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

PRESENT: Edmead Justice PART 35

Thirty-One

INDEX NO. 106759/08

MOTION DATE

-v-

MOTION SEQ. NO. 001

Haggerty, Thomas J.

MOTION CAL. NO.

The following 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

FILED
JUL 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of plaintiff Thirty-One Co. for an order, pursuant to CPLR §3212, granting it summary judgment on liability and damages against defendant Thomas J. Haggerty, in the amount of $70,046.67, and defendant Allied Diagnostic Imaging LLC, in the amount of $193,719.05, is granted; and it is further

ORDERED that plaintiff's motion for an order, pursuant to CPLR §3211(a) and (b) and CPLR §3212, dismissing the affirmative defenses contained in defendants' Answer is granted; and it is further

ORDERED that an assessment of attorneys' fees and costs incurred in this action shall be held on Monday, August 31, 2009 at 9:30 a.m., in Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O. Ira Gammerman, and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties and the Clerk of the Trial Support Office (Room 158) within 20 days of entry, file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed.

This constitutes the decision and order of the Court.

Dated: 7/28/09

HON. CAROL EDMEAD J.S.C.

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

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: PART 35

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THIRTY-ONE CO.,

Index No. 106759/08

Plaintiff,

-against-

DECISION/ORDER

THOMAS J. HAGGERTY and
ALLIED DIAGNOSTIC IMAGING LLC,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff Thirty-One Co. ("plaintiff") seeks to recover damages and attorneys' fees against defendants Thomas J. Haggerty ("Mr. Haggerty") and Allied Diagnostic Imaging LLC ("ADI") (collectively "defendants") for breach of a lease.

Plaintiff now moves, pursuant to CPLR §3212, for summary judgment as to liability and damages against defendants and an order, pursuant to CPLR §3211(a) and (b) and CPLR §3212, dismissing the affirmative defenses contained in defendants' Answer.

Background[1]

On or about November 14, 2005, plaintiff, as the landlord of the building located at 254 West 31st Street, New York, New York (the "Premises"), entered into a written lease agreement with ADI (the "Lease"). The Lease was to expire on September 30, 2015. In connection with the Lease, on November 2, 2005, Mr. Haggerty executed an agreement guaranteeing ADI's obligations under the Lease (the "Guaranty").

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[1] Information is taken from plaintiff's Complaint and defendants' Answer.

Plaintiff alleges that ADI vacated the Premises in January 2008, at which time ADI owed $70,046.67 for rent and additional rent, and Mr. Haggerty failed to pay plaintiff such rent and additional rent pursuant to the Guaranty. Plaintiff also claims that ADI owes plaintiff 148,719.05 for rent and additional rent due and owing through May 2008. Thus, plaintiff seeks judgment against Mr. Haggerty pursuant to the Guaranty (first cause of action), judgment against ADI pursuant to the Lease (second cause of action), and attorneys' fees, costs and expenses against defendants, jointly and severally, pursuant to ¶19 of the Lease and ¶4 of the Guaranty (third cause of action).

In their Answer, defendants allege the following affirmative defenses: (1) lack of personal jurisdiction over defendants; (2) the Complaint fails to state a claim upon which relief may be granted; (3) plaintiff failed to mitigate its damages; (4) the Premises and the keys were timely surrendered to plaintiff or plaintiff's agent or designee, thus contractually limiting plaintiff's liability to rent due at the time of the surrender of the Premises; (5) plaintiff breached the Lease prior to any material breach by defendants, thereby voiding defendants' obligations thereunder; (6) there was a material failure of consideration due to defendants for the Lease and Guaranty; (7) the Lease and Guaranty are void because they contain clauses that are illegal or void as against public policy and do not contain a severance clause.

Plaintiff's Motion

First, plaintiff argues that it is entitled to summary judgment against Mr. Haggerty as to for breach of the Guaranty. According to the affidavit of Sylvia Bonet ("Ms. Bonet"), Director of Asset Management of Winoker Realty Co., Inc. ("Winoker"), plaintiff's managing agent, the Guaranty was a prerequisite to plaintiff's entering into the Lease with ADI. Neither ADI nor Mr.

Haggerty have been released from their obligations under the Lease and the Guaranty, respectively. ADI returned the keys for the Premises in January 2008, at which time ADI owed unpaid rent and additional rent in the sum of $70,046.67. Pursuant to the Guaranty, Mr. Haggerty is obligated to pay plaintiff $69,744.87, representing unpaid rent and additional rent due and owing through January 2008, for the period during which ADI remained in possession of the Premises, legal fees of $301.80 plaintiff incurred in connection with the non-payment proceeding commenced against ADI in 2007. Plaintiff argues that having failed to pay such sums, summary judgment against Mr. Haggerty is warranted.

Second, plaintiff argues that it is entitled to summary judgment on its second cause of action against ADI for breach of the Lease, in the amount of $298,719, excluding legal fees. In addition, ADI is liable for all sums that shall have become due and payable through the date on which judgment is entered.

Plaintiff contends that after ADI vacated the Premises in January 2008, it failed to remove from the Premises, *inter alia*, two large pieces of medical equipment – an MRI machine and a CAT scan machine – that ADI leased from Worldwide Medical & Laboratory Instrumentation ("Worldwide") and had installed on the Premises. The machines "contained chemical substances so as to require specialized, expert handling for removal," plaintiff contends, and their presence rendered the Premises completely unuseable by anyone. As shown by a January 25, 2008 quote from Praxair Cryomag Services for decommissioning the MRI (the "Quote"), a letter dated January 8, 2008 from plaintiff's counsel to defendants' counsel confirming that ADI left the MRI machine at the Premises (the "January 8, 2008 letter"), a letter dated April 2, 2008 from Worldwide to Winoker (the "April 2, 2008 letter"), and a letter dated

April 3, 2008 from plaintiff's counsel to Worldwide concerning the removal of the MRI machine (the "April 3, 2008 letter"), the machines were not removed from the Premises until April 2008, despite plaintiff's prior demands for their removal. Thus, ADI owes plaintiff rent and additional rent through May 2008 in the sum of $151,868.89, which includes arrears through May 2008 ($148,719.05) and legal fees ($2,848.04) incurred in this action, and legal fees ($301.80) related to the 2007 non-payment proceeding. Plaintiff further contends that ADI also owes plaintiff rent and/or additional rent for the period from June 1, 2008 through November 2008 in the amount of $105,000. Accordingly, excluding legal fees, ADI's arrears amount to at least $253,719.05 through November 2008, plaintiff contends.

Further, pursuant to Article 18 of the Lease, ADI is obligated for the costs incurred by plaintiff for real estate brokerage commissions ($90,000) in connection with its re-lease of the Premises to M.J.M. Restaurant Corp. ("MJM") on May 30, 2008 (the "MJM Lease"). Plaintiff paid $45,000 of said commissions (the "June 12, 2008 Invoice"), and the remaining $45,000 was due in April 2009, upon the satisfaction of certain conditions.[2] As of the filing date of this action, MJM had not occupied the Premises and under Article 42(d), MJM's obligation to pay fixed rent was not to commence until November 28, 2008, which is the date "180 days following the date" of the June 1, 2008 commencement of the term of the MJM Lease. Thus, as of the filing date of this action, plaintiff has not been able to mitigate any of the damages resulting

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[2] Plaintiff contends that if judgment is entered in this action on or after April 2009, plaintiff will be entitled to recover the remaining $45,000 in brokerage commissions, if paid. Article 42(d) of the MJM Lease provides that the fixed monthly rent shall be reduced by $25,833.33 per month "for the 13th month of the term of the [MJM Lease]." Thus, if MJM Corp. does not default under the MJM Lease, MJM Corp. will receive a rent credit for the month of July 2009, which is "the 13th month of the term of the [MJM Lease]." Plaintiff will not have been able to mitigate damages with respect to the fixed rent that ADI will owe but is clearly not going to pay for the month of July 2009. If judgment is entered in this action on or after July 2009, plaintiff will be entitled to recover the amount of rent that is reserved in ADI's Lease for that month, plaintiff contends (Bonet aff., p. 9, note 3).

from ADI's breach of the Lease. Thus, ADI owes $298,719.05, which includes $253,719.05 in unpaid rent and additional rent set forth above and $45,000 in commissions, excluding legal fees. Plaintiff further contends that neither Mr. Haggerty nor ADI are entitled to credit for the security deposit. As to ADI, plaintiff is entitled to hold and apply ADI's $105,000 security deposit to all unmitigated damages that shall accrue until September 30, 2015, when the Lease was to expire.

Further, the Guaranty, which was to secure plaintiff for ADI's pre-vacatur defaults, precludes any credit to Mr. Haggerty for the security deposit. Also, Mr. Haggerty cannot claim credit for the security deposit because plaintiff is entitled to hold and apply the security deposit to all unmitigated damages until the September 30, 2015 Lease expiration date, plaintiff contends. ADI has already accumulated at least $105,000 in post-vacatur fixed-rent arrears for the period from June 1, 2008 through November 2008 that plaintiff has been unable to mitigate, plus the $45,000 in brokerage commissions. The $150,000 in post-vacatur arrears completely consumes the security deposit. ADI will continue to remain obligated for the rent and additional rent due and owing under the Lease, and as it becomes due through the term of the Lease, and through the date of entry of Judgment in this action to the extent plaintiff has not mitigated such amounts.

Third, plaintiff argues that it is entitled to summary judgment against defendants jointly and severally for attorneys' fees, costs and disbursements incurred by plaintiff. Article 19 of thc Lease provides for the payment of legal fees, costs, expenses and disbursements incurred by plaintiff by reason of any default under the Lease, and ¶C.4 of the Guaranty obligates Mr. Haggerty to satisfy plaintiff's Lease obligations, and to pay plaintiff the legal fees, costs, expenses and disbursements incurred by plaintiff by reason of any default by Mr. Haggerty

under the Guaranty. Accordingly, defendants are jointly and severally liable for plaintiff's recovery of attorneys' fees, costs, disbursements and expenses, and a hearing should be scheduled to fix the amount of damages to be awarded.

Fourth, plaintiff argues that each of defendants' affirmative defenses should be dismissed on the ground that they lack merit. Plaintiff contends that defendants' conclusory assertion that this Court lacks personal jurisdiction over defendants (first affirmative defense), lacks factual support, and a defendant cannot rely on a conclusory denial of service of process to rebut the sworn affidavits of service and forestall summary judgment. The Affidavits of Service indicate that the Summons and Complaint were properly served upon each of the defendants (the "May 27, 2008 Affidavit of Service on Mr. Haggerty" and the "May 28, 2008 Affidavit of Service on ADI"). And, service was properly completed by the filing of the proof of service, as reflected by the New York County Clerk's stamp on each of the Affidavits of Service. Further, by Stipulation, dated June 24, 2008, defendants "waive[d] any defense as to service of process." Finally, defendants failed to move for dismissal within 60 days of the service of their Answer, pursuant to CPLR §3211(e).

Moreover, as explicitly set forth on page 1 of the Lease, ADI is a limited liability company organized under the laws of the State of New York. As such, ADI is subject to the personal jurisdiction of this Court, plaintiff argues. Meanwhile, Mr. Haggerty was at the Premises doing business in New York within the meaning of CPLR §301, and the "New York Secretary of State Web Page" indicates that he continues to do business in the State of New York. Mr. Haggerty also transacted business within New York by executing the Lease and the Guaranty in New York. Further, the Lease and Guaranty were to be performed in New York,

and Mr. Haggerty operated and directed the business of ADI at the Premises in New York. Plaintiff contends that as this action clearly arises out of Mr. Haggerty's transaction of business within New York, he is subject to the Court's jurisdiction under CPLR §302.

Further, the absolute, good guy unconditional Guaranty waives defendants' second through seventh affirmative defenses.

In any event, defendants' second affirmative defense that the Complaint fails to state any cause of action, is improperly and inadequately pleaded, and should be dismissed, plaintiff contends.

As to the third affirmative defense, plaintiff had no obligation whatsoever to mitigate damages as to ADI's default because the Lease and Premises are entirely commercial, plaintiff argues. The defense is also meritless to the extent that it is intended to refer to ADI's security deposit, as explained above. And, the Guaranty provides that "the security shall not be applied to any [guaranteed] Obligations paid or performed by" Mr. Haggerty (Guaranty, ¶ C.1.). The Guaranty also is unconditional, plaintiff argues, citing Guaranty, ¶ C.2.

Plaintiff argues that defendants' fourth affirmative defense, which alleges that ADI's and Mr. Haggerty's liability is limited to the arrears due at the time ADI returned the keys to the Premises, is unavailing. As to Mr. Haggerty, the Guaranty provides that he is liable for the unpaid sums due under the Lease that accrued until ADI vacated the Premises, plaintiff argues. Defendants concede that liability continued to accrue at least until the keys for the Premises were returned to plaintiff, *i.e.*, January 2008, plaintiff contends. Thus, Mr. Haggerty is liable for all sums that accrued through January 2008. In addition, in leaving the machines on the Premises,

ADI remained in possession of the Premises until April 2008, when plaintiff had the machines removed.

Further, the fourth affirmative defense does not allege that plaintiff released ADI from its obligations under the Lease. The Lease plainly provides that ADI remains liable for the monetary obligations of the Lease through the expiration date, September 30, 2015. Therefore, plaintiff is entitled in this action to recover from ADI all of the sums that have accrued to date, as well as all sums that shall accrue until the issuance of judgment herein.

Plaintiff next argues that the fifth affirmative defense alleging that plaintiff's material breach of the Lease terminated defendants' obligations is unsupported by any facts regarding when or in what manner plaintiff allegedly breached any of its obligations. Such defense is also barred by the terms of the Guaranty and Lease. First, Mr. Haggerty has no basis to allege that plaintiff breached any obligation owed to him because plaintiff owed no obligation to Haggerty under the Guaranty. Second, as set forth above, the unconditional nature of the Guaranty waives all defenses and counterclaims. Third, the defense is specifically barred to the extent premised on a purported breach of some obligation that plaintiff owed to ADI, because ¶ C.2 of the Guaranty unambiguously provides that Mr. Haggerty's obligations "remain in full force and effect without regard to . . . any defense of . . . Tenant under the Lease, or any invalidity or unenforceability . . . of any term of the Lease." The defense is also barred by the Lease, which provides at page 1 that Tenant must pay the rent "without any setoff or deduction whatsoever" and by the fact that ADI's obligation to pay rent is an independent obligation (Lease, Article 55).

Plaintiff argues that the sixth affirmative defense, which alleges that "[t]here was a material failure of consideration due to defendants for agreements at issue," must be dismissed because it supplies no supporting facts whatsoever. The defense is also barred for the same

reasons that bar the fifth affirmative defense. With respect to Mr. Haggerty, there cannot have been any failure of consideration for his giving the Guaranty. As explicitly recited in ¶ B of the Guaranty, plaintiff required Mr. Haggerty to give the Guaranty as a condition to entering into the Lease with ADI. Thus, the consideration for Mr. Haggerty's giving the Guaranty was plaintiff's entering into the Lease, plaintiff argues. Once plaintiff entered into the Lease, Mr. Haggerty received full consideration for giving the Guaranty.

Lastly, plaintiff argues that defendants' conclusory allegation in their seventh affirmative defense that "[t]he agreements at issue are void since they contain clauses that are illegal or void as against public policy and do not contain a severance clause," fails to identify any illegal or void clauses in the Lease or Guaranty. The Lease and Guaranty contain provisions that are standard and in no way illegal, void or against public policy, plaintiff argues. In addition, contrary to defendants' assertion, both the Lease and the Guaranty contain severance clauses.

Defendants' Opposition

Defendants argue that plaintiff failed to offer sufficient evidence to eliminate material facts regarding defendants' liability and damages, pursuant to the Guaranty and Lease.

First, defendants argue that plaintiff failed to establish that the Guaranty is unconditional Mr. Haggerty is liable under the Guaranty only in the event ADI defaults and fails to vacate the Premises. As such, liability and damages are not fixed at the time of default, but rather, are contingent upon disputed factual allegations, namely if and when Tenant was in default and subsequently failed to vacate the Premises, defendants argue. Plaintiff does not allege default anywhere in the Complaint or present motion, and fails to identify the nature and/or date of default.

In addition, plaintiff has failed to establish the underlying debt. The demanded amounts fail to take into account certain payments made by defendants and certain credits owed to defendants, including, but not limited to, defendants' security deposit of $105,000, defendants argue. In its Complaint, plaintiff alleges unpaid rent of $70,046.67 due and owing through January 2008 and $148,719.05 due and owing through May 2008. In its motion, plaintiff alleges further unpaid rent of $105,000 due and owing from June 1, 2008 through November 2008, although plaintiff re-let the Premises in May at a significantly higher rent. ADI is not liable for any amounts allegedly due after the execution of the MJM lease, because plaintiff cannot collect double rent, defendants contend. Defendants further contend that plaintiff "submitted no evidence to support any of its assertions, submitted no evidence to justify its calculations, submitted no evidence regarding [ADI's] alleged default, submitted no evidence of any kind regarding the date these sums began to accrue or why."

Second, defendants argue that plaintiff failed to submit sufficient evidence to eliminate issues of material fact regarding ADI's liability on the Lease. On January 2, 2008, ADI returned the keys to plaintiff and vacated the Premises. Thus, any alleged liability does not extend through the month of January, defendants argue.

Defendants argue that plaintiff has failed to offer any evidence sufficient to support its allegations that MJM has not, thus far, occupied the Premises or that MJM is not in default of its rental obligations at this time. ADI notified plaintiff that the MRI equipment on the Premises was the property of Worldwide, and that it was on the Premises when defendants initially leased the Premises. Plaintiff notified ADI that it would permit Worldwide access to the Premises for the removal of the equipment (see the January 8, 2008 Letter). "Apparently, plaintiff allowed the

equipment to remain on the Premises for several months after Tenant vacated the Premises," plaintiff contends. Plaintiff also failed to submit any evidence that it demanded defendants to remove the equipment and that the MRI machine remained on the Premises until April 2008.

Although plaintiff claims that it accumulated at least $105,000 in post-vacatur arrears for the period from June 1, 2008 through November 2008, plaintiff re-let the Premises to MJM Corp. on May 30, 2008, for a significantly higher rentable rate. Defendants argue that if MJM began to occupy the Premises prior to November 2008, or if MJM is in default, pursuant to the terms of the MJM Lease, facts upon which plaintiff fails to submit any evidence, MJM, and not defendants, would be liable for the rent due and owing on the Premises from June 1, 2008 through November 2008. Accordingly, as plaintiff failed to eliminate the above factual issues, let alone conclusively demonstrate its entitlement to judgment as a matter of law, plaintiff's motion must be denied, defendants argue.

Third, defendants argue that plaintiff failed to mitigate its damages by allowing the equipment to remain on the Premises after defendants vacated. To the extent plaintiff re-let the Premises, defendants cannot be held liable for any sums alleged due after the date of the MJM Lease. (Haggerty Aff., ¶ 13). Caselaw plaintiff cites for the proposition that plaintiff is under no obligation to mitigate damages incurred under a commercial lease is not on point, as plaintiff failed to point to any provisions of the Lease that expressly providc that it is undcr no duty to mitigate its damages, defendants contend. As defendants' defense that plaintiff failed to mitigate its damage is valid, the defense cannot be dismissed at this juncture, defendants argue.

Fourth, defendants argue that plaintiff's motion is premature, since defendants have not been given an opportunity to conduct discovery. Further, there are defenses that depend upon

the knowledge that is exclusively in the possession of the plaintiff. Therefore, summary judgment should be denied.

Plaintiff's Reply

Plaintiff contends that defendants have conceded most of plaintiff's *prima facie* case for summary judgment, including ADI's execution of the Lease, Mr. Haggerty's execution of the Guaranty, that ADI vacated the Premises prior to the September 30, 2015 expiration date of the Lease, that ADI did not abandon the Premises any earlier than January 2, 2008 and did not return the keys to the Premises until January 2, 2008, and that Mr. Haggerty has failed to pay anything under his Guaranty.

Plaintiff maintains that as a matter of law Mr. Haggerty is liable for all unpaid rent due for the full month of January 2008. Under the unconditional Guaranty, Mr. Haggerty is liable for ADI's obligations that accrue through ADI's proper vacatur.

Plaintiff also contends that it is well settled that a guarantor waives any defenses and counterclaims in an action by the creditor where the guarantor absolutely and unconditionally guarantees payment, plaintiff contends. Defendants' arguments as to mitigation are baseless for the further reason that by executing the Guaranty, Mr. Haggerty waived any duty owed to the guarantor by the creditor.

As to ADI, plaintiff is entitled under the Lease to hold and apply the security deposit against all damages and arrears that shall accrue until September 30, 2015, when the Lease was to expire. In addition, as of the date of plaintiff's motion, excluding legal fees, ADI's liability amounted to no less than $298,719.05, which far exceeds the $105,000.00 security deposit. There is also no assurance that MJM will continue to be a tenant in good standing, plaintiff

argues. As to Mr. Haggerty, pursuant to the Lease and the unconditional Guaranty, plaintiff is entitled to apply the security deposit to ADI's post-vacatur arrears that have accrued and/or that shall accrue until September 30, 2015. Plaintiff is not obligated to apply the security deposit to ADI's pre-vacatur arrears, and Mr. Haggerty is not entitled to any credit for ADI's $105,000 security deposit. In particular, the Guaranty bars Mr. Haggerty from receiving any credit for the security deposit, plaintiff contends. ADI now has accumulated at least $105,000 in post-vacatur fixed-rent arrears for the period from June 1, 2008 through November 2008 that plaintiff has been unable to mitigate, plus the $45,000 in brokerage commissions that plaintiff has paid in re-renting the Premises, for which the Tenant is also liable. The aforesaid total of $150,000 in post-vacatur arrears would completely consume the security deposit if it were applied against those post-vacatur arrears (rather than be held against future unmitigated arrears). Thus, Mr. Haggerty is barred from receiving credit for ADI's security deposit.

Plaintiff also contends that it is well settled that under a lease provision requiring payment of rent in advance on the first day of the month, the entire rent for each month is due and owing on the first day of the month. Here, the Lease provides, at page 1, that the rent must be paid "in equal monthly installments in advance on the first day of each month." Accordingly, the entire rent for January 2008 came due and owing under the Lease on January 1, 2008. Plaintiff argues that defendants concede that ADI turned over the keys on January 2, 2008, and that ADI abandoned the Premises no earlier than January 2, 2008. Thus, as of January 2, 2008, the Tenant owed all of the January 2008 rent, and under the Guaranty, Mr. Haggerty is liable for all of the January 2008 rent.

Plaintiff further argues that the January 8, 2008 Letter to defendants' counsel states that in addition to the MRI machine, there remained on the Premises personal property owned by ADI, and that it was agreed that ADI's personal property would be deemed abandoned. Defendants do not controvert the statements of plaintiff's counsel in the January 8, 2008 Letter, plaintiff argues. Moreover, Ms. Bonet attests that at the time ADI turned over the keys on January 2, 2008, ADI failed to remove from the Premises "items of personal property," and Arbitration Award CAT scan machine" as well as the MRI machine. Defendants are completely silent regarding Ms. Bonet's statement.

In addition, Mr. Haggerty is liable for the arrears that accrued through January 2008 because the Bonet Aff. set forth that ADI indeed had installed the MRI machine on the Premises, that ADI leased the MRI machine from Worldwide, and that ADI used the MRI machine. Indeed, Article 2 of the Lease provides for the Premises to be used, *inter alia*, for the performance of MRI evaluations. Defendants do not deny that ADI leased and used the MRI machine, plaintiff contends. Defendants also do not deny that ADI itself caused the subject MRI machine to be installed in the Premises. Instead, defendants attempt to direct the Court's attention away from the fact that ADI installed the MRI machine, and attempts to misdirect the Court's attention to the question of whether the subject MRI machine was installed as of the commencement of the Lease, or at a later date, plaintiff argues citing the Haggerty Aff., ¶ 6. Again, defendants do not deny that ADI leased and used the MRI machine, or that ADI caused the MRI machine to be installed in the Premises, plaintiff argues. It is undisputed that the MRI machine was not removed in January 2008 and remained in the Premises until April 2008. ADI cannot be said to have vacated the Premises while the MRI machine remained on the Premises,

plaintiff argues. Therefore, ADI cannot be said to have vacated the Premises any earlier than January 2008.

Plaintiff maintains that the evidence clearly warrants summary judgment, as plaintiff clearly explained the calculation of damages. In particular, plaintiff submitted the Lease and Guaranty, both of which defendants have admitted. Further, Ms. Bonet attests to ADI's abandonment of the Premises prior to the Lease's expiration and that the unpaid rent and additional rent reflected in the Arrears Statement were due pursuant to the terms of the Lease. In addition, plaintiff submitted the MJM Lease. As set forth in paragraphs 19 through 26 of the Bonet Aff., pursuant to the explicit provisions of the MJM Lease, as of November 28, 2008, MJM had paid no rent because the specified rent-free period had not expired and MJM had not occupied the Premises.

Plaintiff further argues that defendants' challenge to the quantum of evidence and the calculations submitted by plaintiff are conclusory. In the Haggerty Aff., Mr. Haggerty "appears to refer to some unspecified credit or item of arrears," defendants argue, citing Haggerty Aff., ¶ 9. However, Mr. Haggerty failed to identify any such item. In fact, the Haggerty Aff. improperly refers the Court to defendants' Memorandum of Law ("MOL") for a factual explanation of such credits or arrears items. However, defendants' MOL contains no such explanation, plaintiff contends. Indeed, defendants' MOL could not properly provide any explanation that had not been stated in the Haggerty Aff., since the Haggerty Aff. is the only sworn statement submitted by defendants, plaintiff argues. Plaintiff also contends that conclusory assertions such as those advanced by defendants are insufficient to forestall summary judgment.

In response to defendants' argument that plaintiff failed to mitigate its damages by allowing the equipment to remain on the Premises after defendants vacated, plaintiff contends that it is black letter law that under a commercial lease, the landlord has no obligation whatsoever to mitigate damages; after premature abandonment by the tenant, the landlord may do nothing and collect the full amount of rent reserved under the lease as it becomes due. This rule applies as a matter of law to commercial leases, and the rule absolutely does not require that the lease address the matter of mitigation, plaintiff contends. Therefore, it would be entirely irrelevant if the Lease did not address mitigation, plaintiff argues. However, ¶18 of the Lease provides that plaintiff has no obligation to mitigate. Thus, plaintiff had no obligation to collect rent earlier under the MJM Lease, or to mitigate, or to otherwise act for the benefit of defendants, plaintiff argues.

Plaintiff further argues that it is of no consequence that, once rental payments commence under the MJM Lease, the rental payments are to be higher than under the ADI Lease. Indeed, under the express provisions of the ADI Lease, and as a matter of law, ADI is liable for the full amount of the rent for the period through November 28, 2008, as no rent was collected for the period through November 28, 2008 under the MJM Lease. ADI also is not entitled to any credit for any amount by which the MJM rent may exceed the rent due under the ADI Lease. Article 18 of the Lease provides that as each month passes, ADI is liable for any monthly deficiency in rents collected by the landlord from a re-rental of the Premises, but that ADI is not entitled to a credit if rent paid by the new tenants during any month exceeds the rent due under the Lease.

As to the MRI and CAT scan machines, and other personal property left in the Premises after January 2, 2008, plaintiff had no obligation whatsoever to remove such items, or to remove

those items at any earlier time, plaintiff argues. As discussed above, it was ADI's obligation to remove the items; plaintiff repeatedly demanded removal but because of the bulk, weight and dangerous nature of the MRI and the CAT scan machines, removal was not accomplished until April 2008, plaintiff argues. As demonstrated above, plaintiff need not have re-rented the Premises at all, and plaintiff would have been entitled to do nothing and recover the full amount of rent reserved in the Tenant's Lease. Thus, it is baseless for defendants to assert that plaintiff should have removed those items earlier, plaintiff argues

Plaintiff also points out that defendants do not challenge plaintiff's claim that if Mr. Haggerty is found liable under the Guaranty, then he is obligated under the Guaranty to pay plaintiff's attorneys' fees and expenses incurred in enforcing the Guaranty. Similarly, defendants do not challenge that ADI is liable under the Lease for attorneys' fees and expenses incurred by plaintiff as a result of ADI's default under the Lease. Thus, there can be no question that both Mr. Haggerty and ADI are liable for the attorneys' fees and expenses incurred by plaintiff in prosecuting the summary proceeding against ADI, and Mr. Haggerty is liable for the attorneys' fees and expenses incurred by plaintiff in prosecuting this action, plaintiff argues. Plaintiff also argues that as defendants have failed to address that branch of plaintiff's motion to dismiss all of defendants' affirmative defenses, the Court should dismiss said affirmative defenses.

Defendants also failed to show facts essential to justify that opposition may exist, but cannot then be stated, pursuant to CPLR §3212[f] so as to warrant holding summary judgment in abeyance. Denial of a motion for summary judgment pursuant to CPLR §3212(f) must be supported by something more than mere suspicion, surmise or conjecture; and the mere hope that disclosure might uncover evidence likely to help the non-movant's case does not provide a basis

to postpone decision of upon a summary judgment motion, plaintiff contends. Defendants failed to show that discovery would reveal any fact that would enable them to avoid summary judgment. In addition, the Court of Appeals has added an additional requirement to CPLR § 3212(f), requiring that a party seeking the benefit of that provision establish that it has attempted to ascertain facts relevant to the action prior to the making of the subject summary judgment motion, plaintiff contends. Defendants failed to show that they did anything to ascertain any facts between the time that they served their July 14, 2008 answer and December 17, 2008 when plaintiff served the instant motion for summary judgment, plaintiff argues.

Analysis

Summary Judgment

It is well settled that where a plaintiff is the proponent of a motion for summary judgment, pursuant to CPLR §3212, the plaintiff must establish that the cause of action has no merit, sufficient to warrant the Court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 NY Slip Op 51390 [U] [NY Sup 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.* at 853; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as

depositions" (CPLR §3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient *(Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

Liability and Damages on the Guaranty

A guaranty, by definition, is a secondary obligation to answer for the debt of another, the primary obligation, in this case, the Lease (*see Michaels v Chemical Bank*, 110 Misc 2d 74, 76 [1981]). "A guaranty is to be interpreted in the strictest manner"(*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]). Further, "an absolute and unconditional guaranty agreement is independent and stands alone in imposing obligations on the guarantor" (*Davimos v Halle*, 35 AD3d 270, 272, 2006 NY Slip Op 09514, *2 [1st Dept 2006]). A party seeking summary judgment to enforce a written guaranty need only establish the existence of "an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]; *BNY Financial Corp. v Clare*, 172 AD2d 203 [1st Dept 1991]. Further, to establish that the guaranty ever took effect, the plaintiff must demonstrate that there was a default on the part of the principal obligor (*Madison Ave. Leasehold, LLC v Madison Benlley Assoc. LCC, et. al*, 30 AD3d 1, 10 [1st Dept 2006]).

Here, plaintiff has established a *prima facie* entitlement to summary judgment as to liability on the Guaranty. It is undisputed that on or about November 14, 2005, plaintiff entered into the Lease with ADI. On November 2, 2005, Mr. Haggerty executed the Guaranty, in connection with the Lease, and the Guaranty was absolute and unconditional. The Guaranty clearly states:

> The obligations of Principal [*i.e.*, Mr. Haggerty] under this Agreement are *unconditional*, are not subject to any set-off or defense based upon any claim Principal may have against Owner, and will remain in full force and effect *without regard to any circumstance or condition* including, without limitation: (a) any modification or extension of the Lease (except that the liability of Principal hereunder will apply to the lease as so modified or extended); (b) any exercise or non-exercise by Owner of any right or remedy in respect

> of the Lease, or any waiver, consent or other action, or omission, in respect of the Lease; . . . (e) *any defense to or limitation on the liability or obligations of Tenant under the Lease, or any invalidity or unenforceability, in whole or in part, of any obligation of Tenant under the Lease or any term of the Lease.*
> (Guaranty, ¶ C.2) (*emphasis added*)

Such clear language is sufficient to establish that the Guaranty was absolute an unconditional (*Citizens and Southern Commercial Corp. v Catapano*, 164 AD2d 812, 814 [1st Dept 1990]). Further, according to the First Department, an absolute and unconditional guaranty is binding on the guarantor, even if the principal escapes liability (*Manufacturers Hanover Trust Co. v Green*, 95 AD2d 737 [1st Dept 1983], *appeal dismissed*, 61 NY2d 760 [1984]).

Second, plaintiff has established the underlying debt. Based on the evidence in the record, it is undisputed that the Lease was to expire on September 30, 2015. It is also undisputed that ADI vacated the Premises in January 2008, in violation of the Lease, resulting in damages to plaintiff. Thus, plaintiff established Mr. Haggerty's liability for unpaid rent of $70,046.67, which includes $301.80 in legal fees, due and owing through January 2008 (see Arrears Statement; Bonet Aff., ¶ 12). Defendants' argument that it returned the keys to plaintiff and vacated the Premises on January 2, 2008, and is thus not liable for rent for the full month of January, is unavailing. The Lease clearly states that the rent must be paid "in equal monthly installments in advance on the first day of each month" (Lease, p. 1). The First Department has upheld such lease provisions (*see Intell 157 West 57th Street Realty. LLC v Block*, 2002 WL 243391, 2002 NY Slip Op 50058 [U] [1st Dept 2002] ["Since the parties' lease provided that rent was payable in advance on the first of the month, tenant was obligated to pay for the entire month, whether or not it used the premises for the full period]; *Bernstein v Enalander*, 25 NYS2d 319 [1st Dept 1941]). Therefore, the entire rent for January 2008 became due and

owing under the Lease on January 1, 2008. According to the Guaranty, Mr. Haggerty is liable for "the full performance and observance of all the agreements to be performed by Tenant under the Lease *while Tenant was in possession of the Premises*, including the timely payment of all fixed rent, additional rent, use and occupancy charges and other sums which shall be payable by Tenant to Plaintiff pursuant to the Lease" (Bonet Aff., ¶ 6; Guaranty, ¶ C.1). The parties' arguments regarding the equipment allegedly left on the property after ADI returned the keys on January 2, 2008 are of no moment because plaintiff is seeking to hold Mr. Haggerty liable only for rent due through the month of January 2008 (reply, ¶ 19). Defendants fail to provide any evidence that ADI *was not* in possession of the Premises on January 1, 2008. Therefore, based on the evidence in the record, ADI was still in possession of the Premises on January 1, 2008. As such, ADI owed rent for the full month of January. Further, plaintiff has established that ADI failed to pay plaintiff rent and additional rent due for January 2008 (Complaint, ¶¶ 9, 11; Bonet Aff., ¶ 10) and that Mr. Haggerty failed to pay plaintiff rent and additional rent due and owing through January 31, 2008 (Complaint, ¶ 10; Bonet Aff., ¶ 12). Therefore, Mr. Haggerty is liable for unpaid rent through January 31, 2008, pursuant to ¶ C.1 of the Guaranty.

Defendants' argument that plaintiff failed to take into account "certain payments"made by defendants and "certain credits" owed to defendants (*i.e.* ADI's security deposit) is insufficient to defeat plaintiff's *prima facie* entitlement to summary judgment as to liability on the Guaranty. The Lease provides that in the event ADI defaults on the Lease, plaintiff is entitled to hold and apply ADI's $105,000 security deposit to any rent and additional rent due and owing (Lease, Art. 31; Bonet Aff., ¶ 29). However, the Guaranty expressly provides that plaintiff " shall not be required to use any security under the Lease before proceeding against or

collecting any sums from Principal" (Guaranty, ¶ C.1). Further, the Guaranty also states that the "obligations of Principal [*i.e.*, Mr. Haggerty] under this Agreement . . . are not subject to any set-off or defense based upon any claim Principal may have against Owner" (Guaranty, ¶ C.2). The Courts have upheld such lease provisions (see e.g., *Wiener v Tae Han*, 291 AD2d 297, 2002 NY Slip Op 01362 [1st Dept 2002] [rejecting guarantors' argument that they should have been given credit for the security deposit on the ground that "under the terms of both the subject lease and guarantees, plaintiff was entitled to apply the defendants' security deposit to posteviction rent of the tenant"]; *345 Park Ave. South Partners v Barbounia NYC, LLC.*, 2007 WL 2175847, 2007 NY Slip Op 32112 [U] [NY Sup 2007], *citing Wiener v Tae Han* [holding that the plaintiff landlord was "entitled to first apply the security deposit to the rents which last became due after the Vacation Date and were, therefore, arguably, not covered by the Guaranty. There is no requirement that the security be applied in the manner most beneficial to the guarantors"]).

Finally, except for the one statement in the Haggerty Aff., defendants provide no evidence of any payments or credits that should be applied to the amounts due and owing plaintiff. As discussed above, mere conclusions and unsubstantiated allegations or assertions are insufficient to defeat a *prima facie* case for summary judgment (*Alvord and Swift v Steward M. Muller Constr. Co.* at 281-82; *Zuckerman* at 560). Accordingly, as defendants have failed to defeat plaintiff's *prima facie* case, plaintiff's motion for summary judgment as to liability and damages on the Guaranty, in the amount of $70,046.67, is granted.

Liability and Damages on the Lease

To state a cause of action for breach of an agreement, such as a lease, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by

the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071[A], 2006 NY Slip Op 50497 [U] [NY Sup 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Volt Delta Resources LLC v Soleo Communications Inc.*, *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *see also Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]). Further, a complaint alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 [NY Sup 2006], *citing Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [3d Dept 1987], *accord Valley Cadillac Corp. v Dick,* 238 AD2d 894, 894 [4d Dept 1987]).

Here, plaintiff has established a *prima facie* entitlement to summary judgment as to liability and damages on the Lease.

It is undisputed that on or about November 14, 2005, plaintiff and ADI entered into the Lease for the Premises. The Lease was to expire on September 30, 2015. As discussed above, the evidence in the record establishes that ADI breached the Lease by vacating the Premises in January 2008, resulting in pecuniary damages to plaintiff. Further, plaintiff has established by the Arrears Statement and the Bonet Aff. that, pursuant to Article 18 of the Lease, it incurred the following damages as a result of ADI's breach: ADI's arrears through May 2008 of $148,719.05, legal fees of $2,848.04 incurred in this action, legal fees of $301.80 in connection with the non-payment summary eviction proceeding commenced against ADI in 2007; $5,000 in real estate

brokerage commissions in re-renting the Premises to MJM, and rent and additional rent due for the period from June 1, 2008 through November 2008 in the amount of $105,000, amounting to a total of $298,719.05 in damages.

Further, defendants' argument that ADI is not liable for any amounts due after the execution of the MJM Lease lacks merit.

When considering documentary evidence, such as a lease, the Court looks to see whether the lease "unambiguously contradicts the allegations supporting a litigant's cause of action" (*150 Broadway NY Associates, L.P. v Bodner*, 14 AD3d 1, 5-6 [1st Dept 2004]). "It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*id.* at 6). The test for ambiguity in a written agreement is well settled: "A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank*, 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). A mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not sufficient to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1995]).

Here, the documentary evidence in the record clearly establishes ADI's liability on the Lease, even after the execution of the MJM Lease.

According to Article 18(b) of the ADI Lease, in case of default ADI is liable for any shortfall between the amounts reserved under the Lease and any amounts received by plaintiff in re-renting the Premises:

> (b) Owner may re-let the demised premises . . . for a term or terms, which may at Owner's option be less than or exceed the period which would otherwise have constituted the balance of the term of this lease, *and may grant concessions or free rent or charge a higher rental than that in this lease*, and/or (c) Tenant . . . shall also pay Owner, as liquidated damages . . . *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. The failure of Owner to re-let the demised premises or any part or parts thereof shall not release or affect Tenant's liability for damages.* In computing such liquidated damages there shall be added to the said deficiency such expenses as Owner may incur in connection with re-letting, such as legal expenses, reasonable attorney fees, brokerage, advertising and for keeping the demised premises in good order, or for preparing the same for re-letting. . . . *Owner shall in no event be liable, in any way whatsoever, for failure to re-let the demised premises, or in the event that the demised premises are re-let, for failure to collect the rent therof under such re-letting, and in no event shall Tenant be entitled to receive any excess, if any, of such net rent collected over the sums payably by Tenant to Owner hereunder.*
> (Lease, Art. 18[b] and [c]) (*emphasis added*)

It is undisputed that plaintiff re-let the Premises to MJM on May 30, 2008. Article 42(d) of the MJM Lease provides MJM with a rent-free period until "the earlier of . . . 180 days following the date the term of this lease shall commence or . . . the date Tenant . . . first occupies the demised Premises . . . for the conduct of business." Article 42(e) further provides that "the term of this lease shall commence on the earlier of June 1, 2008 or the date on which Owner offers Tenant possession of the demised Premises." Thus, according to the terms of the MJM Lease, MJM was not to start paying rent until November 28, 2008, *at the latest*.

The ADI Lease makes clear plaintiff was free to charge MJM higher rent and offer MJM an 180-day period of free rent (Lease, Art. 18[c]). The ADI Lease also makes clear that plaintiff is not liable for its " failure to collect the rent therof under such re-letting" (Lease, art. 18[c]). In other words, plaintiff's failure to collect rent does not affect ADI's obligation to "pay Owner, as liquidated damages . . . 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" (*id.*).

Ms. Bonet attests that plaintiff did not offer MJM possession of the Premises prior to June 1, 2008, and rent from MJM was not due until 180 days later, November 28, 2008, plaintiff argues (Bonet Aff., ¶ 23). Therefore, the evidence in the record establishes that defendants are liable for rent through November 2008.

Defendants' argument that plaintiff had a duty to mitigate damages on the ADI Lease is not a defense to liability (*see 345 Park Ave. South Partners v Barbounia NYC, LLC.*) In any event, the argument is meritless. It is well settled a landlord is under no duty to mitigate damages arising after a tenant defaults on a commercial lease *(Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130, 133 [1995] ["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"]). Further, defendants' argument that ADI is entitled to credit for the security deposit lacks merit, as discussed above.

Accordingly, as defendants have failed to defeat plaintiff's *prima facie* case as to liability on the Lease, plaintiff's motion for summary judgment as to liability on the Lease is granted.

Plaintiff seeks damages on the Lease of $298,719.05, which includes rent and additional rent through May 2008 in the sum of $148,719.05, rent and additional rent for the period from June 1, 2008 through November 2008 in the amount of $105,000, and brokerage commissions in the amount of $45,000, pursuant to Lease Art. 18. Plaintiff argues that ADI should not get credit

for its security deposit because plaintiff is entitled to "hold and apply ADI's security deposit to all unmitigated damages that shall accrue until September 30, 2015," when the Lease was set to expire (Bonet Aff., ¶ 34). However, this argument lacks merit. First, plaintiff only claims unmitigated damages through November 2008, as discussed above. Second, plaintiff provides no basis, either a provision of the Lease or caselaw, to support the proposition that it does not have to apply ADI's security deposit to the damages it suffered as a result of ADI's default. To the contrary, Article 31 of the Lease provides:

> Tenant has deposited with Owner the sum of $105,000.00 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 rent and additional rent, *Owner may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any rent and additional rent, or any other sum as to which Tenant is in default, or for any sum which Owner 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 in the reletting of the demised premises*, whether such damages or deficiency accrued before or after summary proceedings or other re-entry by Owner. (*Emphasis added*)

It is well settled that a security deposit "remains the property of the tenant unless and until he has defaulted in his obligations under the lease. . . . Upon such default, of course, *the deposit may be used to offset actual damages or, if the lease contains an enforceable liquidated damages clause, as liquidated damages*" (*Rivertower Associates v Chalfen*, 153 AD2d 196, 199 [1st Dept 1990] (*emphasis added*). After the security deposit is applied to the landlord's actual or liquidated damages, then the balance, if any, must be returned to the tenant (*Prudential Westchester Corp. v Tomasino*, 5 AD2d 489, 493 [1st Dept 1958]). As plaintiff only provides proof of actual damages through November 2008, and as it is required to apply ADI's security deposit to its

damages, pursuant to Lease Art. 31, plaintiff is entitled to recover its actual damages through November 2008, *minus* the $105,000 security deposit, or $193,719.05.

Attorneys' Fees

A plaintiff is not entitled to an award of an attorney's fee absent an agreement between the parties, statutory authorization, or court rule (*Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]; *Crispino v Greenpoint Mortg. Corp.*, 769 NYS2d 553 [2d Dept 2003] *citing Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68 [2d Dept 1998]). Here, it is undisputed that ¶ 4 of the Guaranty and Article 19 of the Lease provides for plaintiff's recovery of attorneys fees in this action *(see e.g. BNY Financial Corp. v Clare* at 205 ["With respect to attorneys' fees, the guaranty expressly provided for them if the indebtedness was placed with an attorney for collection. Therefore, liability for attorneys' fees on the second cause of action is clear and remand is required for a determination of a reasonable amount to be awarded"]; *Solow Mgmt. Corp. v Tanger*, 19 AD3d 225, 226 [1st Dept 2005] ["As a general matter, case law establishes that where a landlord has a right to recover attorneys' fees pursuant to a lease provision, the recoverable fees are those that are reasonable"]). Accordingly, plaintiff's motion for summary judgment on liability for attorneys fees is granted, with the exact amount to be determined at a hearing.

Insufficient Discovery

It is well settled that an argument opposing summary judgment on the grounds of insufficient discovery "is unavailing where the nonmoving party has failed to 'produce some evidence indicating that further discovery will yield material and relevant evidence'" (*Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3d 426, 427 [2d Dept 2008], *quoting*

Fleischman v Peacock Water Co., Inc., 51 AD3d 1203, 1205 [3d Dept 2008]); *Hayden v City of New York*, 809 NYS2d 75, 76 [1st Dept 2006] ["In addition, plaintiff failed to show that the representatives already deposed had insufficient knowledge or were otherwise inadequate, or that further discovery was warranted by reason of a substantial likelihood that additional persons sought for deposition possessed information material and necessary to oppose the motion"]; *Prestige Decorating and Wallcovering, Inc. v U.S. Fire Ins. Co.*, 49 AD3d 406, 407 [1st Dept 2008] ["Based on the record, the discovery that has already taken place, and the lack of a showing of what further evidence might be unearthed, the asserted need for further discovery reduces itself to a 'mere hope,' which is insufficient to defeat summary judgment"]; *Steinberg v Abdul*, 230 AD2d 633, 633 [1st Dept 1996] ["We add that the mere hope, expressed by plaintiffs, that evidence sufficient to establish defendants' assumption of a duty to plaintiffs' decedent may be obtained during discovery does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212[f]) and, thus, is insufficient to defeat defendants' motions for summary judgment"]).

In the instant case, there is no indication that further discovery will yield material and relevant evidence raising an issue of fact as to liability or damages.

Dismissal of Affirmative Defenses

According to CPLR §3211(b) a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The "standard of review on a motion to dismiss an affirmative defense pursuant to CPLR 3211(b) is akin to that used under CPLR 3211(a)(7), *i.e.*, whether there is any legal or factual basis for the assertion of the defense (*see Winter v Leigh-Mannell,* 51 AD2d 1012 [1976]). The truth of the allegations must be

assumed, and if under any view of the facts a defense is stated, the motion must be denied" (*Matter of Ideal Mutual Ins. Co. v Becker,* 140 AD2d 62, 67 [1st Dept 1988]). "'If there is any doubt to the availability of a defense, it should not be dismissed' [citation omitted]" (*see Nahrebeski v Molnar,* 286 AD2d 891 [4th Dept 2001]).

Further, statements that will not defeat, mitigate or reduce the plaintiff's remedy are insufficient as a defense (*see* NY Jur, Pleading §138; *Walsh v Judge*, 223 AD 423, 425 [1st Dept 1928]). Thus, allegations of a plaintiff's wrongdoing are insufficient as defenses if the alleged wrongdoing is unrelated to the claim made against the defendants; instead the plaintiff's actions must in some way justify the defendant's actions to be properly pleaded as defenses (*TNT Communications Inc. v Management Television Systems, Inc.*, 32 AD2d 55 [1st Dept 1969], *order affd*, 26 NY2d 639 [1970] [plaintiff's alleged violation of antitrust laws did not justify defendant's appropriation of trade secrets and hence was not a proper defense]). Finally, if a defendant asserts an affirmative defense, he also must be able to prove it. "General denials in an answer are insufficient to raise triable issues"(*Iandoli v Lange*, 35 AD2d 793, 793, [1st Dept 1970]; (*Cornell Univ. v Dickerson*, 100 Misc 2d 198 [NY Sup 1979] [holding that an ex-student seeking to avoid repayment of his student loans was not entitled to interpose the affirmative defense of duress where the university terminated him as a student and withheld his degrees because he presented no evidentiary facts regarding this claim, such as when, where, or by whom the duress was inflicted]).

Lack of Personal Jurisdiction

Defendants fail to assert any facts to support to their first affirmative defense alleging that the Court lacks personal jurisdiction over defendants. Therefore, plaintiff's request that the Court dismiss the first affirmative defense is granted.

Failure to State a Cause of Action

The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). Thus, a pleading "should not be dismissed on a pleading motion so long as, when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists" (*Rosen v Raum*, 164 AD2d 809 [1st Dept 1990] *citing R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). The material allegations of the pleading must be deemed to be true, and the proper inquiry is whether a cause of action exists, not whether it has been properly stated (*Ippolito v Lennon*, 150 AD2d 300, 302 [1st Dept 1989]).

As this Court has thoroughly addressed each of plaintiff's causes of action above and found them to have merit, defendants' second affirmative defense that plaintiff has failed to state a cause of action is stricken.

Plaintiff's Failure to Mitigate Damages

As discussed above, defendants' third and fourth affirmative defenses are not defenses to liability in this action. Therefore, they are stricken.

Plaintiff's Breach of the Lease and Guaranty

Defendants fail to assert any facts in either their Answer or opposition papers support to their fifth affirmative defense alleging that plaintiff materially breached its contractual obligations to defendants prior to any breach by defendants. Therefore, plaintiff's request that the Court dismiss the fifth affirmative defense is granted.

Failure of Consideration for the Lease and Guaranty

Defendants fail to assert any facts to contest plaintiff's arguments that there was sufficient consideration for both the Lease and the Guaranty. Therefore, plaintiff's request that the Court dismiss the fifth affirmative defense is granted.

Illegal and Void Contracts

Defendants fail to identify any clauses that would render the Lease or Guaranty illegal or void as against public policy. Therefore, plaintiff's request that the Court dismiss the seventh affirmative defense is dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff Thirty-One Co. for an order, pursuant to CPLR §3212, granting it summary judgment on liability and damages against defendant Thomas J. Haggerty, in the amount of $70,046.67, and defendant Allied Diagnostic Imaging LLC, in the amount of $193,719.05, is granted; and it is further

ORDERED that plaintiff's motion for an order, pursuant to CPLR §3211(a) and (b) and CPLR §3212, dismissing the affirmative defenses contained in defendants' Answer is granted; and it is further

ORDERED that an assessment of attorneys' fees and costs incurred in this action shall be held on Monday, August 31, 2009 at 9:30 a.m., in Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O. Ira Gammerman, and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties and the Clerk of the Trial Support Office (Room 158) within 20 days of entry, file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed.

That constitutes the decision and order of the Court.

Dated: July 28, 2009

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD