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

WALTER B. TOLUB

PART _____

Justice

Index Number : 117057/2008

PLAZA 52, LLC

vs.

COHEN, CHAIM

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 117057/08

MOTION DATE _____

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 ...	
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

FILED
AUG 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/11/09

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST REF ☒

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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PLAZA 52, LLC,

Plaintiff,

Index No.: 117057/09
DECISION/ORDER

-against-

CHAIM COHEN, BENZION ZION SUKY and YOSSI ZAGA,

Defendants.

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HON. WALTER B. TOLUB, J.S.C.:

In this commercial landlord/tenant action, plaintiff and defendants move and cross-move for summary judgment. The motions are granted to the extent indicated.

BACKGROUND

Plaintiff Plaza 52, LLC (Plaza 52) is a Delaware limited liability corporation that is licensed to do business in New York, and is the owner of a building located at 150 East 52nd Street in the County, City and State of New York (the building). On December 26, 2006, Plaza 52 executed a lease (the lease) for commercial space in the building with non-party tenant Livorno Properties, LLC (Livorno). Contemporaneously with the execution of the lease, defendants Chaim Cohen (Cohen), Benzion Zion Suky (Suky) and Yossi Zaga (Zaga) executed a guaranty of Livorno's tenancy obligations (the guaranty). (Exhibit C).

The relevant portions of the lease provide that:

> Article 1 - Premises, Term, Purposes and Rent ...
> Section 1.04 The rent reserved under this Lease for the term hereof shall be and consist of the following fixed rent ("Fixed Rent"). ... [a 10-year schedule of progressively increasing yearly and monthly fixed rent payments follows] ...
> The Fixed Rent shall be payable in equal monthly installments in advance on the first day of each calendar month during said term ... plus such additional

rent and other charges as shall become due and payable hereunder ... in lawful money of the United States of America.

Article 14 - Damages
Section 14.01 In the event of a Default Termination of this Lease, tenant will pay to Landlord as damages, at the election of the Landlord, either:
(a) a sum which at the time of the Default Termination represents the value of the then excess, if any, of the Present Value, as herein defined, of (1) the aggregate of the Fixed Rent and the additional rent ... which would have been payable hereunder by Tenant for the period commencing with the day following the date of such Default Termination and ending with the scheduled Expiration Date, over (2) the aggregate fair rental value of the Premises for the same period as determined by a real estate appraiser ..., or
(b) sums equal to the aggregate of the Fixed Rent and the additional rent ... which would have been due and payable by Tenant during the remainder of the term had this Lease not terminated by such Default Termination ... .

(Exhibit D). Other provisions of the lease specify that Plaza 52 could collect a portion of the building's real estate taxes and electrical charges from Livorno as "additional rent." (*Id.*).

The relevant portions of the guaranty provide that:

For value received ... the undersigned guarantee to Landlord ... the full performance and observance of all the covenants, conditions and agreements therein provided to be performed and observed by Tenant ... . The undersigned further covenant and agree that this guaranty shall remain and continue in full force and effect ... during any period when Tenant is occupying the Premises as a "statutory tenant." ... Notwithstanding anything herein to the contrary, the liability of the undersigned under the foregoing provisions of this Guaranty shall be limited to a sum equal to two (2) year's Fixed Rent and Additional Rent (at the rate in effect any claim is made hereunder).

In addition to the foregoing, the undersigned further agree that if the Tenant defaults in the payment of rent or regularly recurring additional rent (after expiration of applicable notice and/or cure periods) ... then they shall be personally responsible and liable for the payment of (I) such rent or additional rent up to the date the Premises are vacated ... and/or (ii) the cost to restore the Premises, as above provided. No obligations of the undersigned under this Guaranty shall be duplicative.

(Exhibit C).

Plaza 52 alleges that, in August of 2008, Livorno ceased making rent payments and remained in default from August 1, 2008 through December 31, 2008. (Flitt Affirmation, ¶ 10). As a result, on December 18, 2008, Plaza 52 sent Livorno a notice to cure its default. (¶ 11; Exhibit F). Livorno failed to cure, and Plaza 52 subsequently served a three-day termination notice on Livorno on December 31, 2008. (¶¶ 12-13; Exhibit G). Livorno again failed to take any action and its tenancy was terminated effective as of January 5, 2009. (¶ 13; Exhibit G). Livorno thereafter held over in its premises in the building, and Plaza 52 immediately commenced a summary holdover proceeding against Livorno in the Civil Court of the City of New York under L&T Index Number 50649/09. (¶ 14; Exhibit H). On March 5, 2009, Plaza 52 and Livorno entered into a stipulation to settle the Civil Court proceeding, under the terms of which Livorno agreed to the entry of a final judgment for money in the amount of $138,163.99, and agreed to vacate the building by March 31, 2009. (¶ 29; Exhibit J). Livorno evidently vacated but did not pay.

In the meantime, Plaza 52 had commenced this action against defendants on January 23, 2009 via service of a summons and complaint that sets forth causes of action for: 1) breach of the guaranty; and 2) attorneys' fees pursuant to the guaranty. (Exhibit A). Defendants served a timely answer. (Exhibit B). The parties' competing summary judgment motions are now before the court.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. (*See e.g.*

Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 [1st Dept 2002]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*See e.g. Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Because it deprives the litigant of his or her day in court, summary judgment it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. (*See e.g. Andre v Pomeroy*, 35 NY2d 361 [1974]; *Pirrelli v Long Island R.R.*, 226 AD2d 166 [1st Dept 1996]). However, the court's reluctance to employ summary judgment "'only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated'." (*Blechman v I.J. Pacer's and Sons, Inc.*, 186 AD2d 50, 51 [1st Dept 1992], quoting *Andre v Pomeroy*, 35 NY2d at 364). Here, the court finds that Plaza 52 is entitled to summary judgment on its first claim under the guaranty.

"On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty." (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006], citing *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Here, Plaza 52 has presented a copy of the guaranty and the affidavit of its managing agent, Dawn Garone (Garone), that sets forth a calculation of the amount of unpaid rent and other charges that Livorno is liable for, and states that neither Livorno nor defendants has ever made any payments towards these amounts. (*See* Notice of Motion, Garone Affidavit; Exhibit C). Defendants do not contest that

neither Livorno nor themselves has ever reimbursed Plaza 52 for Livorno's debts. Thus, it is clear that Plaza 52 has established all of the elements of its breach of guaranty claims against defendants.

In their cross motion, defendants nonetheless argue that the guaranty is unenforceable because it contains "conflicts as to the limited nature" of defendants' obligations to Plaza 52. (*See* Notice of Cross Motion, Suky Affidavit, ¶ 7). Defendants assert that the first paragraph of the guaranty provides for a limited liability of two years worth of fixed rent and additional rent (at the then prevailing rate), while the second paragraph imposes an open-ended liability scheme that cannot be reconciled with the first paragraph. (Suky Affidavit, ¶¶ 3-8). For the following reasons, the court disagrees.

As Plaza 52 correctly states, the Court of Appeals held in *South Road Associates, LLC v International Business Machines Corp.*, 4 NY3d 272, 278 [2005], that "[w]hether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous." In determining whether an ambiguity is present, the Court also held that "[i]t is ... important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases." (*South Road Associates, LLC v International Business Machines Corp.*, 4 NY3d 272, 277 [2005]). The Appellate Division, First Department, further expanded upon this canon of construction in *Lovelace v Krauss* ,60 AD3d 579, 579 [1st Dept 2009], when it reiterated that "[i]t is an elementary rule of contract construction that clauses of a contract should be read together contextually in order to give them meaning." Bearing this in mind, the court does not believe there is ambiguity. The guaranty's first paragraph, which contains a maximum monetary limitation on the guarantors' liability, plainly applies for as long

as Livorno was occupying the building either pursuant to the lease, or as a "statutory tenant" - i.e., while its tenancy was in effect. The guaranty's second paragraph, which contains no maximum monetary limitation on the guarantors' liability, plainly applies for as long as Livorno continued to occupy the building after defaulting on its lease obligations (and after any cure and termination periods had expired). Reading the guaranty as a whole, it is, thus, clear that the parties intended that defendants would be liable to Plaza 52 - up to the amount specified in the first paragraph - for the period from August 1, 2008 (when Livorno first stopped paying rent) through January 5, 2009 (when Livorno's tenancy terminated), and that defendants would thereafter be liable to Plaza 52 "for the payment of ... such rent or additional rent up to the date the Premises are vacated," i.e., March 31, 2009. Therefore, the court rejects defendants' sole opposition argument and finds that the guaranty is not ambiguous. Accordingly, the court concludes that Plaza 52 is entitled to summary judgment on its first cause of action on the issue of liability, and finds that the issue of calculation of damages should be referred to a Special Referee to hear and report on. Consequently, the court also finds that Plaza 52's motion should be granted, and defendants' cross motion denied, with respect to Plaza 52's first cause of action (with the foregoing limitation).

Plaza 52's second cause of action seeks an award of attorneys' fees pursuant to the guaranty. However, although the lease might have obligated Livorno to reimburse Plaza 52 for any legal fees that it expended in any action or proceeding commenced pursuant to the lease, the guaranty itself does not provide that defendants would be separately liable for legal fees that Plaza 52 expended in any action or proceeding commenced to enforce the guaranty. Thus, the court finds that the plain language of the guaranty bars Plaza 52's second cause of action.

Accordingly, the court also finds that Plaza 52's motion should be denied, and defendants' cross motion granted, with respect to that cause of action.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Plaza 52, LLC is granted to the extent that said plaintiff is awarded summary judgment on its first cause of action against defendants herein solely on the issue of liability, but is denied as to the second cause of action; and it is further

ORDERED that the issue of the calculation of damages on plaintiff's first cause of action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

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

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants Chaim Cohen, Benzion Zion Suky and Yossi Zaga is granted solely to the extent that the second cause of action in the complaint is dismissed, but is in all other respects denied.

Dated:

New York, New York
August 11, 2009

ENTER:

Hon. Walter B. Tolub, J.S.C.