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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH *Justice*

PART 54

Index Number : 114128/2007

1407 BROADWAY REAL ESTATE LLC

VS.

WONG, KIM WAI

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 114128-07

MOTION DATE 7/31/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
NOV 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/7/08

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

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1407 BROADWAY REAL ESTATE LLC
BY GETTINGER MANAGEMENT LLC,

Plaintiff,

-against-

KIM WAI WONG a/k/a WALLACE KIM WONG,

Defendants.

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Index No. 114128/07

DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.

In this action to enforce a guaranty of a commercial lease, plaintiff moves for summary judgment on the first cause of action in the amount of $50,675.01; for summary judgment on liability for attorneys' fees on the second cause of action; and for dismissal of defendants' eight affirmative defenses, which include standing (1st); payment (2nd); lack of statutory notice (3rd); set-off for seizure of the tenant's furniture (4th); lack of personal jurisdiction (5th); set-off (6th); breach of the Lease for refusal to consent to an assignment (7th); and failure to mitigate damages (8th).

Background

Plaintiff is the assignee of Gettinger Associates, L.P. (Gettinger), which entered into a lease, dated March 21, 2003 (Lease), with W&F Apparel, Inc. (Tenant), for unit 2201 of premises located at 1407 Broadway, New York, NY (Premises). This action is posited on a guaranty of the Tenant's obligations under the Lease for base and additional rent, as well as attorneys' fees incurred in enforcing the Lease. Plaintiff attaches an assignment and assumption agreement dated January 4, 2007, between Gettinger, as assignor, and plaintiff, as assignee (Assignment).

The Assignment recites that Gettinger was assigning its interest as lessee in a sub-lease dated February 1, 1954, between it and Webb & Knapp, Inc. Plaintiff claims, and defendant does not dispute, that pursuant to the Assignment, plaintiff acquired Gettinger's interest in the Lease with the Tenant.

The complaint's first cause of action is based upon the Tenant's failure to pay rent and additional rent for the period May 18, 2007 through July 31, 2007, in the total amount of $50,675.01. Exhibit E to plaintiff's moving papers calculates the amount sought as follows:

5/1/07	$16,265.17	Water $766.50		=	$17,031.67
6/1/07	16,265.17			=	16,265.17
7/1/07	16,753.08	Taxes $375.09	Fees $250.00	=	17,378.17

Total.....$50,675.01

The parties agree that the Tenant vacated the premises on July 31, 2007 (Vacate Date).

Defendant's opposing affidavit states that he does not remember whether he executed a guaranty in connection with the Lease, that the name "Wallace Wong" on the signature line is not his handwriting, and that he "cannot make out the inkblot that follows on that line." He avers that prior to entering into the Lease, the Tenant entered into a prior lease for space on the 15th floor of the Premises. The Lease plaintiff seeks to enforce was signed when the Tenant moved to the 22nd floor at Gettinger's request in order to enlarge the space of another 15th floor tenant. Defendant asserts that summary judgment must be denied because the guaranty attached to plaintiff's moving papers does not refer to the Lease, have a date, or bear the signature of a witness. Finally, defendant alleges that the Tenant paid the rent through the Vacate Date. Attached to his affidavit are three checks drawn by Emperor Industries, Inc., payable to plaintiff,

as follows:

May, 15, 2007	16,265.17
June 6, 2007	16,265.17
June 29, 2007	19,258.45
Total.....	.$51,788.79

Defendant also attaches a fourth check payable to plaintiff in the amount of $16,265.17, dated April 1, 2007, drawn on the same Emperor Industries account.

In reply, plaintiff relies on exemplars of defendant's signature on other documents to prove that the "inkblot" is his distinctive mark. Plaintiff states that the Tenant was given full credit for the four checks plaintiff presented to the court and annexes a new accounting document as Exhibit A to its reply affidavit. The reply affidavit does not dispute defendant's statement that the specific amount sued upon was not owing on the Vacate Date, but argues that the Tenant owed additional monies shown on Exhibit A to the reply.

With respect to defendant's affirmative defenses, plaintiff argues that pursuant to the guaranty, defendant was not entitled to notice of the Tenant's default, set-off for the sale of the Tenant's furniture, any other set-off, credit for the Tenant's security deposit, or any defenses the Tenant could raise. Additionally, plaintiff urges that the Lease bars the defense based upon plaintiff's failure to consent to an assignment. Finally, plaintiff's reply presents a lease pursuant to which it relet the premises to a new tenant to demonstrate that it received no rent to mitigate damages through June 2008.

Discussion

Defendant's denial that the signature on the guarantee is not genuine is insufficient to raise a triable issue of fact. On a summary judgment motion, a court may not compare handwriting samples to determine whether a signature is genuine. *Seoulbank, N.Y. Agency v.*

D&J Export & Import Corp., 270 A.D.2d 193 (1st Dep't 2000). However, it is well settled that something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature. *Banco Popular N. Am. v. Victory Taxi Mgmt.*, 1 N.Y.3d 381, 384 (2004); *Peyton v. State of Newburgh, Inc.*, 14 A.D.3d 51, 54 (1st Dep't 2004), *affirmed*, 5 N.Y.3d 704 (2005)(signature, standing alone, is *prima facie* evidence sufficient to withstand claim of forgery unsupported by other evidence); *Bronsnick v. Brisman*, 30 A.D.3d 224 (1st Dep't 2006). Here, defendant has not offered more than a conclusory denial that his signature is on the guaranty. Defendant's claim that he does not remember whether he signed a guaranty does not rebut plaintiff's affirmative proof that he did.

However, defendant has raised an issue of fact as to payment, his 2nd affirmative defense. While it may be true that the Tenant owed other monies, the court will not consider plaintiff's accounting that was presented for the first time by reply affidavit. *See, Schirmer v. Athena-Liberty Lofts, LP*, 48 A.D.3d 223, 224 (1st Dep't 2008). In light of the determination that defendant has raised an issue of fact as to payment by the Tenant, plaintiff is not entitled to summary judgment on the cause of action to enforce the guaranty or for attorneys' fees.

Plaintiff's argument that defendant agreed to waive all defenses to the guaranty is not borne out by its terms. The clause underpinning the argument provides that the guarantee shall not be impaired or affected by "any limitations of Tenant's liability under the Lease which may now or hereafter be imposed by any statute, regulation or rule of law, or any illegality, irregularity, invalidity or unenforceability, in whole or in part, of the Lease or any term thereof...." Plaintiff's interpretation is overbroad. The clause does not alter the general rule that a guarantor may assert defenses relating to the underlying obligation, such as failure of

consideration or payment, but not independent causes of action in favor of the principal. *H. H. & F. E. Bean, Inc. v. Travelers Indem. Co.*, 67 A.D.2d 1102, 1103 (4th Dep't 1979). The clause plaintiff relies upon prevents defendant from asserting that the Lease was illegal or unenforceable, but is not a global waiver of defenses. None of the cases cited in defendant's brief are to the contrary. *Durable Group, Inc. v. De Benedetto*, 85 A.D.2d 524 (1st Dep't 1981) involved fraud or duress, which went to the heart of the validity of the agreement, as opposed to an independent cause of action. Also inapposite are *Aeschlimann v. Presbyterian Hospital*, 165 N.Y. 296 (1901)(surety may present defense based upon excessive and fraudulent amounts sought by lien) and *Aeschlimann v. Presbyterian Hospital*, 165 N.Y. 296 (1901)(defenses not considered due to improper service).

Hence, defendant may set-off amounts paid by the Tenant against the amount owing to plaintiff under the guaranty, including security retained without reason. Thus, defendant's 6th defense for set-off will not be dismissed. While the guaranty provides that it shall not limit plaintiff's right to retain and/or apply the security, that does not mean that plaintiff need not credit it if there is no damage to the Premises or other reason to keep it. Here, plaintiff's argument that the Tenant owed monies in addition to the amount sought by the 2nd cause of action was raised for the first time in reply and cannot be considered in support of dismissal. The other clause relied upon by plaintiff relates to substitution or release of the security and is inapplicable to the facts presented. However, the remaining defenses must all be dismissed.

Plaintiff is entitled to dismissal of the 1st and 5th affirmative defenses, standing and lack of personal jurisdiction, as defendant has not countered plaintiff's evidence of due service and assignment of the Lease. Bare legal conclusions without supporting factual allegations are

insufficient to raise affirmative defenses. *Robbins v. Growney*, 229 A.D.2d 356, 357 (1st Dep't 1996); citing *Bentivegna v. Meenan Oil Co.*, 126 A.D.2d 506 (2d Dep't 1987). Plaintiff is correct that under the terms of the guaranty, defendant was not entitled to notice of the Tenant's default and, therefore the 3rd defense is dismissed. Nor is defendant entitled to raise the 8th defense of failure to mitigate damages. Failure to mitigate damages is not a defense to a commercial tenant's obligation to pay rent. *See* Lease §10(b)(1)(2) and *Holy Properties Ltd., L.P. v. Kenneth Cole Prods.*, 87 N.Y.2d 130 (1995)(commercial landlord has no duty to mitigate damages). The 7th defense must be dismissed because the Lease permits the Landlord to arbitrarily withhold consent to an assignment and prohibits the Tenant from asserting a claim for damages for unreasonable failure to consent. Lease §§ 3(a) and 30(a). Finally, the 4th defense relating to the seizure of the Tenant's furniture must be dismissed because it is a cause of action in favor of defendant's principal, not a defense to the obligation guaranteed. *H. H. & F. E. Bean, Inc. v. Travelers Indem. Co., supra.* Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted solely to the extent that defendant's 1st, 3rd, 4th, 5th, 7th and 8th affirmative defenses are dismissed, and in all other respects the motion is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on December 4, 2008, at 11:00 a.m. in Part 54, Room 1227, of the Courthouse located at 111 Centre St., New York, NY.

Dated: November 7, 2008