswear clearly states that it is not seeking any recovery of rent and additional rent under the Greenberg Guaranty for the period after February 28, 2007. The fact that Sportswear was able to obtain a Stipulation of Settlement in the holdover proceeding under which it was paid a sum for use and occupancy, which amount Sportswear agrees is to be subtracted from Greenberg’s

liability under the guaranty for rent and additional rent, does not warrant a different conclusion. Sportswear presents undisputed proof that it consistently sought to remove and evict the sublessees (see Kroken Aff., ¶¶ 79-83, 94-100). The Court notes that Article 18 of the Lease provides that Sportswear may re-let the Premises, and that notwithstanding such re-letting, Sales Aware remains liable for liquidated damages measured by the difference between the re-letting sums received and the amounts due under the Lease (Exhibit D to Notice of Motion, Article 18). Contrary to Greenberg's contentions, Sportswear had no obligation under the Greenberg Guaranty to remove the sublessees, or to seek greater amounts for use and occupancy. The Lease was a commercial lease, and, as such, Sportswear had no obligation to mitigate its damages (Sage Realty Corp. v Kenbee Management-New York, Inc., 182 AD2d 480, 481 [1<sup>st</sup> Dept 1992]; Gotlieb v Taco Bell Corp., 871 F Supp at 152).

The affirmative defenses set forth in Greenberg's answer which address liability (the first through seventh affirmative defenses) are dismissed. As Sportswear aptly contends, they are factually unsupported, conclusory, and many of them appear to have been abandoned by Greenberg in opposing this summary judgment motion. As determined above, Sportswear's claim states a cause of action, there was no surrender of the Lease until February 28, 2007, and Greenberg is liable for outstanding rent and additional rent up to that date (the first, second, and fourth affirmative defenses). That Bon Jour also may be liable for the rent under the Bon Jour Guaranty does not relieve Greenberg of his liability (the third affirmative defense). Greenberg's equitable estoppel defense lacks any factual basis, is not addressed in his opposition papers, and the Court finds no basis to impose that doctrine on Sportswear (fifth affirmative defense). The defenses regarding conduct modifying the lease and guaranty, and Greenberg's acts being ratified

by Sportswear, are factually unsupported and meritless (the sixth and seventh affirmative defenses). Finally, the defenses that the rent has been paid, the payments have been misappropriated, and failure to mitigate damages all go to the damages, which issue is discussed below (eighth, ninth, and tenth affirmative defenses).

With regard to the issue of damages, Greenberg has raised some triable issues. There is a difference in the charges and credits shown in the Account Statements submitted by Bon Jour (Exhibits 7-10 to Notice of Cross Motion), and the Occupant Ledger (Exhibit G to Notice of Motion) submitted by Sportswear. In addition, the Occupant Ledger includes a charge for the security deposit, which is no longer required now that the Lease is terminated (see L & B 57<sup>th</sup> Street, Inc. v E.M. Blanchard, Inc., 143 F3d 88, 91 [2d Cir 1998]), and it appears to charge late fees on that security deposit, which is not appropriate. Greenberg also asserts that a security deposit was received by Sportswear at the inception of Sales Aware's tenancy in 2003, but that Sportswear does not indicate if that security deposit was applied to past-due rent, and the Occupant Ledger fails to indicate how it was applied (Greenberg Aff., ¶ 11). Moreover, Greenberg and Bon Jour assert that Sportswear did not respond to their discovery requests, and that they cannot challenge the damages sought without such discovery. Accordingly, the issue of the amount due under the Greenberg Guaranty for rent and additional rent outstanding from Sales Aware under the Lease until February 28, 2007, when the Lease was terminated, is referred to a Special Referee to hear and report after the parties have had an opportunity to conduct discovery limited to the issue of the damages due under the Greenberg Guaranty. Greenberg's assertions about the amount of legal fees does not affect this first cause of action, because Sportswear is only seeking summary judgment of liability with regard to the legal fees in the third cause of action,

which will be addressed below.

Summary judgment on liability also is granted on the second cause of action against Bon Jour for breach of the Bon Jour Guaranty, and its cross motion for summary judgment is denied. As with the Greenberg Guaranty, Sportswear has made a prima facie showing of liability under this guaranty and Bon Jour has failed to raise a triable issue of fact. It is undisputed that Sales Aware executed the Lease, and that Bon Jour executed the Bon Jour Guaranty. Again, it is undisputed that Sales Aware defaulted under the Lease vacating the Premises in June 2006, that its subtenants vacated on February 28, 2007, and that there is rent and additional rent outstanding under the Lease. Bon Jour also does not deny that it has failed to make any payments under its guaranty.

Bon Jour fails to raise an issue of fact with regard to its defense that it was released from liability under paragraph 6 of the Bon Jour Guaranty. Under Article 54 of the Lease, Sales Aware was required to deposit \$40,000.00 in security on or before December 31, 2004, or, if Sales Aware elected, this deposit could be deferred until December 31, 2005 (Exhibit D to Notice of Motion, Article 54, at 9 of Rider to Lease). Article 54 further provides that upon the deposit of this security, the Bon Jour Guaranty “shall terminate” (*id.*). Under the Bon Jour Guaranty, paragraph 6, the guaranty remains in effect unless all of the following conditions are satisfied: (a) Sales Aware is not in default under the Lease; (b) at least one calendar year has passed since December 4, 2003; and (c) Sales Aware has deposited at least \$40,000.00 with Sportswear as an additional security deposit to be held in accordance with the Lease (Exhibit F to Notice of Motion, ¶ 6, at 2). It is undisputed that condition (b) has been met. Bon Jour argues that condition (a) was met because there was no “legal determination” that Sales Aware was in default in May 2006. It then

argues that payments that Sales Aware made in April, May, and June 2006 (Exhibit 11 to Notice of Cross Motion), which appear to be credited to the security deposit billed from December 2005 (Exhibits 7, 8, and 9 to Notice of Cross Motion), demonstrate that the security deposit was paid, and condition (c) was met. However, Bon Jour fails to provide any basis for interpreting condition (a) so as to add in a requirement that there be no "legal determination" of default. A failure to pay the rent and additional rent due constitutes a default under the Lease. Clearly, if the payments were credited toward the security deposit, then Sales Aware was in default in the rent and additional rent charged during those months, because these were the only payments Sales Aware made. Therefore, condition (a) could not have been met. Examination of the checks themselves demonstrates that the amounts they stand for coincide with the rent and additional rent due for each of those months. If the checks were credited toward rent and additional rent, then condition (c) was not met. In either event, all three conditions for release of the Bon Jour Guaranty were not met. Accordingly, Bon Jour's defense (the eighth affirmative defense) on the ground that it was released from liability under paragraph 6 of its guaranty is dismissed as a matter of law. Bon Jour fails to even address any of its other affirmative defenses, which lack merit. There is no issue regarding personal jurisdiction; the claims state a cause of action; there is no requirement for Sportswear to exhaust remedies as against Sales Aware; and there is no basis for a finding of laches (the first, second, sixth, and seventh affirmative defenses). The third, fourth, and fifth affirmative defenses address the issue of damages, which is discussed below. Accordingly, Sportswear is granted summary judgment on the issue of liability on the second cause of action against Bon Jour.

As with the claim on the Greenberg Guaranty, the Court finds that there are factual issues

as to the amount of damages for the same reasons specified with respect to the first cause of action. Unlike the Greenberg Guaranty, however, Bon Jour's obligation was not released on February 28, 2007, and Sportswear is seeking rent due under the Lease until its termination date of December 31, 2008. Paragraph 12 of the Bon Jour Guaranty provides that the guaranty "shall continue in full force and effect so long as any of the Obligations remains unpaid or unperformed (whether or not the Lease shall have terminated)" (Exhibit F to Notice of Motion, ¶ 12). The guaranty defines the "Obligations" to include the timely and complete payment of all fixed rent, additional rent and other charges under the Lease, including the payment of all losses, costs, liabilities and damages Sportswear may incur by the failure of the tenant to vacate (*id.*, ¶ 1). Thus, Bon Jour is liable for all rent due under the Lease. "If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable" (Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc., 87 NY2d 130, 133-34 [1995] [citation omitted]; see also Sage Realty Corp. v Jugobanka, D.D., 1998 WL 702272, \* 5 [SD NY 1998] ["it is well settled that when a tenant vacates the premises prior to the expiration of the lease, the landlord need do nothing and may still collect the full rent due"] [citation omitted]).

Here, paragraph 18 of the Lease specifically provides that the tenant is not released from its obligation to pay rent for the remainder of the Lease term, despite leaving the Premises prior to the expiration of the Lease:

Tenant or legal representatives of Tenant shall also pay Owner as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of

this lease.

Exhibit D to Notice of Motion. Thus, under the Bon Jour Guaranty, Bon Jour is liable for the liquidated damages due pursuant to paragraph 18 of the Lease, which will take into account the net amount received by Sportswear under the Style Master and Cintas Leases, as well as the \$30,000 in use and occupancy from Sales Aware's sublessees. Paragraph 18 also provides that in computing the liquidated damages, the expenses incurred by Sportswear in connection with re-letting, such as legal expenses, reasonable attorneys' fees, brokerage fees, advertising, and keeping the premises in good order, shall be added (id.). Sportswear has not provided documentation supporting its claims for re-letting expenses, and other costs. Accordingly, the issue of the amount due under the Lease, and, thus, the amount due under the Bon Jour Guaranty, is referred to a Special Referee to hear and report after the parties have had the opportunity to conduct limited discovery on that issue.

Finally, summary judgment of liability on the third cause of action for legal fees is granted. The issue of the damages on this claim also is referred to a Special Referee to hear and report. Pursuant to the Greenberg Guaranty, if a judgment is entered against Greenberg in any action to enforce this guaranty, Greenberg agreed to "reimburse [Sportswear] for all reasonable costs and expenses incurred by [Sportswear] in connection therewith, including, without limitation, reasonable attorneys' fees" (Exhibit E to Notice of Motion, ¶ 4). Pursuant to the Bon Jour Guaranty, if Sportswear incurred any costs or expenses to enforce the guaranty, "[Bon Jour] shall, immediately upon demand, reimburse [Sportswear] for all such costs and expenses, including, without limitation, reasonable attorneys' fees" (Exhibit F to Notice of Motion, ¶ 8). Paragraph 19 of the Lease provides that Sportswear is entitled to "reasonable attorneys' fees, in instituting,

prosecuting or defending any action or proceedings” in connection with any default of the Lease, if it “prevails in any such action or proceeding” (*id.*, ¶ 19). Based on these provisions, Sportswear is entitled to summary judgment on the issue of liability on its third cause of action. The issue of the amount of such fees and expenses is referred to a Special Referee to hear and report, again, after the parties conduct limited discovery on this issue.

Bon Jour’s cross motion for summary judgment dismissing the complaint is denied based on the reasoning above.

The branch of the cross motion seeking to strike the complaint for failure to comply with discovery requests also is denied. The defendants have presented nothing that would challenge their liability on the guarantees. The discovery requests do not focus on their liability. Rather, the requests focus on the damages portion of this action. Defendants are granted discovery limited to the damages issues that they will present to the Special Referee with regard to all three causes of action. Therefore, they fail to provide a basis to strike the complaint.

Accordingly, it is

ORDERED that the plaintiff’s motion for summary judgment on its first cause of action as against defendant Maurice Greenberg is granted as to liability; and it is further

ORDERED that the plaintiff’s motion for summary judgment on the second cause of action as against defendant Bon Jour Group Services, Ltd. is granted as to liability; and it is further

ORDERED that plaintiff’s motion for summary judgment against both defendant Greenberg and defendant Bon Jour Group Services, Ltd. on the third cause of action for legal fees and costs is granted as to liability; and it is further

ORDERED that, with respect to all three causes of action, the issue of damages is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue, and the parties are granted discovery limited to the damages and legal fees issues; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet<sup>1</sup> upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: June 24 , 2008



ENTER:

HON. RICHARD B. LOWE, III

**FILED**

JUN 24 2008

COUNTY CLERK'S OFFICE

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<sup>1</sup>Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.