SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

CLK/HP ONE OLD COUNTRY, LLC &
HLP OLD COUNTRY TIC LLC,

Plaintiff,

Index No.: 4674/10
Motion Seq. No.: 02
Motion Date: 01/07/11

- against -

AJA OFFICE LEASE, LLC, JOHN LALIOTIS,
ALEXANDER SKLAVOS and STUART ADLER,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit, and Exhibits and Memorandum of Law	1
Affidavit of Merit by defendant Stuart Adler, Affirmation in Opposition and Exhibits	2
Affirmation in Opposition by defendant Alexander Sklavos and Affidavit	3
Reply Affirmation	4

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order granting it summary judgment against defendants Alexander Sklavos ("Sklavos") and Stuart Adler ("Adler") and striking said defendants' Verified Answers with Counterclaim. Both defendants Sklavos and Adler oppose plaintiff's motion.

This is an action for breach of contract for a written lease guaranty. Plaintiff commenced

the present matter by serving a Summons and Verified Complaint on defendant Sklavos on March 15, 2010 and on defendant Adler on March 19, 2010. Issue was joined on June 3, 2010.

On or about March 14, 2007, plaintiff's predecessor in interest, Treeline 1 OCT LLC ("Original Landlord") entered into a written lease agreement with defendant AJA Office Lease, LLC ("AJA") for the premises known as Suite 200, in the building known as One Old Country Road, Carle Place, New York, for a term of five years and three months beginning June 1, 2007 and expiring August 31, 2012, which lease was assigned to, and assumed by, plaintiff on May 8, 2008. As a material inducement and in further consideration for the Original Landlord to enter into said lease, the Original Landlord requested all individual defendants to execute a Guaranty. Both defendants Sklavos and Adler individually signed and duly executed the Guaranty wherein each absolutely, unconditionally and irrevocably guaranteed payment and performance of all obligations of defendant AJA including, but not limited to, payment of all sums due plaintiff, (assignee under the lease) from defendant AJA pursuant to the terms of the lease. Plaintiff submits that both defendants Sklavos and Adler agreed to be jointly and severally liable for all sums due plaintiff (assignee under the lease) from defendant AJA. In or about May, 2009, defendant AJA defaulted in its monetary obligations due plaintiff, as assignee, pursuant to the lease, by failing to make payment for rent and additional rent as due. A summary proceeding was commenced between plaintiff and defendant AJA in First District Court of Nassau County, under Index No. SP01272/09, for rent and/or use and occupancy due and owing for the premises. Defendant AJA defaulted in appearing in the First District Court action and plaintiff did regain possession of the premises via Sheriff's execution of a warrant of eviction on January 19, 2010.

Plaintiff submits that, in accordance with the terms of the Guaranty, guarantors, defendants Sklavos and Adler, agreed to be responsible for all obligations and liabilities of defendant AJA, as tenant owed to plaintiff, the landlord, through the expiration date of the lease. Plaintiff now seeks to enforce the Guaranty thereby requiring the guarantors, defendants Sklavos and Adler, to pay all the amounts due to plaintiff pursuant to the terms of the lease between plaintiff and defendant AJA based upon the Guaranty in furtherance of same. Plaintiff argues that defendants Sklavos and Adler have failed to comply with their obligations as guarantors in that they have failed to make payments to plaintiff under the terms of the lease and Guaranty in the amount of $806,952.84; consisting of $650,569.97 for rent due under the lease; $14,724.22 for additional rent due under the lease; $6,300.00 for late fees due under the lease; $6,310.00 for legal costs/disbursements associated with the prior landlord/tenant action; and $174,048.65 for attorney's fees associated with the current action. Plaintiff adds that "[t]hrough their respective attorneys, Defendants Sklavos and Adler interposed separate but identical answers. In an attempt to defend against the current action, Defendants Sklavos and Adler seek to raise defenses that perhaps should/could have been raised in the original summary proceedings between the landlord, the Plaintiff herein, and the tenant, AJA. Defendants Sklavos and Adler have failed to raise any viable issues, or valid defense, with respect to their personal liability to Plaintiff."

In defendant Adler's opposition to plaintiff's motion (which was adopted by defendant Sklavos), he first argues that plaintiff's motion for summary judgment is premature as there has been no discovery done in the matter. A Preliminary Conference has yet to be held. Defendant Adler states that "[c]learly without engaging in discovery the plaintiff's motion for both

summary judgment on their allegations and dismissing our counter claim is premature." Defendant Adler's second argument is that plaintiff agreed to modify the terms of the lease at issue by reducing the rents, reducing the space and obtaining new, smaller space in the same building. Defendant Adler states that said agreement was entered into in writing and duly executed by the attorneys for the plaintiff. Said document was entitled "Stipulation of Settlement Non-Payment" and dated April 30, 2009. *See* Defendant Adler's Affirmation in Opposition Exhibit B. Defendant Adler submits that he detrimentally relied upon this agreement and that plaintiff never lived up to any of the terms of said agreement despite defendants' compliance. Defendant Adler adds that "[t]he plaintiff's Landlord-Tenant action never demanded any monetary judgment. The fact that they asked us to vacate the premises and only then showed us space is indicative of their belief and desire to be bound by the executed stipulation. At the very least this creates a question of fact which requires the motion to be denied in its entirety."

As previously stated, defendant Sklavos adopted the arguments made in defendant Adler's opposition papers. Defendant Sklavos also argues that "[p]laintiffs (*sic*) obtained a warrant of eviction from the Landlord Tenant Court. Upon information and belief, Plaintiff did not request a money judgment for use and occupancy charges against the tenant or the guarantors form the Landlord Tenant Court despite having requested such relief in its petition and having every right to do so. As such, Plaintiff has waived the right to seek those remedies here."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth*

Century- Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. S*ee Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974); *Mosheyev v. Pilevsky*, 283 A.D.2d 469, 725 N.Y.S.2d 206 (2d Dept. 2001). Indeed "[e]ven the color of a triable issue forecloses the remedy." *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Rudnitsky v. Robbins*, 191 A.D.2d 488, 594 N.Y.S.2d 354 (2d Dept. 1993). *See also Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957)

First, it is apparent that little, if any, discovery had been completed prior to the making of plaintiff's motion. It is settled that "[a] party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." *See Valdivia v. Consolidated Resistance Co. of America, Inc.*, 54 A.D.3d 753, 863 N.Y.S.2d 720 (2d Dept. 2008); *Venables v. Sagona,* 46 A.D.3d 672, 848 N.Y.S.2d 238 (2d Dept. 2007). *See generally Gruenfeld v. City of New Rochelle*, 72 A.D.3d 1025, 2010 WL 1716148 (2d Dept. 2010); *Gonzalez v. Nutech Auto Sales,* 69 A.D.3d 792, 891 N.Y.S.2d 910 (2d Dept. 2010); *Elliot v. County of Nassau*, 53 A.D.3d 561, 862 N.Y.S.2d 90 (2d Dept. 2008); *Fazio v. Brandywine Realty Trust*, 29 A.D.3d 939, 815 N.Y.S.2d 470 (2d Dept. 2006).

Second, while the Court finds that plaintiff has established *prima facie* entitlement to judgment as a matter of law, it also finds that the defendants have met their burden and come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.*

Therefore, it is ordered plaintiff's motion for summary judgment is hereby denied.

It is further ordered that the parties shall appear for a Preliminary Conference on May 9, 2011, at 9:30 a.m. in the Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

ENTERED
MAR 29 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
March 24, 2011