[* 1]

COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE PART 10

Justice

John LLC
Plaintiff (s),

- v -

Frank Ciolli
Defendant(s)

* Corrected D+O *

INDEX NO. 116429/09

MOTION DATE

MOTION SEQ. NO. 001

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	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 21 2010
COUNTY CLERK'S OFFICE
NEW YORK

Decision & Order of Dec 17, 2010 is corrected. See corrected decision & order dated Dec 21, 2010

Dated: Dec 21, 2010

Hon. Judith J. Gische, *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: IAS PART 10

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135 John LLC,

Plaintiff (s),

-against-

Frank Ciolli,

Defendant (s).

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CORRECTED
DECISION/ ORDER
Index No.: 116429/09
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltff n/m (3212) w/ NF affirm, CJ affid, exhs	1
Def's opp w/PJP affirm, FC, JCLL, BEF affids, exhs	2
Pltff's reply w/ PD affid, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by plaintiff to enforce two separate guarantee agreements signed by defendant Frank Ciolli ("Ciolli" at times "guarantor"). Ciolli has answered the complaint and plaintiff now moves for partial summary judgment. Since issue has been joined, summary judgment relief is available; this motion will be decided on the merits (CPLR § 3212 [a]; Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept 2001]).

The court's decision and order is as follows:

Facts and Arguments Presented

Ciolli is the principal of Grimaldi John Street Corp. ("Grimaldi" sometimes

"tenant"). Grimaldi entered into a commercial lease with plaintiff to open a pizzeria-restaurant at 135 John Street in Manhattan ("premises"). The commercial lease, dated August 18, 2008, was for a term of 15 years ("lease") and for occupancy of the entire building. The lease commenced on September 2, 2008, the date the premises were delivered to Grimaldi.

Pursuant to Article 3 of the rider to the lease, the tenant was required to: "install all new fixtures, lighting and new floor covering and make such other Alterations, repairs and improvements in, to an upon, the Premises as Owner may approve so as to renovate and rehabilitate the Premises into a first-class pizzeria restaurant for the uses herein permitted." Pursuant to article 2.2 of the rider to the lease, the tenant agreed that it would "open for business within 180 days of the Commencement Date" and to "install all necessary trade fixtures and permitted signs..." Thus, the restaurant was to have opened for business on March 1, 2009.

Ciolli provided the plaintiff with an unconditional "Guarantee of Completion" ("completion guaranty") in connection with the lease. He also provided the plaintiff with a "Limited Guaranty" ("guaranty of payment"). Each guaranty is dated July 17, 2008.

The completion guaranty recites that it was provided by Ciolli as "an inducement for the Landlord to enter into a lease for the Premises." Similar language is contained in the guaranty of payment. The completion guaranty provides, among other things, that Ciolli is obligated to "fully indemnify and save harmless Landlord from all costs and damages the Landlord may suffer" if the improvements are not completed and paid for, or for any liens imposed against the real property, etc. (paragraph 2). Under the guaranty of payment, Ciolla guaranteed, among other things, the tenant's obligation to

pay rent and additional rent.

It is unrefuted that the improvements were never completed by the tenant and the restaurant never opened for business. According to plaintiff, the tenant gutted the interior, even removing the floors, and left the premises in that condition.

After this action was commenced, plaintiff brought a non-payment proceeding in Civil Court against the tenant (L&T Index No. 51395/2010) ("non-payment proceeding"). That proceeding was initially for arrears in the sum of $62,767.91. This represented unpaid base rent for the months of November 2009, December 2009, January 2010 and February 2010. It also included late, water, sewer and real estate charges through December 1, 2009.

The parties settled the non-payment proceeding by entering into a stipulation of settlement that was "so-ordered" by Judge Oing on March 24, 2010. Pursuant to that stipulation of settlement, the parties agreed a judgment would be entered against Grimaldi in the amount of $115,657.60, a warrant of eviction to issue forthwith, execution stayed provided the tenant met certain conditions. Among those conditions was the payment of rent (current and accruing) and full satisfaction of the arrears. A rider to the stipulation of settlement set forth a payment schedule. In the event tenant defaulted under the stipulation of settlement, Grimaldi was obligated to pay plaintiff's legal fees "as billed by petitioner." Grimaldi defaulted under the stipulation, the warrant was executed, Grimaldi was evicted, and plaintiff regained legal possession of the premises on May 12, 2010. Photographs taken of the premises depict a completely bare and gutted interior with wooden planks laid over large openings in the floor, exposed wires, dangling cables and unprotected vents.

Thereafter, plaintiff served Grimaldi with a "Notice of Acceleration of Annual Base Rent as a Result of Lease Termination" ("acceleration notice") dated May 13, 2010 . According to the acceleration notice, rent and additional rent due is $2,308,749.99.

Plaintiff has asserted four causes of action in its complaint. The first cause of action is for specific performance, based upon tenant's breach of article 3 of the lease. The relief sought is an order directing the defendant to complete the construction and equipping of the improvements. The second cause is for indemnification for the costs and damages plaintiff has suffered because the tenant did not complete the renovations. The third cause of action is for the guarantor to pay the arrears due under the lease through November 20, 2009 ($22,718.84) and the fourth cause of action is for legal fees, costs, expenses, etc., of this action.

Plaintiff seeks enforcement of the guaranty of payment by entering a money judgment against the guarantor in the amount of the Civil Court judgment and also for the accelerated rent that is now due. Plaintiff has not moved with respect to the guaranty of enforcement (first and fourth causes of action), but seeks to sever and continue those claims "for determination at trial." Plaintiff also seeks an order striking Ciolli's three affirmative defenses ("__ AD"). They are: failure to state a cause of action (1st AD), failure to join a necessary party (Grimaldi) to this action (2nd AD) and impossibility of performance (3rd AD).

Defendant does not deny the guarantees are unconditional or enforceable against him. Nor does he deny that he expressly waived any affirmative defenses or counterclaims. He argues, however, that plaintiff's motion is for relief not contained in

the complaint and based upon matters which arose subsequent to the commencement of this action. Ciolli contends that not only are these matters new, he has not had an opportunity to address them or had any discovery.

Defendant also claims that although Grimaldi undertook to make renovations to the premises, including installation of new fixtures, lighting, new floor covering and ramps, Grimaldi did not anticipate the decrepit conditions it encountered at the premises once it started doing the work. According to Ciolli the beams were deteriorated, rotten and collapsed and the mortar was cracked and loose. Ciolli states that this meant a complete overhaul of the premises was needed, not just cosmetic work, all of which was "impossible" to complete in the 180 day period provided for under the lease. Thus, Ciolli claims the parties made a mutual mistake in agreeing to that time period. Defendant disagrees with plaintiff, claiming that all that the building systems were fully intact.

Law Applicable to Motions for Summary Judgment

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

When an issue of law is raised in connection with a motion for summary

judgment, the court may and should resolve it without the need for a testimonial hearing (*See*: Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]).

Discussion

The affirmative defenses

Plaintiff's motion for an order striking Ciolli's affirmative defenses is granted. The first affirmative defense – failure to state a cause of action – is not an available defense against the complaint. Affording the complaint a liberal construction, taking the allegations of the complaint as true, and providing the plaintiff with the benefit of every possible inference, plaintiff has clearly stated a cause of action against the defendant for enforcement of each personal guarnty (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st Dept 1997]). Therefore, the first affirmative defense is stricken.

The second affirmative defense (failure to join a necessary party) is also stricken. A "necessary party" within the meaning of CPLR § 1001 is a person who ought to be a party if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action (CPLR §1001[a]). The court has the discretion to excuse their non-joinder if "an effective judgment may be rendered in the absence of the person who is not joined . . ." CPLR §1001[5]. "The rule serves judicial economy by preventing a multiplicity of suits. It also insures fairness to third parties who ought not to be prejudiced or "embarrassed by judgments purporting to bind their rights or interest where they have had no opportunity to be heard" (City of New York v. Long Island Airport, 48 NY2d 469, 475 [1979]).

Grimaldi is not a necessary party to this action. The limited and completion guaranty each provides that the owner may proceed against the guarantor without having to institute any legal action against the tenant. Furthermore, plaintiff already litigated its claims against Grimaldi and obtained a money judgment which is the subject of this action. The guarantor may have legal remedies against the tenant (his own corporation) but that does not make Grimaldi a necessary party. Therefore, plaintiff's motion to strike the second affirmative defense is granted and that defense is stricken.

The third affirmative defense of impossibility is also a defense unavailable to Ciolli. The premises were leased to Grimaldi in an "as is" condition. The lease states that the plaintiff has made no representations or promises about the condition of the premises or fitness or sufficiency for a particular use (Article 20 of lease).

Assuming, without deciding, that Grimaldi undertook more extensive renovations that it could not complete within 180 days, this would not be a defense to plaintiff's claims against the guarantor. Impossibility of performance is a recognized common law defense, but it is narrowly applied and then only in extreme circumstances. (Kel Kim Corporation v. Central Markets, Inc., 70 NY2d 900 [1987]). Impossibility will excuse a party's performance only when the subject matter of the contract has been destroyed or when the means of performance makes performance objectively impossible (Kel Kim Corporation v. Central Markets, Inc., supra; Warner v. Kaplan, 71 AD3d 1 [3rd Dept. 2009]). Performance is not excused merely because it has become more difficult (Monroe Piping & Sheet Metal, Inc. v. Edward Joy Company, 138 AD2d 941 [4th Dept. 1988]). Consequently, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even where unforseen circumstances

make performance burdensome. Therefore, plaintiff's motion to strike the third affirmative defense is granted as well.

The personal guarantees

A personal guaranty must be in writing signed by the person to be charged (Schulman v. Westchester Mechanical Contractors, Inc., 56 A.D.2d 625 [2nd Dept. 1977]). Moreover, the intent to guarantee payment must be clear and explicit (Salzman Sign Co. v. Beck, 10 N.Y.2d 63 [1961]; PNC Capital Recovery v. Mechanical Parking Systems, Inc., 283 A.D.2d 268 [1st Dept. 2001]). It is unrefuted that these legal standards are met by each of the personal guarantees that Ciolli signed. Under the guaranty of payment he agreed to be personally obligated for Grimaldi's unpaid rent and pursuant to the completion guaranty, Ciolli guaranteed Grimaldi's completion of alterations and improvement to the premises in accordance with the lease (PNC Capital Recovery v. Mechanical Parking Systems, Inc., 283 A.D.2d 268 [1st Dept 2001]). Thus, as a matter of law, plaintiff has proved the guarantees Ciolli signed are enforceable against him and that he is personally liable for Grimaldi's default in paying rent and competing the improvements undertaken by the tenant.

Ciolli contends, however, that even if the guarantees are enforceable, summary judgment should be denied because it is being sought on unpleaded causes of action. He also claims to need discovery, without stating what information it is that he needs which remains in the possession of the plaintiff. Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion (CPLR § 3212 [f]; Lewis v.

Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 [1st Dept. 2004]). The mere hope, however, that defendant can uncover useful evidence is an insufficient reason to postpone consideration of plaintiff's motion and defendant has failed to demonstrate how further discovery might yield material facts that would warrant the denial of summary judgment at a later time (Seelig v. Burger King Corp., 66 A.D.3d 986 [2nd Dept 2009]). Therefore, this motion is not premature although brought before discovery is complete.

While the general rule is that a party cannot obtain summary judgment on an unpleaded cause of action (Cohen v. City Co. of New York, 283 NY 112 [1940]), summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and the opposing party has not been misled, to its prejudice (Weinstock v. Handler, 254 AD2d 165 [1st Dept 1999]). Thus, as with a trial, the pleadings may be deemed amended to comply with the proof (Weinstock v. Handler, 254 AD2d at 166).

Plaintiff's third cause of action is for the unpaid rent Grimaldi owed as the date this action was commenced. Since then, however, additional rent arrears accrued and plaintiff successfully obtained a money judgment in Civil Court against Grimaldi $115,657.60. This reflects rent and additional rent due, owing and unpaid through the end of March 2010. Thus, Ciolli was on notice that plaintiff would be seeking to enforce the guaranty of payment against him in the amount of all unpaid rent by the tenant.

Defendant has not shown prejudice. "Prejudice" does not mean, nor is established by merely showing increased liability alone (*see* Loomis v. Civetta Corinno Construction Corp, 54 NY2d 18 [1981]). There must be a showing by the defendant

that he was hindered in some way from preparing and presenting his case. Having waived his defenses pursuant to the guaranty and failing to deny any of the proof providing by plaintiff, plaintiff's motion for summary judgment on its third cause of action in the amount of $115,657.60 is granted. The Clerk shall enter a money judgment in that principal amount against Frank Ciolli with statutory interest from March 24, 2010.

Although no cause of action is pleaded against Ciolli in the complaint for the accelerated rent due under the lease, this is not a bar to plaintiff obtaining summary judgment because the evidence necessary to substantiate this claim is in the record (Kramer Levin Naftalis & Frankel LLP v. Canal Jean Co., Inc., 73 AD3d 604 [1st Dept 2010] *citing* Weinstock v. Handler, *supra*). The annual rent was accelerated as a result of Grimaldi's default under the lease (see Article 17). Pursuant to the guaranty of payment -- provided by the guaranty as an inducement for the landlord to enter into the lease – Ciolli is personally liable to the plaintiff for any unpaid rent owed by the tenant, his corporation, Grimaldi. Ciolli has not presented any triable issues of fact that the money is unpaid, due and owing. Nor has he shown any prejudice (see cases, *supra*), therefore, plaintiff's motion for entry of a money judgment in the amount of the accelerated rent ($2,308,749.99) is granted. The Clerk shall enter a money judgment against defendant Frank Ciolli in the principal amount of $2,308,749.99 with interest from May 18, 2010.

Another branch of plaintiff's motion is for partial summary judgment on its claim under the completion guaranty (second cause of action). Plaintiff seeks partial summary judgment on the issue of liability, reserving the issue of damages for trial. In opposition defendant has raised the defense of mutual mistake.

Leaving aside the issue that it is not a defense pleaded by him, this is not an available defense against plaintiff's second cause of action. Before reformation of a contract may be granted, a party must establish his right to such relief by clear, positive and convincing evidence (Ribacoff v. Chubb Group of Ins. Companies, 2 A.D.3d 153 [1st Dept. 2003]). Furthermore, reformation is only permitted "where the parties have a real and existing agreement on particular terms and subsequently find themselves signatories to a writing which does not accurately reflect that agreement" (Harris v. Uhlendorf, 24 N.Y.2d 463, 467 [1969]). Here, however, Ciolli is claiming the lease is the product of a mutual mistake. He makes no claim that the completion guaranty is the product of mutual mistake. The completion guaranty accurately reflects their agreement, that the landlord would agree to lease the premises to Grimaldi provided it was personally guaranteed by Ciolli. Thus, plaintiff has proved the completion guaranty is enforceable and that the tenant did not complete the renovations agreed to under the lease. Thus, plaintiff's motion for summary judgment on the issue of liability on the second cause of action is granted. The issue of damages will be decided at trial.

The court hereby schedules a preliminary conference in this case for JANUARY 20, 2011 at 9:30 a.m. in Part 10, 60 Centre Street, Room 232. No further notices will be sent.

Conclusion

Plaintiff's motion for partial summary judgment is granted in part and denied in part.

In accordance with the foregoing,

IT IS HEREBY

ORDERED that the Clerk shall enter judgment in favor of plaintiff 135 John LLC against defendant Frank Ciolli in the principal amount of One Hundred Fifteen Thousand, Six Hundred Fifty Seven and 60/100 Dollars ($115,657.60) together with statutory interest March 24, 2010, plus costs and disbursements as taxed by the court; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff 135 John LLC against defendant Frank Ciolli in the principal amount of Two Million, Three Hundred Eight Thousand, Seven Hundred Forty Nine and 99/100 Dollars ($2,308,749.99) together with statutory interest May 18, 2010, plus costs and disbursements as taxed by the court; and it is further

ORDERED that plaintiff's motion for partial summary judgment on its second cause of action is granted on the issue of liability; the issue of damages will be decided at trial; and it is further

ORDERED that the court hereby schedules a preliminary conference in this case for **JANUARY 20, 2011 at 9:30 a.m.** in Part 10, 60 Centre Street, Room 232; no further notices will be sent; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
December 21, 2010

So Ordered:

Hon. Judith J. Gische, JSC