SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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DELTOID, LLC,

Plaintiff,

- against-

NASSER aka "NANDO" GHORCIAN,

Defendant.

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Index No.: 650633/2012
Motion Seq. No. 001

DECISION AND ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover on a guaranty of a certain lease, plaintiff, Deltoid, LLC (the "Landlord") moves for summary judgment dismissing the affirmative defense and counterclaims of defendant Nasser a/k/a "Nando" Ghorcian ("defendant"), granting plaintiff $185,323.82 against defendant, and setting the matter down for a hearing on attorneys' fees.

Defendant cross moves to dismiss the complaint pursuant to CPLR §§3211 (a)(1), (4), (5), (7), and (10), 1001 and/or 1003, and EPTL §9-1.1.

Factual Background

Plaintiff, the owner and landlord of a commercial condominium unit on the ground floor of a building located at 130 Franklin Street, New York, New York (the "Premises") leased the Premises to a commercial tenant Lena, Inc. (the "Tenant") pursuant to a lease dated January 27, 2009 (the "Lease").

Defendant executed a "Good Guy Guaranty" also dated January 27, 2009 (the "Guaranty"), in "consideration of the Lease dated 1/27, 2009" with respect to the ground floor and basement space at the Premises "unconditionally" guaranteeing "to Landlord" the full and timely payment, performance and observance of, and compliance with all of Tenant's obligations

under the Lease, including" rent, additional rent, and:

> "all other charges and sums due and payable by Tenant under the lease (including . . . Landlord's attorneys' fees and disbursements) through and including the date that Tenant . . . shall have completely performed all of the following: (i) provide written notice to Landlord . . . of Tenant's intention to vacate . . . no less than ninety (90) days prior to the date Tenant actually vacates . . . (ii) vacated and surrendered the Demised Premises . . .; (iv) paid to Landlord all Obligations . . . ."

The Guaranty is "an absolute and unconditional guaranty of payment and performance."

In January 2012, the Landlord commenced a nonpayment proceeding in Civil Court against the Tenant, and by Decision and Order dated January 28, 2013 the Civil Court granted Landlord judgment against the Tenant for $75,823.82, for rent arrears from December 2011 through June, 2012.

Also in 2012, the Tenant commenced an action in King's County against, *inter alia*, Landlord for lost profits resulting from sidewalk scaffolding that was erected during facade repairs.

Landlord commenced this action against defendant based on the Guaranty and the Tenant's breach of the Lease. In response, defendant asserted numerous affirmative defenses and counterclaims.[1]

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[1] As for his affirmative defenses, defendant alleges: the complaint fails to state a cause of action (first), the Court lacks subject matter jurisdiction (second), another matter pending in another court between the same parties bars the complaint under CPLR 3211(a)(4) (third), there is no valid contract between the parties (fourth/nineteenth), the complaint fails to name a necessary party pursuant to CPLR § 1001 and should be dismissed under CPLR §3211(a)(10) (fifth), defendant does not owe plaintiff any monies (sixth) or the amounts as demanded (seventh), plaintiff failed to mitigate it damages (eighth), that the doctrine of unclean hands bars this action (ninth), that plaintiff's claims are barred by waiver and estoppel doctrines (tenth), plaintiff failed to furnish defendant with water charges (eleventh), neither of the two leases for the premises are valid (twelfth), defendant's offer to pay was refused (thirteenth), plaintiff's breach of the lease excuses defendant's duties (fourteenth), defendant is entitled to an offset against the alleged damages (fifteenth), plaintiff waived its rights under the lease (sixteenth), plaintiff's misrepresentations equitably estops the claims (seventeenth), abatement (eighteenth), improper attempt to pierce the corporate veil (twentieth), defendant is still in possession of the Premises and thus, the Guaranty is inapplicable (twenty-first), plaintiff failed to furnish the Tenant with invoices regarding water charges (twenty-second), and there is no good guy clause in the lease and thus the complaint should be dismissed (twenty-third and twenty-fourth),

The Landlord then entered into a new lease dated August 20, 2012, which provided free rent for 3 months. Thus, Landlord did not collect any rent for the Premises until December 2012.

In support of its instant motion, Landlord argues that defendant is liable under the Guaranty for $75,823.82, based on the judgment of the Civil Court.

Further, defendant is liable for $57,500.00 in additional arrears from July 2012 through November 2012, at $11,500.00 per month prior to the reletting of the Premises. Although the Tenant surrendered possession of the Premises, the Tenant failed to comply with two of the three requirements necessary to terminate the Guarantor's obligations in that the Tenant (1) never provided Landlord with a 90-120 day notice of its intention to vacate prior to the actually vacating and surrendering and (2) failed to pay the rent arrears payable through June, 2012 in the sum of $75,823.82.

And, defendant is liable for the $52,000 brokers fee for reletting the Premises, totaling $133,323.82, and attorneys' fees pursuant to paragraph 19 of the Guaranty, to be determined at a hearing.

Landlord also argues that defendant's counterclaims and defenses lack merit and do not relieve defendant of his obligations under the unconditional Guaranty. The Guaranty is a distinct contractual agreement and defendant has not right to raise any defenses to the Landlord's claims. Furthermore, the claims and defenses are identical to those raised in the Kings County action,

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footnote 1, contd.

constructive eviction (twenty-fifth).

As for defendant's counterclaims, defendant seeks damages for loss of business due to the scaffolding plaintiff erected at the Premises that blocked the Tenant's signs from foot traffic (first) which constituted a breach of quiet enjoyment (second), breach of Lease, a misrepresentation as to the "as is" nature of the Leased premises (third and fifth), negligence (fourth), and interference with use (seventh, eighth), the Landlords failed to maintain the scaffold (sixth), and for attorneys fees (ninth).

which were rejected by the Court (Graham, J.) when the Tenant's complaint therein was dismissed for failure to state a cause of action. Therefore, defendant is collaterally estopped from raising these claims and defenses.

In opposition, defendant argues that the complaint is barred by collateral estoppel and *res judicata* because the issue of the rent arrears was determined in the Civil Court action, where Landlord had a full and fair opportunity to litigate the herein issues.

Also, this action was commenced while the Civil Court action was pending, and since both action are substantially similar, this action should be dismissed under CPLR §3211(a)(4) notwithstanding that the Civil Court action has been disposed. This action brought under the Guaranty was not ripe because the Guaranty requires defendant to have vacated the Premises and returned the keys and defendant was still in possession of the Premises at the time this action was commenced.

The Guaranty also violates EPTL §9-1.1, the Rule Against Perpetuities because (1) there is an additional lease at issue, dated March 2009, and the Guaranty references "the Lease" without specifying which of the two leases to which it refers; (2) it requires the Tenant to have the foresight to know precisely when it intends to vacate between 120-90 days prior thereto, which is impossible and onerous; and (3) it locks defendant into the Guaranty forever, with no time limitation, because the absence of any notice given between 90-120 requires defendant and its heirs and assigns liable for eternity.

And, because the documentary evidence shows that there are two competing leases, one signed by defendant on March 27, 2009 and the other signed by Luigi Leuci on January 27, 2009, for the same period, the complaint should be dismissed pursuant to CPLR §3211(a)(1). Since

only one purported lease has a guaranty, while the other does not, an issue exists as to which lease the Court should examine if there is a valid guaranty. A guaranty is executed simultaneously with the lease upon which it is based. Defendant could not have guarantied (in January 2009) a non-existent lease, which did not come into existence until March 2009. Signing a guaranty three months before signing the corresponding lease nullifies the Guaranty *per se*. If the Landlord is basing its claim on the lease signed by Luigi Leuci on January 27, 2009, then there is no guaranty, and thus, the complaint fails.

Further, the Landlord is not entitled to any monies for rent after the Tenant vacated the Premises in June 2012. In any event, the Landlord had a duty to mitigate, and obtained a new tenant in August 2012 but declined to charge rent for three months. The Landlord's concession does not provide a cause of action against defendant. And, the Guaranty does not address any landlord "concession."

Nor are the attorneys' fees sought recoverable since the Landlord could have sought them in the Civil Court action, and the Guaranty does not provide for attorneys' fees since, as the Landlord states, it is a separate and distinct contract.

And, the complaint must be dismissed for failure to name a necessary party, Luigi Leuci, as he is the only person that can clarify the contrasting leases. Because the only valid lease is the one signed by Leuci, the Landlord only has a viable cause of action against Leuci.

Defendant argues that the Landlord cannot both disallow defendant from raising defenses to the lease, and simultaneously seek judgment (including attorneys' fees) based on the same lease. Defendant's defenses were not adjudicated in the Kings Court action because the parties were not the same as those in this action; Lena, Inc. was the plaintiff in that action and Ghorcian

is the defendant in this action. And, defendant interposed his defenses before the Kings County decision was rendered, and thus, there is no collateral estoppel. Dismissal of the Tenant's complaint in the Kings County action raises no collateral estoppel bar to defendant's affirmative defenses, which are not specific to any lease.

Further, the Landlord failed to show any damages from the Tenant's failure to provide the 120-90 day notice.

In reply, the Landlord argues that the defendant's opposition lacks merit, raises irrelevant arguments, and that the Guaranty's language, which has been upheld by courts, permits the Landlord to pursue this action against defendant for rental arrears accruing through the expiration of the lease. The two leases are identical, except for the signatures, which is legally irrelevant. In any event, according to the Landlord's counsel who negotiated the Lease, after Leuci executed the lease on behalf of the Tenant, the Tenant's counsel requested that replacement leases be prepared to be re-executed by defendant as this was necessary to defendant's application for a liquor license. An identical lease was forwarded and signed, and superceded the lease signed by defendant. Judicial estoppel and the doctrine of estoppel against inconsistent positions preclude the Tenant, which relied upon and pursued claims based on the January 2009 lease in the Kings County action.

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v*

Prospect Hosp., 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc., supra*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]).

On a motion for summary judgment to enforce a written guaranty, "the creditor needs to prove an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (*Davimos v Halle*, 35 AD3d 270, 826 NYS2d 61[1st Dept 2006], *citing City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 681 NYS2d 251 [1st Dept 1998]).

Here, the Landlord made a *prima facie* showing of the elements necessary to enforce the written Guaranty. The Guaranty dated on January 27, 2009, is executed by defendant, and expressly refers to a "Lease dated 1/27, 2009" between the Tenant and Landlord. Plaintiff submitted a Lease (Exh. A), which was "made as of this 27th day of January in the year 2009." Further, it is undisputed that the Tenant was found liable for rental arrears for $75,823.82 pursuant to this particular Lease. That such Lease ("made" on January 27, 2009), was executed and acknowledged by defendant three months later on *March 27*, 2009, thereby predating the Guaranty, does not defeat the Landlord's *prima facie* showing that defendant is liable under the Guaranty (*see Arthur at the Westchester, Inc. v Westchester Mall, LLC*, 104 AD3d 471, 960 NYS2d 417 [1st Dept 2013] ("The guaranty, which recited that it was made to induce execution

of a lease, was supported by consideration *notwithstanding that it was signed before the lease"*)).[2]

Further, the Landlord established its entitlement to the rental arrears incurred subsequent to the Tenant's vacatur of the Premises through the date the Landlord received rent from its new tenant. In *300 Park Ave., Inc. v Café 49, Inc.* (89 AD3d 634, 933 NYS2d 274 [1st Dept 2011]), the First Department upheld a finding of damages under a guaranty assessed through the end of the term of a commercial lease, where the conditions providing for earlier termination of the lease were not satisfied. In *300 Park Ave., Inc.*, Court stated that the guaranty:

> "provided that the 'Term' would end on the day after Café 49 completely vacated the premises, removed substantially all of its property, and delivered possession 'together with all keys thereto.' It is undisputed that the last condition was never satisfied and, thus, the motion court properly found [the guarantor] Lee liable for damages until the end of the 'Term,' June 30, 2010, as set forth by the lease. We also reject defendants' substantial compliance argument. Defendants failed to satisfy all three conditions as required by the guaranty. The terms were unambiguous."

And, once the Lease was executed, the Tenant's obligation to pay rent was "fixed according to its terms" and the Landlord was "under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages" (*Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130, 661 NE2d 694 [1995] *citing* 2 Rasch, New

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[2] It is noted at this juncture that dismissal of a complaint pursuant to CPLR 3211(a)(7) is warranted where "plaintiff has not stated a claim cognizable at law" or where "plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 980 NYS2d 21 [1st Dept 2014]). Since the Landlord's pleadings and submissions establish a *prima facie* case against defendant for liability under the Guaranty, defendant's affirmative defense and motion to dismiss premised on the failure to state a cause of action lacks merit and such affirmative defense is dismissed.

Similarly, dismissal of a complaint pursuant to CPLR 3211(a)(1) is unwarranted, as the lease signed by Leuci, on January 27, 2009, does not unambiguously contradict or conclusively establish a defense to the allegations in the complaint, that the Tenant was adjudged liable under the subject Lease, and that defendant guaranteed the Tenant's obligations under said Lease. Dismissal where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]).

York Landlord and Tenant § 26:22 [3d ed 1988] (once "the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease")). There is no duty to mitigate damages in a commercial lease setting (*11 Park Place Associates v Barnes*, 202 AD2d 292, 608 NYS2d 664 [1st Dept 1994]). Therefore, defendant's contention that the Landlord is not entitled to collect rent under the Lease for any period after the Tenant surrendered possession of the Premises lacks merit.

Additionally, and contrary to defendant's contention, the Landlord established its entitlement to the attorneys' fees sought. Under the Guaranty, defendant guaranteed the Tenant's performance of Tenant's "obligations under the Lease" including rent and additional rent and "all other charges and sums due and payable by Tenant under the Lease (including, without limitation, Landlord's reasonable attorneys' fees and disbursements) through and including the date that Tenant . . . shall have completely . . . performed all of the following . . . (iv) *paid to Landlord all Obligations to and including the date* which is the later of (x) *the actual receipt by Landlord of the Obligations*, (y) the surrender of the Demised Premises or (z) receipt by Landlord of the keys to the Demised Premises." "Obligations" is defined in the same paragraph as "all base annual rent, Additional Rent and al other charges and sums sue and payable by Tenant under the Lease (including, without limitation, Landlord's attorneys' fees). Here, Landlord has yet to receive full performance of the Tenant's Obligations, and thus, is entitled to the attorneys' fees it incurred (*see also, Kensington House Co. v Oram*, 293 AD2d 304, 739 NYS2d 572 [1st Dept 2002] (stating "While the guaranty . . . does not explicitly provide for costs and attorney's fees incurred by [plaintiff] in attempting to obtain payment of the underlying debt,

the language of the guaranty, *obligating the guarantors to the full performance of all monetary obligations under the lease*, incorporates the explicit terms of the lease, which clearly provide for full payment of the additional rent, late charges, water and sewer charges, costs, disbursements and attorney's fees sought") (emphasis added)). And, attorneys' fees against the Guarantor under the Guaranty are properly sought herein, as opposed to in the Civil Court (landlord/tenant) proceeding against the Tenant under the *Lease*. Therefore, attorneys' fees is warranted. That the Guaranty is a separate and distinct contract has no bearing on this issue.

And, the Landlord established its entitlement to the brokers' fee incurred in reletting the Premises pursuant to paragraph 18 of the Lease.

Defendant raised no issue of fact as to the calculation of the amounts sought by the Landlord.

Further, defendant failed to raise a triable issue of fact as to the enforceability of the guaranty, as their contentions are entirely premised upon the alleged unenforceability of the underlying lease (*Acadia Woods Partners, LLC v Signal Lake Fund LP*, 102 AD3d 522, 957 NYS2d 862 [1st Dept 2013]). Such arguments are unavailing, given that the Guaranty is a "separate undertaking" (*Acadia Woods Partners, LLC*, 102 AD3d at 523, *citing American Trading Co. v Fish*, 42 NY2d 20, 26, 396 NYS2d 617, 364 NE2d 1309 [1977]) and a "self-standing document[ ]" (*id., citing European Am. Bank v Competition Motors*, 182 AD2d 67, 72, 586 NYS2d 816 [2d Dept 1992]).

The "Good Guy" guaranty of tenant's lease obligations did not terminate upon delivery of possession to landlord, so as to cause guarantor's obligations under the guaranty to cease on that date (*Russo v Heller*, 80 AD3d 531, 915 NYS2d 268 [1st Dept 2011]). The Guaranty and the

leases are entirely separate documents, the former imposing obligations on the defendant and the latter imposing obligations on Landlord and Tenant (*Park Towers South Co., LLC v 57 W. Operating Co., Inc.*, 96 AD3d 443, 945 NYS2d 554 [1st Dept 2012]). Again, that defendant acknowledged the Lease in March 2009 after he signed his Guaranty is inconsequential, since the Guaranty defendant signed was in consideration of the January 27, 2009 Lease (see discussion above).[3] And, the Guaranty provides that defendant "agrees that the obligation of the undersigned hereunder shall in no way be terminated or other affected or impaired by reason of an assertion by Landlord against Tenant of any of" the Landlord's rights under the Lease. Furthermore, the Guaranty "shall survive" the termination of the January 27, 2009 Lease. Thus, the Tenant's subsequent vacatur of the Premises, does not limit Tenant's exposure for unpaid rent, or the commensurate Guaranty obligations defendant undertook (*id.*).

As to defendant's defense based on CPLR §3211(a)(4), this section permits a party to move for dismissal of a complaint where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." Notwithstanding that this action was commenced subsequent to the commencement, and during the pendency, of the Civil Court action, at present, the Civil Court action has been disposed. Therefore, since the premise of defendant's claim pursuant to CPLR §3211(a)(4)—the existence of a pending action in regarding the same subject matter—"has now been eliminated, this factor weighs heavily against dismissal" (*see L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 841 NYS2d 82 [1st Dept 2007]). Therefore, this affirmative defense is moot and dismissed.

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[3] To the extent defendant's signature (in March 2009) modified the lease previously signed by Luigi Leuci, defendant's January 2009 Guaranty expressly provides that it "shall remain and continue in full force and effect as to any . . . modification . . . of the Lease."

Furthermore, contrary to defendant's contention, dismissal pursuant to CPLR §3211(a)(5) of the Landlord's claims, including those for attorneys' fees, is not warranted under the doctrines of *res judicata* or collateral estoppel. "'Collateral estoppel' refers to the conclusive effect given to the determination of matters actually litigated in one action, when those matters are raised in a subsequent action based upon a different cause of action. 'Res judicata' applies to the entire cause of action whereas 'collateral estoppel' applies only to an issue which has been determined in a prior action and which is decisive of the subsequent action in which it is sought to be invoked" (*Colon v Bermudez*, 61 Misc 2d 255, 305 NYS2d 630 [New York City Civ. Ct. 1969]).

Specifically, the doctrine of *res judicata* holds that a final judgment bars further actions between the same parties or those in privity with them on either the same cause of action or any claim related to the same course of conduct, unless the requisite elements and proof required for the new claim "vary materially" from those of the claim in the prior action (*Ginezra Associates LLC v Ifantopoulos*, 70 AD3d 427, 895 NYS2d 355 [1st Dept 2010] *citing Lukowsky v Shalit*, 110 AD2d 563, 566, 487 NYS2d 781 [1985]). As to parties to a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action (*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 386 NE2d 1328 [1979]).

Here, *res judicata* does not bar the Landlord's claim against the defendant, as guarantor, who was not personally a party to the Lease and whose obligations arise from a separate agreement requiring different proof; the liability of the Tenant is not necessarily conclusive on the issues of fact and questions of law as pertaining to defendant's liability under the Guaranty (*see, Ruth v Shalom Brothers, Inc.*, 276 AD2d 408, 714 NYS2d 482 [1st Dept 2000] (holding that

plaintiff's attorneys' fees award from its holdover proceeding for services rendered in that proceeding has no collateral estoppel effect on his enforcement of the guarantees for purposes of recovering the reasonable attorneys' fees he incurred after the holdover proceeding)).

"Collateral estoppel is a corollary to the doctrine of Res judicata ; it permits in certain situations the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided" (*Gramatan Home Investors Corp.*, 46 NY2d at 485)). As the party seeking to invoke the doctrine, defendant must show that the Landlord was "afforded a full and fair opportunity to contest the decision said to be dispositive of the present controversy" and that "the issue in the prior action is identical, and thus decisive, of that in issue in the current action (*id.* at 485). Since the issue of the defendant's liability under the separate Guaranty is not identical, it cannot be said that this action is collaterally barred.[4]

Additionally, neither CPLR 1001 nor CPLR 1003 warrant dismissal of the action pursuant to CPLR §3211(a)(10). Under CPLR 3211(a)(10), a motion to dismiss may be made on the ground that "the court should not proceed in the absence of a person who should be a party."

CPLR 1001, entitled "Necessary joinder of parties," provides in relevant part that:

> "(a) . . . Persons who ought to be parties 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 shall be made plaintiffs or defendants. . . .

CLPR 1003 provides in pertinent part:

> "Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that

[4] However, as the Landlord suggests, defendant, which is in sufficient privity with the Tenant (of which defendant was its officer), is barred from challenging the judgment of the Civil Court.

party under the provisions of that section."

Here, the Court finds that Luigi Leuci is not a necessary party pursuant to CPLR 1001 in order for complete relief to be accorded between the Landlord and defendant, the sole parties to the Guaranty upon which this action is based. Nor is discovery from Luigi Leuci necessary to ascertain the circumstances of the existence of the two leases, as this action is sufficiently based on the Guaranty, Civil Court judgment based on the Lease, and proof the defendant's failure to pay the Tenant's obligations pursuant to such Lease. Thus, dismissal even without prejudice is unwarranted. It is noted that while CPLR 1001(b) and 1003 permits dismissal on the grounds of failure to join a necessary party, dismissal pursuant to these sections is discretionary, not mandatory (*Eve & Mike Pharmacy, Inc. v Greenwich Pooh, LLC*, 107 AD3d 505, 968 NYS2d 22 [1st Dept 2013]).

Further, as to the affirmative defense based on EPTL 9-1.1, the Rule against Perpetuities prevents the "vesting" of an estate in another (*i.e.*, alienation) which does not occur within the measuring period (*U.O.T.S. Inc. v DeBaron Associates LLC*, 89 AD3d 538, 932 NYS2d 468 [1st Dept 2011]). It is noted that the Tenant has cited no caselaw for its position that the conditions under which its obligations shall cease under the Guaranty violates the Rule Against Perpetuities. Further, the Lease was already "vested" in the Tenant at its inception, and no provision of the January 2009 Lease attempted to further alienate the land in the future, beyond the initial, finite 12 years. Thus, although defendant's obligation under the Guaranty survives the expiration of the Lease, any amounts due under the Lease do not accrue beyond the 12- year period. And, similar to the requirement in *300 Park Ave., Inc.*, (*supra*) of delivering possession "together with all keys" for early termination of the lease, the failure to give the required notice by the Tenant

herein can, arguably, remain unsatisfied for an indeterminate amount of time. However, the Court in *300 Park Ave., Inc.* permitted the landlord to collect, as against the guarantor, the amounts due through the end of the lease term, notwithstanding substantial compliance with the other requirements necessary for early termination of the lease (*see also*, *Wooster 76 LLC v Ghatanfard*, 68 AD3d 480, 892 NYS2d 310 [1st Dept 2009] ("the guaranty's clear language provided that any termination would not be effective until three months after plaintiff's receipt of the termination notice. To interpret the guaranty otherwise would render the provision delaying the effective date of termination meaningless, in contravention of rules of contractual construction")). Therefore, this affirmative defense lacks merit.

The remaining affirmative defenses concerning lack of subject matter jurisdiction, doctrine of unclean hands, water charges, offer was refused, plaintiff breached the lease, waiver, misrepresentations, abatement, improper attempt to pierce the corporate veil, and constructive eviction, which were not referenced in defendant's opposition papers, are likewise dismissed as abandoned.

Finally, the Landlord's request for dismissal of defendant's counterclaims is granted. Contrary to defendant's contention, the Landlord established its burden of showing that there is "an identity of issue which has necessarily been decided in the prior action [against a party, or one in privity with a party] and is decisive of the present action," and there was "a full and fair opportunity to contest the decision now said to be controlling" (*Lumbermens Mut. Cas. Co. v 606 Restaurant, Inc.*, 31 AD3d 334, 819 NYS2d 511 [1st Dept 2006]). Defendant's counterclaims seek damages and relief for loss of business income due to the scaffolding plaintiff erected at the Premises that blocked the Tenant's signs from foot traffic. The record demonstrates that the

Tenant asserted the same claims in the Kings County action against the Landlord. The defendant is an officer of the Tenant. Since the Tenant's claims were dismissed for failure to state a cause of action, such finding is binding upon, and cannot be relitigated by defendant, with which the Tenant has sufficient privity (*see e.g., 114 West 26th Street Associates LP v Fortunak*, 22 AD3d 346, 801 NYS2d 895 [1st Dept 2005] (defendants failed to establish a meritorious defense where their defenses had been previously rejected by the Civil Court which "determined that the *tenant, with whom defendant guarantors are in privity, and of whom they are principals*, lacked any defense to the landlord's non-payment petition") (emphasis added)). Thus, defendant is collaterally estopped from asserted the counterclaims herein that arise from the scaffolding placed by the Landlord, and the counterclaims are dismissed.

And, defendant's counterclaim for attorneys' fees lacks merit.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment dismissing the affirmative defense and counterclaims of defendant Nasser a/k/a "Nando" Ghorcian, granting plaintiff $185,323.82 against defendant, and setting the matter down for a hearing on attorneys' fees is granted, and the issue as to the amount of attorneys' fees due and owing plaintiff is referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that defendant's cross-motion to dismiss the complaint pursuant to CPLR §§3211 (a)(1), (4), (5), (7), and (10), 1001 and/or 1003, and EPTL §9-1.1 is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry

on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

This constitutes the decision and order of the Court.

Dated: March 12, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD