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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 100017/2011
37 W.14TH ST.ASSOCIATES LLC
vs.
MEYER, MATTHEW D.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 100017/11

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 7/12/11

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

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37 W.14TH ST. ASSOCIATES, LLC,

Plaintiff,

Index No.100017/11

Seq No.: 002

- against -

Decision and Order

MATTHEW D. MEYER,

Defendant.

----------X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action against defendant Matthew D. Meyer seeking to recover an outstanding balance of $70,175.88, for unpaid rent and additional rent. Plaintiff now moves for summary judgment pursuant to CPLR 3212 on its first, second and third causes of action. Plaintiff also requests a hearing to determine reasonable attorneys fees. Meyer opposes.

On May 4, 2007, plaintiff entered into a lease agreement with Impulse Media Productions, Inc.("Impulse") for a term of five years. Meyer was the guarantor on the lease. The monthly rents agreed upon were: for the first year, $7,250.00, for the second year, $7,467.50, for the third year, $7,691.53, for the fourth year, $7,922.27, and for the fifth year, $8,159.94.

Plaintiff alleges that Impulse defaulted on its rent from January thru December 2010. On October 12, 2010 Impulse sent a notice informing plaintiff that it would vacate the premises within 180 days. Thereafter a nonpayment proceeding was commenced against Impulse in Civil Court. A judgment was issued on February 11, 2011, awarding plaintiff a judgment of possession and $49,206.84.

Plaintiff, in support of its motion, submits: the affidavit of Jack Cohen, General Partner of plaintiff; the pleadings; a copy of the lease agreement; a copy of a "notice of petition commercial non-payment;" a copy of the civil court judgment; a balance

sheet; a copy of an unsigned "First Modification of Lease;" and several emails. Plaintiff asserts that Impulse is in default, and pursuant to the guaranty agreement, Meyer is responsible for the unpaid rent and additional rent. Plaintiff argues that Meyer's answer does not raise any issues of fact.

Meyer, in opposition, submits: copies of two checks, both dated May 4, 2007; a copy of a check dated April 27, 2010; copies of several emails along with a First Modification of Lease; Impulse's vacate notice; a copy of his answer; and a copy of "Defendant's First Notice for Discovery and Inspection." Meyer argues that the motion should be denied because there is an issue of fact created by the acceptance of reduced rent for the months of March thru July, 2010. In fact, Meyer asserts, plaintiff had drafted a proposed lease modification agreement in July 2010.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is 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]),

The Guaranty here states that the Guaranty is "absolute, unconditional and irrevocable . . ." Plaintiff has established, through competent evidence, that Impulse defaulted on its obligations and that Meyer has failed to perform under the guaranty. In opposition, Meyer fails to raise an issue of fact. Although there were discussions regarding modification of the lease, it is undisputed that neither Meyer nor plaintiff ever signed the proposed agreement. As plaintiff correctly points out, Paragraph 82(D) of the Rider to the Lease, requires that all modifications must be in writing and

signed by both parties.

Even if the Court were to consider the First Modification of Lease provided in defendant's opposition, paragraph 4 of that Amendment states:

> If Tenant shall be in default of any of the terms, covenants or conditions of the Lease as modified by this Amendment, at Landlord's sole option, this Amendment may be retroactively canceled and the base annual rent that was otherwise due Landlord pursuant to the Lease shall become immediately due and payable, as if this Amendment was never entered into.

The Court finds that plaintiff did not waive its rights or remedies under the lease by accepting a lesser amount from Meyer. Section 25 of the lease states:

> the receipt by Owner of rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach, and no provision of this lease shall be deemed to have been waived by Owner unless such waiver be in writing signed by Owner. *No payment by Tenant, or receipt by Owner, of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than an account of the earliest stipulated rent* . . . (emphasis added).

Wherefore it is hereby

ORDERED that the motion for summary judgment on the first second and third causes of action in the complaint herein is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant Matthew D. Meyer in the sum of $70,175.88, plus 9% interest from the date of entry of judgment until the date the judgment is paid, as calculated by the Clerk; and it is further

ORDERED that the fourth cause of action for attorneys fees is hereby severed and the issue of the amount of reasonable attorneys' fees plaintiff may recover against defendant is referred to a hearing on the matter; and it is further

ORDERED that the parties are to appear in Part 15 of this Court, 80 Centre Street, Room 308, in the County and State of New York at 11:00 a.m. on Tuesday,

August 9, 2011, for the above ordered hearing.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 12, 2011

EILEEN A. RAKOWER, J.S.C