SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Arthur F. Engoron **PART** 52
Justice

Index Number : 600811/2009
KANTOR, AMY
vs.
75 WORTH STREET, LLC
SEQUENCE NUMBER : 006
TRIAL DE NOVO

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 2/21/13

_____ J.S.C.
HON. ARTHUR F. ENGORON

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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AMY KANTOR d/b/a WORTH STREET VETERINARY HOSPITAL [etc.],

Index Number: 600811/09

Plaintiff,

Post-Trial Decision and Order

- against -

75 WORTH STREET, LLC and JODI RICHARD,

Defendants.

----------x

Arthur F. Engoron, Justice

Motions 6 through 10 are consolidated for disposition and disposed of as indicated herein.

In compliance with CPLR 2219(a), this Court states that the following papers were used on the following motions:

Motion 6 - By defendant, for judgment notwithstanding the verdict:

	Papers Numbered:
Moving Papers	1
Opposition Papers	2
Reply Papers	3

Motion 7 - By plaintiff, for reargument and a new trial:

	Papers Numbered:
Moving Papers	1
Opposition Papers	2
Reply Papers	(memorandum only)

Motions 8 - By plaintiff, for spoliation sanctions; and 9 - By defendant, for sanctions for frivolous litigation:

	Papers Numbered
Moving Papers (8 - plaintiff)	1 and 1A
Moving Papers (9 - defendant)	2
Opposition to Motion 8 (defendant)	3
Opposition to Motion 9 and Reply in Support of 8 (plaintiff)	4

Motion 10 - By plaintiff, also for spoliation sanctions:

	Papers Numbered
Moving Papers	1 and 1A
Opposition Papers	2
Reply Papers	none

Upon the foregoing papers, Motion 6 is granted and Motions 7-10 are denied, all as indicated herein.

Synopsis

Some cases are winners; some cases are losers; and some cases, like this one, should never have been brought in the first place. Despite a complex complaint; extensive disclosure from the parties and non-parties; motion practice of the pre-trial, in limine, and post-trial sort; an appeal to the Appellate Division; lengthy settlement discussions; and, not least, a trial lasting several days, all covering a total of more than three years, the case boils down to this: plaintiff Amy Kantor is suing defendant Jodi Richard for promising Kantor to guarantee and/or collateralize a loan for which Kantor was applying, despite the fact that (1) Kantor admits that the lender would not have accepted an uncollateralized guarantee from Richard; and (2) after the loan fell through Kantor, in writing, twice, indicated that she never expected Richard to collateralize the loan and, indeed, did not think that Richard could do that. Simply put, Kantor is suing for breach of a promise that did her no harm (the promise to guarantee) and/or a promise that was never and could not have been made (the promise to collateralize).

To highlight just one of many possible examples of how this case got out of hand, Kantor sought the loan from a bank (United Western Bank, or "UWB") in Denver. Her determined attorney has gone to great lengths to try to prove that Richard promised the bank to collateralize the loan. His herculean efforts have yielded some bank documents – and, consequently, lots of legal argument about which of them should have been admitted into evidence at trial – indicating that at least certain people at the bank apparently thought that Richard had agreed to collateralize the loan, which Richard staunchly denies. However, the whole dispute is irrelevant, because Kantor did not plead a promise to the bank; she expressly disclaims reliance on a promise to the bank and/or on a third party beneficiary theory; and Richard may have had a Statute of Frauds defense to any such promise (assuming she did not waive it). As Kantor's own counsel states:

> Kantor's complaint ... asserts only that defendants directly agreed with *Kantor herself* to guarantee the loan (First Claim) and to provide second [sic] mortgage collateralizing that guarantee (Second Claim). Kantor repeatedly declined to rely on any third party beneficiary claim at trial, and has never alleged that defendants reached an agreement with UWB that UWB – let alone a third party could enforce. ... Kantor has never pled or relied upon a third party beneficiary theory.

Mot. 6, Opp. Memo, at 27-28 (*italics* in original; underline added). This statement, in conjunction with Kantor's statement that she never expected Richard to collateralize the loan, and the irrefutable, unrebutted evidence that guaranteeing the loan would not have been sufficient, doom Kantor's claims ab initio.

Background

Many of the facts are undisputed; indeed, most are documented. The following recitation is taken largely from the complaint and the undisputed e-mails. Kantor is a veterinary surgeon. Richard is the managing member of defendant 75 Worth Street LLC ("75 Worth"), which owns the real property and building at and known as 75-77 Worth Street, New York City. In or about

late 2007 their plans dovetailed: Richard wanted to use some or all of the building as "an integrated canine care center," and Kantor wanted to establish a canine veterinary practice. On or about December 5, 2007 they entered into a lease for space in the building at $10,000 a month, payments due starting in or about April 2008 (see Mot. 6, Moving Exh. G, at 2), later changed to July 15, 2008; and Kantor gave Richard a $10,000 deposit. In order to obtain funds for the build-out, medical equipment and supplies, and initial rent and salary expenses, etc., Kantor applied for a $1.2 million Small Business Administration ("SBA") loan. The SBA assigned the loan application to UWB, in Denver. In early May 2008 UWB informed Kantor that she would need a co-guarantor and suggested Richard. On or about May 9, 2008, in a discussion in Richard's kitchen (Mot. 6, 5/10/12 Trial Transcript, at 55-57), at Kantor's request, Richard agreed to guarantee the loan. The parties disagree as to whether the amount of Richard's guarantee was 20% or 100% of the $1.2 million (e.g., Mot. 6, Opp. Memo, at 5-6). The overwhelming evidence points to the former, but today's decision would be the same either way. Kantor has never presented any evidence that Richard agreed with Kantor to collateralize the loan.

In a May 21, 2008 e-mail (Mot. 6, Opp. Exh. 18) UWB wrote Kantor that "If Jodi [Richard] is willing to let [UWB] put a second mortgage on the building, I think we can get there." In a May 22, 2008 e-mail (Mot. 6, Opp. Exh. 41), Kantor again asked Richard to guarantee the loan, without, rather surprisingly, mentioning any need for collateral. At her deposition, UWB's Anne Marie Murphy testified that she never discussed the terms of the guaranty with Richard and that collateralizing the loan "didn't come up." Mot. 6, Reply Exh. B, at 96, lines 10-13 ("Question: Did [Richard] ever tell you that she had agreed to have the property serve as collateral for Doctor Kantor's loan? Answer: Didn't come up."); see also, at 100, lines 2-6 ("Question: Is it fair to say that you did not have any discussions with [Richard] regarding how much or what she was agreeing to guarantee? A: Correct. ... I didn't discuss that with her.").

Kantor argues (Mot. 6, Opp. Memo, at 4) that her May 22, 2008 e-mail (Mot. 6, Opp. Exh. 41) "explicitly conditioned her promise to reimburse Richard for construction expenses upon Richard's agreeing to provide a guaranty." This absurd statement is incorrect for several reasons. First, it does not impose this condition, certainly not explicitly. Second, Kantor would not have the right unilaterally to condition repayment of a loan. Third, Kantor refers to "the money you've already invested," so Richard had already forwarded the money, or part thereof. Fourth, seven months later, in December, Kantor referred to the money as a loan, without mentioning any conditions, even though the UWB loan was falling, or had fallen, through. Also on or about May 22, 2008 Richard forwarded some of her financial records to UWB.

In an e-mail dated August 5, 2008 (Mot. 6, Moving Affirm. Exh. G, at 6-7), Kantor wrote Richard as follows:

> What I know is that the lease commenced in July, that I owe you rent from that point onward as well as an additional month's security which I have been unable to pay you yet. ... I know that you've bent over backwards to help make this whole thing happen for me and I truly both understand the risk you've taken and truly appreciate it. ... I am willing to assume all my responsibilities as a tenant and have always expected to pay you all monies owed as soon as the loan clears. I never had any other expectation.

Sometime in or about early December 2008, Kantor gave Richard $20,000 in rent.

The loan was scheduled to close on December 18, 2008. However, UWB refused to proceed, because Richard refused to collateralize. In an e-mail of December 19, 2008 (Mot. 6, Moving Exh. B [Trial Exh. 48]), Kantor wrote Richard,

> I have never seen the 500k as anything you've given me. As I understood it, it's a loan, with interest. * * * It was something I always appreciated, and my sole intention is to be able to pay you back within the first years of the [veterinary] practice, as we've discussed.
>
> * * *
>
> * * * I guess my impression was that you had agreed to personally guarantee my loan .... I never thought the real estate was involved in it because ...I didn't think you could do that[,] being my landlord.

Kantor claims (Mot. 6, Opp. Memo, at 8, n. 2) that her saying, "I never thought the real estate was involved," is irrelevant, because she made it after defendants repudiated their agreement. However, the only agreement they could have repudiated was to guarantee (at whatever percentage or amount) the loan, whereas UWB would only accept a collateralization.

Confirming the essence of all the above, on January 8, 2009, the month after the UWB loan fell through, Richard e-mailed Kantor as follows (Mot. 6 Moving Exh. E; Trial Exh. 51):

> Amy, the document the SBA sent us has me guaranteeing the entire $1.2m loan with the property at 75 Worth Street as collateral. It also states that, should you default, they will come after me first, for the entire amount, and they will take over my property, proceed to evict ALL of my tenants, and then sell the property to get their money back. Not only can I NOT legally use 75 Worth to guarantee your loan because of my loan with TD Bank North, I will not do it under these conditions because they are ridiculous. My attorney is in contact with the lender and has told them that I will guarantee up to $200,000.00 in cash only, which is basically the amount we were all under the assumption I was guaranteeing. ... What sucks is that they tricked both of us into believing something that made us comfortable and then tried to sneak this in on us at the last minute.

Kantor's response (id.), later that day, is telling (and, yet again, dispositive):

> Hi Jodi, That is shocking news – am sorry you were so mislead, as was I.

Thus, a month after "I never thought that the real estate was involved" Kantor is still "shocked" that UWB was expecting Richard to collateralize the loan. (To inject some contract law into the discussion, there was a "meeting of the minds," but the meeting place was that Richard would guarantee, not collateralize, the loan.). From the aborted closing in December 2008 through to February, 2009, Kantor attempted, unsuccessfully, to obtain alternate financing.

Meanwhile, in or about early 2009, Richard sent Kantor a bill for $663,000, representing $92,042 in past due rent and $529,500 in construction expenses that Richard claims to have advanced on behalf of Kantor (the imprecise math is Kantor's, see Complaint ¶ 28).

Kantor finally gave up the ghost and terminated the lease via a February 18, 2009 letter from counsel (see Answer ¶ 50). The FDIC placed UWB in receivership in early 2010.

The Pleadings

Kantor commenced this action in 2009. Her first cause of action alleges that "Richard agreed with Kantor to co-guarantee Kantor's obligations under [Kantor's] loan agreement with UWB" and that Richard "breached her agreement with Kantor to co-guarantee Kantor's obligations under the loan." Kantor's second cause of action alleges that Richard, acting through 75 Worth Street, "agreed with Kantor" to collateralize the loan and breached that agreement. Kantor's third cause of action seeks a declaration that her "obligations under the lease ... were conditioned upon her obtaining a loan" that she in fact never obtained, and that 75 Worth Street frustrated the purposes of the lease. (The Court need not address the fourth and fifth causes of action, to establish a Lien Law Trust and for tortious interference with contractual relations, respectively, for reasons stated throughout this opinion). The complaint seeks several million dollars in damages. Richard's answer sets forth a laundry list of affirmative defenses (13 in all) and four counterclaims that, in sum and substance, seek rent in the amount of $60,000 and additional rent in the amount of $23,802.88, plus repayment of a $529,500 loan, advanced on behalf of Kantor to construction contractors, all totaling $613,302.88, plus legal fees, etc.

The Depositions

At her deposition Kantor testified that she believed (wrongly, as it turned out) that because the government was guaranteeing 80% of the loan, she and any co-guarantor, i.e. Richard, could at most be held accountable for 20% of the loan (Mot. 6., Moving Exh. A, at 57-59). Kantor confirmed (Mot. 6, Moving Exh. A, at 83) that she "never thought that the real estate was going to be collateral." She also testified (id. at 94-95) that she did not remember asking Richard to collateralize the loan, and she did not remember seeing anything from UWB to Richard stating that the loan would not go through without Richard's collateral. She also indicated (id. at 95), by implication, that in December 2008 she was not surprised that Richard said she could not collateralize the loan.

At this same deposition, Kantor acknowledged (id. at 111) that when Richard said that Richard had given Kantor $500,000, rather than respond that Richard had used it to "build out" Richard's own space, as opposed to Kantor's space, in the building, Kantor responded, in essence (in the December 18, 2008 e-mail) that the money "was a loan and I owe it back with interest."

The Trial

Kantor and Richard both testified at trial, and the aforesaid e-mails (and others) were introduced into evidence. On the record, this Court directed a verdict in favor of defendants on their counterclaim for rent. Rent was due from mid-July 2008 to mid-February 2009, at $10,000 per month, less the $30,000 that was paid. Thus Kantor owes Richard $40,000 in unpaid rent.

Disputed Evidentiary Ruling

At trial, this Court denied Kantor's request to admit into evidence a "United Western Bank 7(a) SBA Loan Memorandum," marked for identification as Plaintiff's Exhibit 22 (Mot. 6, Opp. Exh. 22). According to Kantor (Mot. 6, Opp. Memo, at 21), "the loan memorandum was written by an individual named D. Wishart, an underwriter who was employed as an independent contractor by UWB." The Memorandum indicates (at 5) that a mortgage "is being permitted by the landlord ... on the [commercial real estate] where the improvements are located." According to Kantor, the Court gave two grounds for denying admission: "unfairness"; and lack of foundation as a business record.

The fact that Wishart was an "independent contractor," rather than employee, of UWB, strongly suggests that he would not be in a position to lay a proper foundation as a "custodian of records." See generally, JP Morgan Chase Bank, N.A. v Rabel, 27 Misc 3d 656 (Civ Ct, Kings County, 2010):

> A business record is admissible if "it was made in the regular course of any business and ... it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures." Although Mr. Taylor testified that both documents were made in the regular course of plaintiff's business, he did not establish that he was familiar with plaintiff's business practices or procedures, and he further failed to establish when, how, or by whom they were made ... .
>
> Further, Mr. Taylor failed to demonstrate that the preparer of plaintiff's exhibits 1 and 2 had actual knowledge of the events recorded therein or that they obtained knowledge of those events from someone with actual knowledge of them and who had a business duty to relay information regarding the events to the preparer.

Id. at 660-61 (citations omitted). Here, for all that appears, the source of Wishart's "knowledge" may well have been intra-bank hearsay. Even assuming that Richard informed UWB of her ownership of 75 Worth Street, that might encourage UWB to accept Richard as a personal guarantor, but it is not an agreement to collateralize the loan. A far-flung bureaucracy like UWB could easily have gotten the mistaken impression from each other, or from Kantor, that Richard had agreed to collateralize the loan, especially when otherwise they would have to reject the loan application, and when they obviously would have been well aware of the existence of Richard's property from the terms of Kantor's loan application. Richard was not just some friend with unrelated real estate, she was Kantor's landlord at the property at which the proceeds of the loan would be utilized.

In any event, as discussed elsewhere, had this Court admitted the document into evidence, and had the jury believed the truth of its contents, that still would not change the fact that Kantor rejected any suggestion that Richard promised Kantor to collateralize the loan, would not withdraw or negate her counsel's statement that Kantor is not relying on a promise to UWB, and would not amend her complaint.

The Verdict

Five of six jurors agreed that defendants promised to guarantee and collateralize the (proposed) loan in full (Answer 1); that defendants breached this promise (Answer 2); that this breach damaged Kantor in the amount of $225,127.22 (Answers 3 and 4); and that Kantor's obligation to reimburse Richard for construction costs was conditioned on Kantor's receiving a loan (Answer 9). This Court was flabbergasted, dumbfounded.

Trial Aftermath

At a post-trial settlement conference on May 25, 2012, Transcript at 62-63, this Court noted as follows:

> As I believe I said either on the record or off the record, I let this case go to the jury because I was so convinced that they would throw it out, which maybe doesn't reflect well on either me or juries.
>
> * * *
>
> I let it go to the jury, and I think [Richard's counsel] pointed out that I said I can always order a new trial or direct entry of judgment notwithstanding the verdict. ...
>
> Now I give [Kantor's counsel] credit. [He] got a jury verdict. Appellate courts are very tough on overturning verdicts and ordering new trials, but I have to do what I think is right. I sat through this trial and tried to bring all my legal acumen, street smarts, all my intuition. This was not a case of inference. It was a case of pure speculation that seemed so unlikely to me that I never thought we would be having this discussion.

The Motions

By Motion 6, defendants move, pursuant to CPLR 4404, to set aside the jury verdict as a matter of law, and/or as against the weight of the credible evidence; for judgment, notwithstanding the jury verdict, dismissing Kantor's claims and in favor of defendants' breach of contract claim; to conform the pleadings to the proof; and for permission to serve an amended answer in the event of a new trial.

By Motion 7, Kantor moves, pursuant to CPLR 2221, for reargument and renewal of this Court's May 15, 2012 decision granting defendants judgment as a matter of law on their counterclaim for rent, and upon reargument and renewal, vacating that judgment and dismissing that counterclaim; or, alternatively, pursuant to CPLR 4404, for a trial of Kantor's claims that defendants' alleged breaches of their alleged agreements to guarantee and collateralize the subject loan hindered or prevented Kantor from paying rent; or, alternatively, pursuant to CPLR 4404, increasing Kantor's damages by the amount of the rent assessed against her; and, pursuant to CPLR 3126(3) to strike defendants' answer on the grounds of spoliation of evidence.

By Motion 8, Kantor moves for various sanctions for spoliation of evidence. By Motion 9, Richard moves for various sanctions against Kantor, Kantor's counsel, and a non-party attorney,

essentially on the ground of frivolous litigation. By Motion 10, Kantor moves for further sanctions for spoliation.

The Law

Judgment Notwithstanding the Verdict

In the definitive Cohen v Hallmark Cards, 45 NY2d 493 (1978), the Court of Appeals set forth the classic formulation of what is required to direct entry of a judgment notwithstanding the verdict.

> For a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence, ... [i]t is necessary to ... conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men [sic] to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict.

Id. at 499 (citations omitted).

Verdict Contrary to the Weight of the Evidence

Pursuant to CPLR 4404(a), a court may order a new trial when "the verdict is contrary to the weight of the evidence." Perhaps the best explication of this area of the law is in the exhaustive Nicastro v Park, 113 AD2 129 (2d Dept 1985), decided in the shadow of Cohen:

> The power to set aside a jury verdict and order a new trial is an inherent one ... . The power is a broad one intended to ensure that justice is done. * * *
>
> Initially, it must be reemphasized that whether a jury verdict is against the weight of the evidence is essentially a discretionary and factual determination which is to be distinguished from the question of whether a jury verdict, as a matter of law, is supported by sufficient evidence [citing and discussing Cohen, et al.].
>
> The criteria for setting aside a jury verdict as against the weight of the evidence are necessarily less stringent, for such a determination results only in a new trial and does not deprive the parties of their right to ultimately have all disputed issues of fact resolved by a jury. Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors. * * *
>
> The fact that determination of a motion to set aside a verdict involves judicial discretion does not imply, however, that the trial court can freely interfere with any verdict that is unsatisfactory or with which it disagrees. A preeminent principle of jurisprudence in this area is that the discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. Fact

> finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and "unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty."
>
> Thus, it has often been stated that a jury verdict in favor of a defendant should not be set aside unless "the jury could not have reached the verdict on any fair interpretation of the evidence." A similar "fair interpretation" standard has since come to be applied as well to jury verdicts in favor of a plaintiff ... .
>
> * * *
>
> It is well settled that a motion to set aside a verdict as contrary to the weight of the evidence invokes the court's discretion, and resolution of such a motion involves an application of that professional judgment gleaned from the Judge's background and experience as a student, practitioner and Judge. The significance of the fair interpretation standard is that it provides a strong cautionary note by stressing to the court that the overturning of the jury's resolution of a sharply disputed factual issue may be an abuse of discretion if there is any way to conclude that the verdict is a fair reflection of the evidence.

Id. at 132-35 (citations omitted); accord, Phillips v Katzman, 90 AD3d 436 (1st Dept 2011).

Dispositions

Motion 6 - Dismissal or New Trial

For the reasons set forth throughout this opinion, this Court holds that there is simply no valid line of reasoning and permissible inferences that could possibly have lead the jury to the conclusion they reached on the basis of the evidence presented at trial, and that defendants are entitled to judgment notwithstanding the verdict. Kantor claims that Richard breached an agreement with Kantor to guarantee the loan, and that defendants breached an agreement with Kantor to collateralize it. However, there was no evidence that Richard breached her agreement to guarantee the loan; any such breach did not damage Kantor; and Kantor admitted that there was no agreement to collateralize the loan.

Indeed, her consistent admissions, in e-mails and in sworn testimony in this litigation, that she never thought Richard was going to collateralize the loan, arguably estops her from now relying on an alleged promise by Richard to do so. "It is a well-settled principle of law in this State that a party who assumes a certain position in a legal proceeding may not thereafter, simply because his interests have changed, assume a contrary position. Invocation of the doctrine of estoppel is required in such circumstances lest a mockery be made of the search for truth." Karasik v Bird, 104 AD2d 758, 758-59 (1st Dept 1984).

Alternatively, and also for the reasons stated throughout this opinion, this Court holds that the jury could not have reached its conclusions on any fair interpretation of the evidence, and that, at the very least, Richard is entitled to a new trial. Of course, any time a judge (at least this judge)

considers overturning a jury verdict, he or she must consider why the jury reached the verdict that it did. Richard postulates that the jury engaged in speculation, upon which, by hornbook law, a verdict may not be based. E.g., Bernstein v City of New York, 69 NY2d 1020, 1021-22 (1987) (jury verdict overturned where based on speculation as to cause of ice patch). This Court agrees that speculation was a factor, in particular, speculation that if the UWB loan documents indicated 75 Worth Street as collateral, Richard must have agreed to collateralize the loan. Another factor was the complexity of the trial evidence, with its numerous e-mails and conversations stretching over more than a year (late 2007 to early 2009). Likely, sympathy was also a factor. When the dust had settled, Richard still owned her building, whereas Kantor's investment had been wiped out. Then there was the different bearing and manner of the antagonists. Richard was self-assured, and may have come across as smug; Kantor was more humble. As this Court noted in the May 25, 2012 conference (Mot. 7, Opp. Exh. D, Transcript at 62):

> I think [Kantor and Richard] were both basically honest. When Kantor could not answer a question favorable to herself she just didn't say anything or she would sit there and sort of try to hope that the thing went away. When Richard was asked questions, she just said ["]this is what I did.["]

Thus, if this Court were not to direct judgment notwithstanding the verdict, it would direct a new trial.

Kantor's Reliance Argument

In her post-trial submissions, Kantor relies heavily on reliance, namely, that she relied on Richard's alleged promise to UWB to collateralize the loan. Ironically, all of Kantor's evidence that UWB expected or hoped or believed that Richard would collateralize the loan establishes beyond peradventure of a doubt, and Kantor neither disputed nor disputes, indeed her case is essentially premised on, the fact that UWB was not going to loan Kantor $1.2 million dollars without Richard's collateral (in fact, that UWB would accept nothing less). Kantor expressly concedes this point (Mot. 6, Opp. Memo, at 9):

> In late May 2008 UWB decided that it would not approve Kantor's loan unless Richard not only guaranteed the loan but also provided collateral for the guaranty in the form of a second mortgage on the 75 Worth Street property.

So even if Richard refused to guarantee the loan – she says she did not; and this Court sees no evidence that she did – Kantor was not going to get her loan, period. In crude street parlance, without the collateral, Kantor's loan was "DOA."

Kantor is in an impossible conundrum. She claims that defendants agreed with her to collateralize the loan (Second Cause of Action), and she admits that without that collateralization UWB would not have approved the loan (Mot. 6, Opp. Memo at 9) (which moots her first cause of action and requires its dismissal as a matter of law), but she admits, in at least two e-mails and in unambiguous sworn testimony, that she never thought Richard agreed to or even could collateralize the loan. She claims that defendants agreed with UWB to collateralize the loan, but she states that she is not relying on any promise that Richard made to UWB (only on promises Richard made to Kantor herself) (Mot. 6, Opp. Memo, 27-28 passim), and her complaint does not

contain a cause of action alleging that Richard promised UWB to collateralize the loan. The numerous internal inconsistencies are self-evident.

Her response (Mot. 6, Opp. Memo at 9-10) is to claim "reliance" damages. She states (ibid.) "all that is needed to recover reliance damages is a showing that plaintiff detrimentally relied on the defendant's contractual promise." Just what "contractual promise" she relied on is unclear. She did not rely on a promise by Richard to Kantor (see Kantor's e-mails) or to UWB (see counsel's statements) to collateralize the loan; she did not rely on a promise by Richard to UWB to guarantee the loan (continually eschewed, and not pled); so she could only be referring to a promise by Richard to Kantor to guarantee the loan. However, relying on that promise did not damage Kantor, because the bank would only accept a collateralized guarantee (Mot. 6, Opp. Memo, at 9). Indeed, to the extent that Kantor might be claiming that she relied on Richard's promise, to whomever, to collateralize the loan, even though she did not believe Richard would or could do this, any reliance would not have been reasonable or justifiable. Cf. Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 178 (2011) (fraud claim requires "justifiable reliance of the other party on the misrepresentation or material omission").

Kantor recognizes her problem. She states (Mot. 6, Opp. Memo, at 10), "as defendants contend, performance of an agreement to guarantee the loan (without also allowing a second mortgage) would not have enabled Kantor to obtain that loan or bestow any benefit upon her." Thus, Kantor's reliance on a personal guarantee caused her no damage; what damaged her was the inability to obtain the $1.2 million SBA loan, without which she was forced to abandon her plan to establish a veterinary hospital in the 75 Worth Street property. Indeed, this led to her losing her entire investment: the rent she paid; the rent she is still liable for; the construction "loan" (as she herself characterized it); and her numerous incidental expenses, such as for equipment. But none of this was Richard's fault; Kantor bet the farm on establishing a veterinary hospital for which she required a loan that UWB was unwilling to give her. Kantor knew this as early as "late May 2008," but proceeded ahead heedless of the risks, perhaps hoping that Richard would change her mind (she did not), perhaps hoping that the bank would change its mind (it did not), or perhaps hoping that it all would not matter (it did). Thus, again, any "reliance" was not justifiable.

The abject futility of Kantor's reliance argument is also evident based upon the Restatement (Second) of Contracts § 349, which Kantor herself cites (Mot. 6, Opp. Memo, at 10): reliance damages do not include "any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." Here, Richard does not have to prove this; Kantor has admitted it, by conceding that she knew as early as May, 2008, that UWB would not loan the money without Richard's collateral. Losing the loan caused all of Kantor's damages, not Richard's alleged breach of a promise to guarantee the loan, which would have done no good in any event.

Indeed, Kantor gives away the store when she states as follows (Mot. 6, Opp. Memo, at 11):

> It is irrelevant to Kantor's claim for reliance damages that, had defendants performed an agreement that required them only to guarantee the loan but not also

> collateralize the guaranty, Kantor would not have received any benefit from the performance of that agreement.

Id. (emphasis added). This astounding admission means that any breach of the one agreement on which Kantor conceivably could rely did not damage her. Elementary contract law (as well as common sense and logic) dictates that you cannot sue for breach of contract damages based on a breach that caused you no damage. See generally, Noise In The Attic Prods., Inc. v London Records, 10 AD3d 303 (1st Dept 2004); see also, Mot. 6, Opp. Memo, at 11, n. 4: "Even if a promise to give a guaranty (but not to allow a mortgage) would not have resulted in any benefit to Kantor (since UWB would eventually insist on a mortgage ...)."

Kantor's attempts to prove a breached agreement on which she supposedly relied eventually descend into non-sequitur. As a classic example (Mot. 6, Opp. Memo, at 11):

> defendants ... agreed with Kantor to collateralize the guarantee ... .
>
> Specifically, on May 12, 2008, Kantor informed ... UWB ... that Richard had agreed to guarantee the loan ... .

This is fallacious for several reasons. First, Kantor attempts to prove what defendants did by claiming what Kantor herself did. Second, Kantor equates a collateralized guarantee with a personal guarantee, and there is a world of difference between the two. Third, there are the December 19, 2008 and January 8, 2009 e-mails and the sworn testimony belying this very contention.

Yet another example appears one page later (Mot. 6, Opp. Memo, at 12):

> Kantor understood that the promise Richard had made on May 9, 2008 to guarantee the loan did not necessarily include a promise to collateralize the guaranty by allowing a second mortgage on the property. Therefore, on May 22, 2008, the day after Kantor learned that UWB was going to ask Richard to allow a second mortgage on the property to collateralize the guaranty, Kantor emailed Richard and repeated her request that Richard adhere to her promise to guarantee the loan.

So taking Kantor at her word, when she learned that UWB wanted a collateralized guarantee, Kantor e-mailed Richard and asked her to confirm her agreement to provide a personal guarantee. Kantor's explanation for not mentioning the need to collateralize a million dollar loan by mortgaging a multi-million dollar building (Mot. 6, Opp. Memo, at 13) not only rings completely hollow, it begs the following question: if Kantor did not ask Richard to agree to provide collateral for the loan when Kantor found out the need for it, when did Richard promise to provide it? But as we already know, the answer is "never."

Then there is the following statement by Kantor (Mot. 6, Opp. Memo, at 13; Trial Exh. 23, at 3):

> Though Richard did not concede that she agreed in her conversation with Murphy to allow a second mortgage on the property, UWB clearly understood from its

communications with Richard that she would allow such a second mortgage, as demonstrated by the following evidence:

First, the June 23, 2008 conditional loan approval letter Kantor received from UWB (Trial Ex. 23) specifically stating that the conditions of approval included [a]

* * *

"Receipt, review and approval of current appraisal of the property located at 77 Worth Street, New York, New York, indicating a minimum "as is" market value of $15,000,000 by a UWB approved appraiser."

That UWB required such an appraisal does not mean that Richard "agreed in her conversation with Murphy to allow a second mortgage on the property." Once again, Kantor would have us conclude that because UWB required collateral, Richard must have promised it, which simply does not follow.

Some of Kantor's arguments evince wishful thinking or disingenuousness. Thus, the following (Mot. 6, Opp. Memo, at 17):

> In light of Richard's May 21 email to Kantor about the need for a second mortgage, it is extremely unlikely that Murphy and Kantor would or could discuss the need for a guaranty without also discussing the need to secure that guaranty with a second mortgage.

Except that the May 21 e-mail was from Murphy, not Richard; and Murphy's subsequent discussion was with Richard, not Kantor. In any event, Murphy (and Richard) testified that collateralization "didn't come up."

Kantor tries to make much of the fact that various UWB documents suggest that UWB thought that Richard owned the 75 Worth Street property individually, whereas an examination of public records would have indicated ownership by the LLC (Mot. 6, Opp. Memo at 17). Thus, concludes Kantor, UWB must have gotten its information straight from Richard (who, understandably, often referred to herself as "the owner"). As repeated *ad nauseum* herein, Richard's communications with UWB would not constitute a promise to Kantor.

"Risible" is the word that comes to mind when reading the following (Mot. 6, Opp. Memo, at 17-18):

> Sufficient evidence of a meeting of the minds thus exists. Richard communicated to UWB that she would allow a second mortgage and Kantor was relying on Richard's willingness to do so, as confirmed by the terms of the conditional loan approval she had received.

This might suggest reliance, but certainly not a "meeting of the minds" (Kantor's cases on the possible "informal" formation of contracts notwithstanding).

Second Ground for Dismissal of Second Cause of Action

As argued by Richard (Mot. 6, Moving Affirm. ¶¶ 37-39), she is also entitled to judgment as a matter of law dismissing Kantor's second cause of action, alleging a promise to collateralize the loan, because an alleged agreement to mortgage real estate must be in writing to be enforceable. General Obligations Law § 5-703; Straus & Co., Inc. v Felson, 216 AD 431, 434 (1926) ("The purpose of the act is to prevent litigation over oral agreements in relation to real property."). Quoting what was then McKinney's Consolidated Laws of New York (Book 49, p. 299, Real Prop. Law, § 259, note), the Straus court, id., summarized as follows:

> The purpose of the section was to prevent litigation over oral agreements, where the terms are always dependent upon the uncertain and varying memory of witnesses. This evil was to be remedied by the reduction of the terms of the contract to writing, so that the parties might not misunderstand the particulars of the contract which they were making; that no one might be induced to enter a court of justice to vex the peace of his opponent without clear and definite evidence of the terms of the contract which formed the ground of action, equally accessible to both parties and to the court; and that perjury might not be invited to sustain a claim which never had any real existence.

Here, Kantor is in a double bind she cannot escape. She is claiming that Richard promised to mortgage her property to guarantee Kantor's debts, but, pursuant to the Statue of Frauds, a promise to mortgage must be in writing, signed by the party to be charged, and a promise to guarantee the debts of another must be in writing, signed by the party to be charged, and there is no writing, much less any signing.

Indeed, Kantor's argument is reduced to the following (Mot. 6, Opp. Memo at 16): "the jury was certainly on sound footing in concluding that someone told UWB that Richard would allow the second mortgage." All we have to do is change "someone told UWB" to "Richard told Kantor," and the jury's conclusion would mean something. Kantor's speculations (Mot. 6, Opp. Memo, at 17) that the "someone" was Richard still does not change "UWB" into "Kantor."

As noted, Kantor claims waiver of any Statute of Frauds defense by Richard. True, Richard failed to assert the Statute of Frauds in her answer, and pursuant to CPLR 3211(e) that constituted a waiver. However, as Richard points out, citing Endicott Johnson Corp. v Konik Indus., 249 AD2d 744 (3d Dept 1998):

> It is settled law that defenses waived under CPLR 3211(e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay. Notably, unless coupled with significant prejudice to plaintiff, even inordinate delay is not a barrier to amendment. [Amendment should be allowed unless] plaintiff incurred 'significant trouble or

Id. at 744-45 (citations omitted). This Court finds that Kantor has known about defendants' proposed reliance on Statute of Frauds defenses at least since the eve of trial (when the case first came to this Court), and that defendants' delay in asserting them has not caused Kantor to incur "significant" avoidable "trouble or expense." See also, discussion in Mot. 6, Moving Affirm. ¶¶ 40-44, convincingly arguing that amendment should be allowed to answer Kantor's amended claims of an implied agreement with Kantor or a third-party agreement with UWB. Indeed, the only reason amendment should arguably be denied is that it is unnecessary, as Kantor disclaimed reliance on a promise to her (per her e-mails and testimony) and cannot rely on a promise to UWB (per her Memoranda of Law).

Third Cause of Action

Kantor's third cause of action (supra) fails because of the Parol Evidence Rule, see generally Woodmere Academy v Steinberg, 41 NY2d 746, 750-51 (1977), because of the merger clause in the lease, ¶ 23.1, and because of the Tenant Estoppel Certificate (see Mot. 6, Moving Exh. G, at 3).

Counterclaim for Construction Loan

Kantor argues (Mot. 6, Opp. Memo, at 4) that Richard was not damaged by her construction loan to Kantor because the total Richard spent on construction was $1 million, and she values the space at that amount. However, that fails to take into account the cost of the unimproved real estate itself, which apparently was upwards of $6 million, as TD Bank had a mortgage of $5.9 million dollars on the property, and possibly as high as $15 million (as per the UWB loan documents). As noted, Kantor acknowledged responsibility for paying $500,000 back to Richard:

> I have never seen the 500k as anything you've given me. As I understood it, it's a loan, with interest. * * * It was something I always appreciated, and my sole intention is to be able to pay you back within the first years of the [veterinary] practice, as we've discussed.

Mot. 6, Moving Exh. B, Trial Exh. 48.

Motion 7

Kantor premises her request for renewal of this Court's finding that Kantor owed four months rent on the jury verdict finding that defendants breached their agreement to guarantee and collateralize her loan and on the well-known "prevention or hindrance doctrine," pursuant to which one party to a contract may not benefit or rely on a breach by the other party if the first party "substantially hindered performance." This argument deserves but short shrift. First, as a matter of law, Richard did not breach any agreement to guarantee or collateralize. Second, Richard was not obligated, by the express terms of the lease or by any obligation of "good faith and fair dealing" to fund Kantor's build-out or to guarantee or collateralize her loan. Simply put, Kantor's argument proves too much; otherwise, any time a tenant tries to get a loan from a third-party, and the landlord refuses to guarantee or collateralize it, and the tenant is unable to secure the loan, the tenant will be relieved of the obligation to pay rent by proving that if the loan came through, the rent would have been paid. In the cases Kantor cites, the proponents of the "prevention or hindrance doctrine" had reasonable expectations, arising out of the contract or

the loan, the tenant will be relieved of the obligation to pay rent by proving that if the loan came through, the rent would have been paid. In the cases Kantor cites, the proponents of the "prevention or hindrance doctrine" had reasonable expectations, arising out of the contract or lease or otherwise, that the other party would perform or refrain from certain actions. Not so here. Kantor had no reasonable expectation that Richard would jeopardize her multi-million dollar real estate investment on whether or not Kantor, who for all that appears was a casual friend, could obtain or repay a million dollar plus loan that Kantor did not have the financial wherewithal to obtain on her own.

Kantor relies on, among many other cases, Roberts v H. Gin Realty Corp., 185 AD2d 209, 210 (1st Dept 1992), the holding of which Kantor summarizes (Mot. 7, Moving Memo, at 7) in an explanatory parenthetical as follows:

> seller of real property could not assert that the purchase [sic] was financially unable to complete the purchase, as a defense to a broker's commission since the seller had interfered with and thwarted the purchasers [sic] efforts to syndicate the purchase.

Here, Richard did not "interfere with or thwart" Kantor's loan application. Rather, for reasons that are barely fathomable, Richard offered to guarantee at least a portion of Kantor's loan, held the offer open for some seven months, and withdrew the offer only when it became obvious that there was a colossal misunderstanding about UWB's insistence on collateral, by Kantor as well as by Richard, and when it became obvious that the offer would do no good. For this Richard has endured years of acrimonious (and presumably expensive) litigation. (As the saying goes, "No good deed goes unpunished.")

Kantor then argues (Mot. 7, Moving Memo, at 5) that defendants "demanded that Kantor start paying rent as of July 15, 2008, but that they did not deliver the premises to her by that time." Kantor primarily relies on a July 14, 2008 e-mail (Trial Exh. 25) from Richard to Kantor stating as follows:

> The work we are doing has to be done for me to be able to complete my construction so we can tell the SBA that I am getting the space ready for you to rent and takeover the space.

According to Kantor (id. at 6) this e-mail "unequivocally stated that the work [the contractor] was doing was necessary for Richard's *own* benefit." Not so. Kantor and Richard were building out their space at the same time, one (Kantor?) on top of the other (Richard?). While there might (absent other evidence) be some issue as to who was obligated to pay the contractor, they both needed the construction work to proceed interdependently. Under the circumstances, including the lease, the parties' understandings, and this mutually dependent need to construct their respective premises, Kantor's obligations to pay rent clearly commenced no later than mid-July, 2008.

Kantor's fears that use of a construction contractor not approved by UWB would thwart her loan application never came to fruition and are neither here nor there now (except in Kantor's papers).

As argued by defendants (Mot. 7, Opp. Memo, at 5), "the work which was being done was work related to plans which Kantor claims she created with the assistance of an architect, [and] the contractors were performing work in accordance with those plans." (Ironically, in an e-mail to the Court on February 19, 2013, after the submission of the instant motions, Kantor's counsel wrote "The obligation to pay rent began on July 15, 2008.")

Finally, Kantor's reliance on a November 27, 2007 e-mail (Mot. 7, Reply Exh. 8) in which Richard asked "Would you feel ok with me writing a letter and signing it stating that you can cancel your lease at anytime without any penalty" is unavailing because this offer was not accepted, because the lease contains a merger clause, and because Richard apparently did let Kantor cancel at any time, that is, in February 2009, when Kantor gave up hope of obtaining alternative financing and her counsel wrote Richard that Kantor was canceling the lease.

Motions 8, 9, and 10

Motions 8 and 10 are denied because the is no evidence of spoliation. Among various other reasons the Court reaches this conclusion is that Richard could not reasonably have anticipated that she would be sued for breaching an agreement to collateralize (a loan) that she never made, by a person she had bent over backwards to help. Furthermore today's decision moots Kantor's spoliation claims. Motion 9 is denied, in the Court's discretion, and as the Court does not believe that Kantor's spoliation motions were made frivolously.

Conclusion

For the reasons set forth herein, defendants are entitled to judgment notwithstanding the verdict as follows: dismissing all of plaintiff's claims; for $40,000 in rent, plus interest on that amount from December 15, 2008 (midway between October 15, 2008 and February 15, 2009); for $23,802.88 for additional rent (a claim that Kantor failed to refute), plus interest on that amount also from December 15, 2008; for $500,000 in construction costs, plus interest from December 18, 2008 (the date of Kantor's e-mail acknowledging same); plus attorney's fees pursuant to the lease, in an amount to be determined at an inquest (which defendants may obtain by serving and filing with the clerk of the court a copy of this decision, along with a Notice of Inquest and any necessary fee). The clerk is hereby directed to enter judgment accordingly.

Dated: February 21, 2013

Arthur F. Engoron, J.S.C.