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

PRESENT: **WALTER B. TOLUB** PART 15

Justice

Index Number : 114047/2006

132 LUDLOW STREET

VS.

KAISH, NORMAN

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FOR THE FOLLOWING REASON(S):

Dated: 11/10/08

WALTER B. TOLUB 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 15

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132 LUDLOW STREET LLC,

Plaintiff,

-against-

Index No. 114047/2006

NORMAN KAISH and LEONARD TAUB,

Defendants.

----------X

TOLUB, J.:

In this breach of contract action, plaintiff 132 Ludlow Street LLC (Ludlow) moves, pursuant to CPLR 3212, for an order granting it summary judgment in the amount of $69,936.00 plus attorneys' fees, costs, and disbursements in this action.

Defendants have filed a counterclaim, pursuant to Real Property Law § 234, for an award of attorneys' fees, costs and expenses incurred in connection with the defense of this action.

Ludlow is a limited liability company, created under the laws of the State of New York. It is the owner in fee of a property located at 100 Rivington Street, New York, New York.

Defendants Norman Kaish and Leonard Taub maintain a place of business known as Kaish & Taub Development Group Corp. that is located at 261 Madison Avenue, 12th Floor, New York, New York.

100 Rivington Corporation (Rivington) is the corporate tenant in accordance with a written lease agreement dated July 1, 2004 (Lease) between plaintiff and Rivington.

The following facts are not in dispute. Plaintiff leased the corner store and the basement area at 100 Rivington Street (the Premises) to Rivington for a period beginning July 1, 2004 through June 30, 2014. Upon the execution of the Lease, defendants Kaish and Taub executed a

guaranty (Guaranty) whereby the two men guaranteed the payment of the base rent and additional rents (as such terms are defined in the Lease) at the Premises until the "expiration" or "termination" of the Lease. Ludlow received its last rent payment from Rivington in April of 2006. On June 13, 2006, Rivington vacated the Premises and delivered the keys to Ludlow.

On September 19, 2006, as a result of Rivington's default, Ludlow commenced this action, asserting two causes of action for breach of the Guaranty and attorneys' fees. The complaint seeks a judgment in the amount of $45,365.00, together with attorneys' fees, costs and disbursements in this action. On November 8, 2006, Ludlow relet the Premises to Steve Madden Retail, Inc.

Ludlow argues that it is entitled to summary judgment because: (1) defendants executed a written Guaranty to pay Rivington's base rent and all additional rents in the event of Rivington's default, (2) the Guaranty is an absolute and unconditional guaranty, (3) there is an underlying debt owed to Ludlow following Rivington's default and vacatur of the Premises, (4) defendants have failed to pay the arrears under the Guaranty, and (5) defendants have failed to provide a 90-day notice prior to vacating, and thus they are liable for rent arrears beginning in May of 2006 and ending in November of that same year.

Defendants argue that Ludlow is not entitled to summary judgment because: (1) pursuant to the Guaranty, Rivington provided Ludlow with the requisite 90-day written notice of its intent to vacate the Premises, (2) there was no outstanding rents due at the time of Rivington's departure, (3) Ludlow failed to mitigate its damages and obtain a new tenant prior to November 2006, (4) the copy of the Lease attached to plaintiff's moving papers is illegible, and (5) the signatures on the Guaranty attached to plaintiff's papers have not been notarized.

A party moving for summary judgment, pursuant to CPLR 3212, must demonstrate its entitlement thereto as a matter of law. To defeat summary judgment, the party opposing the motion must show that there is a material question of fact that requires a trial *(Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, plaintiff has demonstrated its entitlement to summary judgment and defendants have not demonstrated that a material question of fact remains.

Where, as here, a landlord seeks summary judgment upon a written guaranty, the landlord need only prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (*see Kensington House Co. v. Oram*, 293 AD2d 304, 305 [1st Dept 2002]). The Guaranty provides in part:

> "This Guaranty is an absolute and unconditional guaranty of payment and performance (and not merely of collection). Guarantor acknowledges that this Guaranty and Guarantor's obligations and liabilities under this Guaranty are and shall at all times continue to be absolute and unconditional in all respects, and shall at all times be valid and enforceable irrespective of any other agreements or circumstances of any nature whatsoever which might otherwise constitute a defense to this Guaranty and the obligations and liabilities of Guarantor under this Guaranty or the obligations or liabilities of any other person or entity (including, without limitation, Tenant) relating to this Guaranty or the obligations or liabilities of Guarantor hereunder or otherwise with respect to the Lease or to Tenant."

(Exhibit E to Affirmation of Steven Lesh, dated January 15, 2008) (Lesh Aff.). It further provides:

> "Guarantor's obligations and liabilities under this Guaranty shall include, but not be limited to, the payment of all Base Rent and Additional

> Rent (as such terms are defined in the Lease), and all foreseeable and unforeseeable damages that may arise in the foreseeable or unforeseeable consequence of any non-payment, non-performance, or non-observance of, or non-compliance with, any of the terms, covenants, or conditioned [sic] described in clauses 'a' and 'b' of the preceding paragraph (including, without limitation, all attorneys' fees and disbursements and all litigation costs and expenses incurred or payable by Landlord or for which Landlord may be responsible or liable, or caused by any such default)"

(Exhibit E to Lesh Aff.).

Ludlows' submissions establish: that the parties executed an unconditional and absolute Guaranty, proof of an underlying debt, and that the guarantors (defendants) failed to perform under the Guaranty (Exhibit E to Les Aff.); (Affidavit of Eran Varnai, dated January 10, 2008) (Varnai Aff.). Therefore, Ludlow has demonstrated its entitlement to summary judgment.

A party opposing summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.

Defendants argue that Rivington lawfully vacated the Premises pursuant to the terms of the Guaranty. The Guaranty provides in relevant part:

> "For the Purposes of this Guaranty, 'Vacate Date' shall mean the date specified in a notice ('the Vacate Notice') delivered to Landlord in the manner specified in the Lease for the delivery of notices, which date is the last day of a calendar month and not less than niney [sic] (90) days after the date of giving the Vacate Notice, upon which Tenant, and all persons and entities claiming by, through or under Tenant, will:
> (x) vacate and surrender possession of the

> Premises in accordance with all of the applicable provisions of the Lease, as if the Expiration Date, as defined in the Lease, thereunder had occurred."

(Exhibit E to Lesh Aff.). Defendants submitted a copy of a certified mail receipt demonstrating that on February 22, 2006, they provided Ludlow with written notice concerning Rivington's intent to vacate the Premises on June 15, 2006 as required under the Guaranty, and thus they are not liable for the sums outlined in the complaint (Exhibit D to Affirmation of Brian Clark Haberly, dated February 15, 2008) (Haberly Aff.). However, Ludlow contends that it never received the alleged letters.

Generally, "'proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee'" (*New York Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 547 [2d Dept 2006]). The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (*id.*). Furthermore, "an addressee's signature on a certified mail receipt supports a finding that the addressee received the notice" (*State Farm Mut. Auto. Ins. Co. v Kankam*, 3 AD3d 418, 419 [1st Dept 2004]).

Defendants submitted a copy of a certified mail receipt along with an affidavit from their attorney to support their allegations (Exhibit D to Haberly Aff); (Affidavit of Howard Leder, Esq., sworn to on February 15, 2008) (Leder Aff.). However, defendants' submission failed to include the official stamp of the United States Postal Service (Exhibit D to Haberly Aff.). Defendants also failed to submit a copy of the addressee's (Ludlow's) signature on the certified mail receipt. In addition, the record reveals that the United States Postal Service has no record of the certified mail receipt submitted by defendants (Exhibit H to Lesh Aff.). Hence, Ludlow's

allegation that it never received the requisite written notice of Rivington's plan to vacate prior to Ludlow serving defendants with a notice to produce, along with the submissions from the United States Postal Service, followed by defendants failure to produce Ludlow's signature on the alleged certified mail receipt are sufficient to rebut the presumption of receipt raised by defendants' proof of mailing (*State Farm Mut. Auto. Ins. Co. v Kankam*, 3 AD3d 418, *supra*).

Defendants further contend that they are not liable for Rivington's rent arrears because Ludlow should have applied Rivington's $17,922.00 security deposit to satisfy the base rent due in May and June of 2006. It is undisputed that Rivington failed to remit payment for the months of May and June of 2006. Article 51 of the Lease provides in part:

> "Tenant has deposited with Landlord the sum of $17,400, in cash, as security for the faithful performance and observance by Tenant of the terms, provisions and conditions of this lease; it is agreed that in the event Tenant defaults in respect of any of the terms, provisions, and conditions of this lease, including, but not limited to, the payment of fixed rent and additional rent, Landlord may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any fixed rent and additional rent or any other sum as to which Tenant is in default or for any sum which Landlord may expend or may be required to expend by reason of Tenant's default in respect of any of the terms, covenants, and conditions of this lease, including but not limited to, any damages or deficiency accrued before or after summary proceedings or other re-entry by Landlord. In the event that Tenant shall fully and faithfully comply with all of the terms, provisions, covenants, and conditions of this lease, the cash security and any interest thereon shall be returned to Tenant after the date fixed as the end of the lease and after delivery of entire

> possession of the Demised Premises to Landlord.
> In the event Landlord applies or retains any portion
>
> of all of the security deposited, Tenant shall
> forthwith restore the amount deposited shall
> be equal to two (2) months of Fixed Rental"

However, even if the vacate notice had been proper, defendants were still liable for the rent arrears because, under the Guaranty, all amounts due and owing prior to the vacate date should have been paid prior to the termination date (Exhibit E to Lesh Aff.). It is clearly written within the Lease that "Landlord may use, apply or retain the whole or any part of the security so deposited . . . for any sum which Landlord may expend or may be required to expend by reason of Tenant's default in respect of any of the terms, covenants, and conditions" of the Lease (Article 51). Accordingly, Ludlow used Rivington's security deposit to pay for a broker's commission to relet the Premises and to pay part of the legal fee toward drafting a new lease agreement for a new tenant (Varnai Aff.); (Exhibits A & B to Affirmation of Steven Lesh, dated March 4, 2008) (Lesh II Aff.). Thus, as a result of Rivington's improper vacatur and defendants' failure to remit all guaranteed amounts prior to the vacate date, defendants were liable for Rivington's default under the Lease.

Defendants also argue that they are not liable for Rivington's default through November 2006 because Ludlow failed to mitigate its damages.

The law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury (*Holy Properties Ltd., L.P. v Kenneth Cole Prods.*, 87 NY2d 130, 133 [1995]). However, leases are not subject to this general rule, for, unlike executory contracts, leases have been historically recognized as a present transfer of an

estate in real property (*id.*). Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages (*id.*).

As stated above, it is undisputed that Rivington abandoned the Premises prior to the expiration of the term of the Lease. Following Rivington's abandonment, Ludlow had three options under Article 18 of the Lease: (1) it could do nothing and collect the full rent due under the Lease, (2) it could have accepted Rivington's surrender and relet the Premises for its own account thereby releasing the tenant from any further liability, or (3) Ludlow could have notified Rivington that it was entering and reletting the Premises for Rivington's benefit. If Ludlow relet the Premises for Rivington's benefit, the rent collected would be apportioned first to repay Ludlow's expenses in reentering and reletting and then to pay Rivington's rent obligation (Article 18 of the Lease). However, Article 18 expressly provided that plaintiff was under no duty to mitigate damages upon the tenant's abandonment of the Premises. It provides in part:

> "In case of any such default, re-entry, expiration and/or dispossess by summary proceedings or otherwise, (a) the rent, and additional rent, shall become due thereupon and be paid at the time of such re-entry, dispossess and/or expiration . . . The failure of Owner to re-let the premises or any part or parts thereof shall not release or affect Tenant's liability for damages"

(Exhibit D to Lesh Aff.). Thus, Ludlow was within its rights under New York law and under the Lease to do nothing and collect any outstanding monies due (*Holy Properties Ltd., L.P. v Kenneth Cole Prods.*, 87 NY2d at 134).

Finally, Ludlow has demonstrated its entitlement to attorneys' fees. The Guaranty

provides:

> "In addition, Guarantor hereby covenants and agrees to pay within five (5) days after Landlord's demand therefor, all reasonable attorneys' fees and disbursements and all litigation costs and expenses incurred or paid by Landlord in connection with the enforcement of this Guaranty"

(Exhibit E to Lesh Aff.). As a result of the parties' agreement, Ludlow may obtain payment for all foreseeable and unforeseeable consequences of non-payment. The court has considered the remainder of defendants' unsupported arguments and finds them unavailing.

Accordingly, it is

ORDERED that the motion is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff 132 Ludlow Street LLC and against defendants Norman Kaish and Leonard Taub in the amount of $69,936.00, together with interest as prayed for allowable by law from June 30, 2006, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and it is further

ORDERED that the portion of plaintiff's action that seeks the recovery of attorneys' fees is severed and an assessment thereof is directed, and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed.

Dated: 11/10/08

Walter B. Tolub J.S.C.