

1710 Realty LLC v Portabella 308 Utica, LLC
2017 NY Slip Op 32498(U)
November 29, 2017
Supreme Court, Kings County
Docket Number: 516951/16
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

x

1710 REALTY LLC,

Plaintiff,

DECISION / ORDER

-against-

Index No. 516951/16

Motion Seq. No. 1 & 2

Date Submitted: 9/14/17

**PORTABELLA 308 UTICA, LLC and
KARL ASHMAWY,**

Defendants.

x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment dismissing the complaint and a money judgment on its counterclaims and plaintiff's cross-motion for summary judgment.

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed	<u>1-10</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed	<u>11-20</u>
Answering Affidavits	<u>21-37</u>
Reply Affidavits	<u>38</u>
Other: <u>Defendants' Memoranda of Law</u>	<u>39, 40</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

Defendants move for summary judgment dismissing the complaint and a money judgment on its counterclaims for the return of its security deposit and first month's rent with regard to a commercial lease between plaintiff 1710 Realty LLC as Landlord and defendant Portabella 308 Utica, LLC (hereinafter Portabella) as Tenant. Plaintiff cross-moves for summary judgment.

Defendants' Motion

Defendants support their motion with copies of the pleadings, an affidavit from defendant Ashmawy, an affidavit from someone named Khamis Baker, who states he is the "construction manager" for defendant Portabella, a copy of the fully executed Lease Agreement and the Guaranty, (hereinafter "Lease" and "Guaranty"). The Guaranty was acknowledged on December 16, 2015, which the parties agree is the date of the undated Lease. Defendants also provide a copy of an application to the New York City Buildings Department for a work permit for renovating the Demised Premises, photos, defendant's letter claiming to terminate the Lease and copies of cancelled checks for the security deposit and first month's rent, which checks are signed by Mr. Ashmawy on Portabella's account.

Mr. Baker states in his affidavit that he is defendant's "construction manager," that he took the photos included as Exhibit C to defendant's motion, that they were taken between March 11, 2016 and April 14, 2016 and show that there were miscellaneous items that hadn't been removed by the prior tenants. He also lists these items, and the list includes things such as mannequins, computers, a bicycle, shelving brackets and other debris. He claims these items prevented him from doing any construction. He doesn't state whether he is defendants' employee or if he was hired by defendants as an independent contractor.

Defendants also provide an affidavit from Mr. Ashmawy. He is a named defendant, as he signed the Guaranty, and states he is the "owner" of the defendant LLC. He claims the Premises were never delivered to defendant Portabella, as they

were never made vacant and broom clean by plaintiff, as required by Paragraph 2.1 of the Lease.

Defendant's letter to plaintiff, which claims to terminate the Lease, is dated April 19, 2016. As both sides have included a copy of this letter in their papers, it is deemed stipulated that it was sent and received. The letter states that the Tenant elects to terminate the Lease in accordance with Paragraph 2.1. thereof, as "Landlord has failed to deliver the Demised Premises to the Tenant in Delivery Condition within ninety (90) days of the date of the Lease." No further specifics are provided in the letter.

Plaintiff's Cross Motion

Plaintiff cross-moves for summary judgment on its complaint, including its claim for a money judgment for rent for some part of the Lease term and asks for an order referring plaintiff's claim for attorneys' fees and costs to an inquest, and also asks the court to dismiss defendants' affirmative defenses and counterclaims.

Plaintiff supports its motion with an attorney's affirmation, an affidavit from Wolf Sicherman, the managing member of plaintiff, the pleadings, the Lease, the Guaranty, e-mails, and a bank statement reflecting defendant's security deposit.

Plaintiff's managing member, Mr. Sicherman, claims that defendant Portabella agreed to accept the Premises "as is," because they were going to demolish the interiors of the three (3) stores they leased and then combine them into one store. The plaintiff Landlord signed the application to the Department of Buildings for a permit. The Landlord gave Tenant a \$2,500 credit to remove the debris that the prior tenants left behind when defendant Tenant complained about it. The Tenant never moved in, Mr. Sicherman alleges, and abandoned the Lease, because they negotiated an extension of

their lease at their current location - not because possession was not delivered by the plaintiff Landlord.

Plaintiff's managing member claims defendant Tenant took possession of the Premises as soon as the Lease was signed. Both sides provide the same copy of the Lease, so the court considers it to be admissible by stipulation of the parties. It is 44 pages long, single spaced. It is not a form, and is clearly customized for this transaction. Paragraph 13.1 states in its entirety "Landlord hereby agrees to deliver to Tenant the Demised Premises on the Commencement Date, as is." Paragraph 13.2 states that "Tenant shall be responsible for all build-outs and construction necessary for Tenant to open and operate . . ." The court notes that defendant Tenant agreed to accept possession "as is" on the "Commencement Date," which is defined in Paragraph 2.1, discussed below.

The three stores were vacant and the debris complained of was in said stores when the Lease was signed, which states that the Tenant was leasing the Premises "as is." The clause defendant relies on in its claim that it did not receive possession cannot be interpreted as defendant argues. There were no tenants who had not vacated. "Broom clean" in an "as is" lease must be interpreted by industry standards, custom and practice. While fixtures and heavy equipment have been found to be the obligation of the Landlord to remove, a broken bicycle and a few mannequins is not the sort of debris left behind that can be interpreted to be the Landlord's failure to deliver vacant possession.

The Lease also provides in Paragraph 2.1 that no rent shall be due until the date which is 270 days after the Commencement Date, approximately nine months later.

This is clearly a negotiated rent forbearance during the anticipated period for the construction work defendant wanted to do to, among other things, combine three stores into one (Paragraph 13.2 "Tenant's Initial Work.") The Landlord agrees in this paragraph to reimburse defendant tenant for the cost of removing the walls between the stores, in an amount up to \$3,000. The Lease states that Tenant was to install a new floor, new electric, a new H.V.A.C. unit and was to build fitting rooms. The Lease is a fifteen (15) year lease, starting from the commencement date, at a monthly rental of \$11,200 for the first five (5) years, with increases thereafter, plus add-ons for taxes and other items ("additional rent").

Defendants' Opposition to Plaintiff's Motion

Defendants oppose plaintiff's cross motion for summary judgment with a lengthy affidavit from defendant Ashmawy, an affidavit from Jody Markman, an attorney who worked on the Lease negotiations, many red-lined draft versions of the Lease, and e-mails between the attorneys regarding the Lease negotiations. The court did not read the e-mails or the draft versions of the Lease, as the final, executed Lease is the only document that is enforceable. Moreover, the e-mails are not submitted in admissible form.

Mr. Ashmawy, the managing member of defendant Portabella and the defendant on the Guaranty, first disputes that the Premises were ever "delivered" as required by the Lease. He is not an attorney, and his nineteen-page affidavit is clearly written by an attorney. Notably, the affidavit does not dispute Mr. Sicherman's claim that he offered defendant Portabella a \$2,500 credit to clean out the debris after they complained that the prior tenants left debris. Instead, Mr. Ashmawy acknowledges that (Par. 31) the

broker wrote an e-mail to him on January 26, 2016, after the plans were approved by the Buildings Department, which said “take the \$2,500 credit and call it a day. You are doing demolition anyway.” Mr. Ashmawy then espouses at length about the plain meaning of the term “broom clean,” and states that he refused the offer of \$2,500. He also points out that his company’s comptroller had e-mail correspondence with the broker early in January about the debris, asserting that the space wasn’t “broom clean” and denying that the Lease said, “as is.”

Mr. Ashmawy clarifies that Portabella had Ms. Markman represent it in the Lease negotiations, an attorney from a different firm than is representing defendants in this action. He states that the negotiations went on for almost six months, from July 2015 to December 16, 2015, when the Lease was “finally signed.” He explains that the terms “commencement date” and other terms were specifically negotiated. The court has no reason to doubt this, as Portabella obtained a rent concession of nine months for the anticipated duration of construction, along with a deferral of the Lease commencement date to, among other possible dates, the date the NYC Department of Buildings approved the construction plans, so Portabella would not have to pay any rent if there were any bureaucratic delays, or if the Landlord failed to approve the plans for any reason, whether due to substantive objections or because Mr. Sicherman was out of town, as the Landlord’s signature was required on the application for a permit. He points out that he negotiated the reimbursement of \$3,000 for tearing down the walls between the stores. He asserts that it is not possible that, in such a carefully negotiated Lease, that Portabella agreed to take the Premises in “as is” condition, even though the Lease clearly says, “as is,” the Premises were unoccupied when the Lease was signed,

and all the items left behind by the prior tenants were there to be seen by Portabella before the Lease was signed. Their careful and thorough negotiation failed to mention whose obligation it was to remove the mannequins, shelving brackets and shelving, the broken bicycle and the other debris.

Mr. Ashmawy then proceeds to analyze the various iterations of the draft lease, but none of this is relevant, as it is only the one that was signed that is binding and enforceable. He then states that he was never given the keys to the Premises, so they never had possession. This statement is belied by Portabella's construction manager's affidavit, which states that he entered the Premises on numerous dates to take the photos in the papers to prove that the mannequins and the bicycle and shelving brackets and other debris was still there. Mr. Ashmawy then avers that while the e-mails he annexes prove that the Landlord told his staff to get the keys from the superintendent, and provided the super's contact information, the fact that they did not go to pick up the keys proves they did not have possession (Par. 35). This confuses the issue of legal possession with physical possession. Portabella had legal possession on the Commencement Date, which was January 21, 2016.

Finally, Mr. Ashmawy disputes Mr. Sicherman's claim that the debris was "de minimis" and states that it was enough to fill two dumpsters.

Plaintiff's Reply

Plaintiff replies to defendants' opposition with an attorney's affirmation and another Memo of Law. Counsel again avers that it was the defendant who breached the Lease, that the Tenant accepted the \$2,500 credit for the debris removal, and that

the lease required the Tenant to take possession "as is." Counsel re-asserts that the amount of debris was de minimis, and while the Premises weren't "broom clean," this didn't deprive Portabella of possession, as not only did they agree to accept the Premises "as is," they had filed plans to, among other things, take down two walls and combine three storefronts into one, which would have necessitated a dumpster.

The Pleadings

The Complaint, dated September 23, 2016, asserts five causes of action. The First is for breach of contract against defendant Portabella, and claims defendant is responsible for the rent for the entire Lease term plus reasonable expenses incurred in connection with re-letting the Premises. The Second Cause of Action alleges breach of contract against defendant Ashmawy, which unartfully attempts to recite the elements of a claim on a lease guaranty. The Third Cause of Action is not actually contained in the complaint and the Fourth Cause of Action is for attorneys' fees and costs as against both defendants.

Defendants' Answer to the Complaint includes four affirmative defenses and three counterclaims. The First Affirmative defense asserts that plaintiff failed to deliver possession as required by the "delivery condition" in ¶ 2.1 of the Lease, which, pursuant to that paragraph, entitled defendant Portabella to terminate the Lease, which it did. The Second Affirmative Defense repeats the claims in the First Affirmative Defense and states that defendant Ashmawy has no liability as Guarantor, as the Lease never commenced. The Third Affirmative Defense states that the lease doesn't permit acceleration and that ¶ 21(c) requires damages to be paid monthly. The Fourth

Affirmative Defense claims the obligation to pay rent never started, as the landlord failed to “meet the delivery condition,” so the Lease never commenced.

Defendant’s First Counterclaim is for a return of its rent security deposit and first month’s rent, totaling \$33,600.00. The Second Counterclaim alleges plaintiff “converted” the rent security of \$22,400, and the Third Counterclaim seeks legal fees and expenses for this action caused by plaintiff’s default under ¶ 16.2 of the Lease.

Discussion

Paragraph 2.1 of the Lease defines the “Commencement Date” as the later of 1) delivery of the Premises in the Delivery Condition (as hereinafter defined), or 2) tenant has been issued a permit by the New York City Department of Buildings (DOB), or 3) January 15, 2015 [sic]. This paragraph then states that if the Premises are not delivered within ninety (90) days of the execution of the Lease (which is dated December ____, 2015), then Tenant shall have the right to terminate the Lease. Then, the “Delivery Condition” is defined as “shall mean vacant, broom clean and free of the prior tenants’ personal property and fixtures.” While the permit was never “pulled” by defendant, the plans were approved by the Department of Buildings on January 21, 2016, so the court concludes that the Demised Premises were delivered to defendant Portabella on January 21, 2016, which by the Lease’s terms is the Commencement Date.

The court finds that there was a valid Lease and Guaranty, that the Demised Premises were vacant and free of tenancies when the Lease was executed, that possession of the premises was delivered to Tenant “as is” on January 21, 2016, that defendant breached the lease by abandoning it entirely, including failing to “pull” the work permit and proceed with the work, and failing to take occupancy, that the debris

left by the prior tenants was not a valid basis to terminate the Lease, and that the Lease provides at Paragraph 21.1(c) that the Landlord is entitled to legal fees and expenses, should defendant Tenant default.

Summary Judgment

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; *Winegrad v NYU Medical Center*, 64 NY2d 851 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Only if this burden is met, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of the action. *Zuckerman v City of New York*, *supra*. If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Ayotte v Gervasio*, 81 NY2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." *Sillman v Twentieth Century Fox Films*, 3 NY2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court

may and should resolve them without the need for a testimonial hearing. *Hindes v Weisz*, 303 AD2d 459 (2d Dept 2003).

Analysis

Liability on the Lease

To state a cause of action for breach of an agreement, such as a lease, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc3d 1071[A] [Sup Ct NY Co. 2006], citing *Furia v Furia*, [2d Dept 1986]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; see also *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]).

Further, a complaint alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc3d 1072[A] [Sup Ct NY Co 2006], citing *Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [3d Dept 1987], accord *Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894 [4th Dept 1987]).

Here, plaintiff has established its prima facie entitlement to summary judgment as to liability on the Lease.

It is undisputed that on or about December 16, 2015, plaintiff and defendant Portabella executed the Lease for the Premises. As discussed above, the evidence in the record establishes that Portabella breached the Lease by abandoning it, resulting in pecuniary damages to plaintiff.

In support of its motion for summary judgment, defendants rely on their interpretation of the Lease. The defendants have not made a prima facie showing of entitlement to summary judgment as a matter of law, nor have they overcome plaintiff's *prima facie* showing of its entitlement to summary judgment on the issue of liability.

"[W]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is *required* to do so and to give both effect" (*LI Equity Network, LLC v Village in the Woods Owners Corp.*, 79 AD3d 26, 35 [2d Dept 2010] [internal quotation marks omitted]; *Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 987 [1st Dept 2009]; *G&B Photography v Greenberg*, 209 AD2d 579, 581 [2d Dept 1994]). Here, the court finds that the standard boilerplate clause, which requires the Landlord to deliver the Premises vacant, broom clean and free of tenancies and fixtures, was modified by the specific provision that the Premises were to be delivered "as is," which is logical and reconcilable, as the Tenant was planning to demolish the walls between the stores and do other work in the Premises, thereby obviating the Landlord's need to have the Premises "broom clean" and in move-in condition, as that term is ordinarily interpreted. To the extent the debris required a few hours to load into a dumpster, which the Tenant would need for the demolition anyway, Landlord offered a concession of a \$2,500 credit, which was reasonable. Certainly, the debris left at the

Premises did not amount to a material breach on the Landlord's part, even if the "as is" provision did not control, as the court finds it does on these facts (*Moulton Paving, LLC v Town of Poughkeepsie*, 98 AD3d 1009, 1012 [2nd Dept 2012]).

In support of its cross motion for summary judgment on the issue of the Tenant's liability in this action, the Landlord relies upon the pleadings and the Lease. With this evidence, the Landlord has made a *prima facie* showing of entitlement to judgment as a matter of law on the issue of the Tenant's liability for breach of the provisions of the Lease. (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In opposition, the Tenant has failed to establish that it did not abandon the Premises prior to the expiration of the Lease. Therefore, the Landlord is entitled to damages for Tenant's breach. (see *Holy Props. v Cole Prods.*, 87 NY2d 130, 134, 661 NE2d 694, 637 NYS2d 964 [1995]; see also *Rios v Carrillo*, 53 AD3d 111, 113, 861 NYS2d 129 [2008]).

However, the amount of damages cannot be ascertained on the papers. The amount demanded in the complaint appears to be approximately four years of rent, but plaintiff would not have collected four years of rent until around November 1, 2020, as the Landlord agreed that Tenant did not need to pay any rent for the first nine months after the Commencement Date, which was January 16, 2016. While the Landlord is not required to mitigate damages in a commercial lease, the court finds that the dispute concerning whether and to what extent the Landlord has been injured by the Tenant's breach is a matter to be litigated at a trial on the issue of damages. (See *Rep A8 LLC v Aventura Tech., Inc.*, 68 AD3d 1087, 1088-1090 [2d Dept 2009]).

A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation (*Truck Rent-A-Center, Inc. v Puritan Farms 2, Inc.*, 41 NY2d 420 [1977]); *City of Rye v Public Serv. Mut. Ins. Co.*, 34 NY2d 470, 473 [1974]). A liquidated damages provision, however, will not be enforced where it is a penalty that "lacks a reasonable relation to the amount of probable actual harm." *Id.* (upholding acceleration of lease payments for truck rentals); see also *Thirty-Third Equities Co. LLC v Americo Group, Inc.*, 294 AD2d 222 (1st Dept 2002) (upholding projected damages equal to 250% of rent reserved in lease where new tenant paid approximately that amount); *Lexington Bldg. Co., L.P. v S-Fer Int'l. Corp.*, 225 AD2d 406 (1st Dept 1996) (bargain should be enforced where foreseeable damages at time of leasing not disproportionate to actual damages and no evidence of fraud or overreaching).

Moreover, it is not alleged in plaintiff's papers that the Landlord sent an acceleration notice to defendant, or a notice to cure, or a notice of default, or indeed any signed writing accepting or otherwise authorizing defendants to unilaterally vacate the Premises, nor were there any writings waiving plaintiff's legal or equitable rights. Further, there is nothing in the complaint to indicate how the sum demanded in the *ad damnum* clause, \$444,864.00, was calculated.

As the party seeking to avoid liquidated damages, the burden is ordinarily on the defendant to show that the stated liquidated damages are, in fact, a penalty or that the [liquidated damages] fee is conspicuously disproportionate to the foreseeable losses"

(*Ray v Ray*, 61 AD3d 442 [1st Dept. 2009], quoting *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]). Defendants' papers are silent on this issue, but so are plaintiff's.

While the defendants may claim at trial that the sum sought in the *ad damnum* clause here, approximately four years of the base rent, bears no relationship to the damages sustained by landlord as a result of the breach, the acceleration clause in the Lease is nothing more than a bargained-for device which seeks to insure the performance of a material element of the obligation of the Tenant and attempts to fix the damages for its breach. However, as the Tenant breached the Lease before even moving in, the full four years' rent sought may not be an equitable recovery if the Landlord is able to rent the premises to another business. (See *Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc.*, 46 NY2d 573, 578 [1979]; *L'Aquila Realty, LLC v Jalyng Food Corp.*, 148 AD3d 1004 [2d Dept 2017]; *Cyber Land, Inc. v Chon Prop Corp.*, 36 AD3d 748 [2d Dept 2007]; *30 Broadway, LLC v Grand Cent. Dental, LLP*, 96 AD3d 934 [2d Dept 2012]).

Accordingly, as defendants have failed to defeat plaintiff's prima facie case as to liability on the Lease, plaintiff's motion for summary judgment as to liability on the Lease is granted. However, plaintiff has not established that there are no triable issues of fact with regard to its damages. This matter shall thus proceed to trial on the issue of damages only, once the Note of Issue is filed. (See *1911 Richmond Ave. Assoc. LLC v GLC Capital LLC*, 2010 NY Slip Op 31075(U) [Sup Ct Richmond Co]).

Liability on the Guaranty

A Guaranty, by definition, is a secondary obligation to answer for the debt of another, the primary obligation, in this case, the Lease (*see Michaels v Chemical Bank*, 110 Misc2d 74, 76 [1981]). "A guaranty is to be interpreted in the strictest manner" (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]). Further, "an absolute and unconditional guaranty agreement is independent and stands alone in imposing obligations on the guarantor" (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). A party seeking summary judgment to enforce a written guaranty need only establish the existence of "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 [1st Dept 1998]; *BNY Financial Corp. v Clare*, 172 AD2d 203 [1st Dept 1991]). Further, to establish that the guaranty took effect, the plaintiff must demonstrate that there was a default on the part of the principal obligor (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc., LLC*, 30 AD3d 1, 10 [1st Dept 2006]).

Here, plaintiff has established a prima facie entitlement to summary judgment as to liability on the Guaranty. It is undisputed that on or about December 16, 2015, plaintiff entered into the lease with Portabella. On the same date, Mr. Ashmawy executed the Guaranty, in connection with the lease, and the Guaranty is absolute and unconditional. The Guaranty is four pages long, and clearly states at ¶¶ 2 and 5:

2. This Guaranty is an absolute, unconditional and irrevocable guaranty of payment and performance. The liability of Guarantor hereunder is coextensive with that of Tenant with respect to the obligations guaranteed hereunder, and action or suit may be brought against Guarantor and carried to final judgment and/or completion and final recovery had, either with or without making Tenant a party

thereto. The liability of Guarantor hereunder shall not be impaired, released, terminated or discharged, in whole or in part, by the release of any other entity from liability for the performance or observance of any of the covenants under the Lease or the part of Tenant to be performed, whether by operation of law or otherwise and whether or not notice of such release is given to such other entity.

5. Guarantor acknowledges and agrees that this Guaranty and Guarantor's obligations under this Guaranty are and shall all times continue to be absolute, present, primary and unconditional in all respects, and shall at all times be valid and enforceable irrespective of any other agreements or circumstances of any nature whatsoever which might otherwise constitute a defense to this Guaranty and the obligations of Guarantor under this Guaranty or the obligations of any other person or party (including, without limitation, Tenant) relating to this Guaranty or the obligations of Guarantor hereunder or otherwise with respect to the Lease. The Guaranty sets forth the entire agreement and understanding of Landlord and Guarantor, and Guarantor absolutely, unconditionally and irrevocably waives any and all right to assert any defense, set-off, counterclaim or cross-claim of any nature whatsoever with respect to this Guaranty or the obligations of Guarantor under this Guaranty or the obligations of any other person or party (including, without limitation, Tenant) relating to this Guaranty or the obligations of Guarantor under the Guaranty or otherwise with respect to the Lease in any action or proceeding brought by Landlord with respect to the Lease or the obligations of Guarantor under this Guaranty unless such defense, set-off or counterclaim is available to Tenant under the Lease and existed prior to the Surrender Date. Guarantor acknowledge that no oral or other agreements, understanding, representations or warranties exist with respect to this Guaranty or with respect to the obligations of Guarantor under this Guaranty except as specifically set forth in this Guaranty.

Such clear language is sufficient to establish that the Guaranty is absolute and unconditional (*Citizens and Southern Commercial Corp. v Catapano*, 164 AD2d 812, 814 [1st Dept 1990]). Further, an absolute and unconditional guaranty is binding on the

guarantor, even if the principal escapes liability (*Manufacturers Hanover Trust Co. v Green*, 95 AD2d 737 [1st Dept 1983], appeal dismissed, 61 NY2d 760 [1984]).

Additionally, plaintiff has established the underlying liability. Based on the evidence in the record, it is undisputed that the Lease commenced on January 21, 2016. It is also undisputed that Portabella claims to have terminated the lease in April 2016, but in fact abandoned the Lease, a default under the terms of the Lease, resulting in damages to plaintiff. Thus, plaintiff has established Mr. Ashmawy's liability for damages and legal fees, in an amount to be determined at trial. Defendants' argument that it terminated the Lease pursuant to its terms and thus is not liable for any rent is unavailing. Defendants fail to provide any evidence that Portabella was not in possession of the Premises on January 21, 2016. Based on the evidence in the record, Portabella breached the Lease, not plaintiff. Therefore, Mr. Ashmawy is liable on the Guaranty for plaintiff's damages.

Plaintiff has demonstrated its prima facie entitlement to summary judgment as to liability on the Guaranty. For the same reasons stated above, plaintiff has failed to demonstrate its prima facie entitlement to summary judgment on the issue of damages. Accordingly, as defendants have failed to defeat plaintiff's prima facie case, plaintiff's motion for summary judgment as to liability on the Guaranty is granted.

Defendants' Motion for a Money Judgment on its Counterclaims

Defendants seek a return of the first month's rent of \$11,200 and its rent security deposit of \$22,400, by means of a money judgment, on the basis that defendants

properly terminated the Lease when plaintiff failed to deliver possession by the date which was 90 days after the lease was executed.

As the court has determined, as a matter of law, that possession was delivered and the lease did commence, this branch of the defendants' motion is denied.

Article 3.2 of the Lease provides:

Tenant has deposited with Owner the sum of \$22,400 as security for the faithful performance and observance by Tenant of the terms, provisions and conditions of this lease . . . if Tenant defaults in its payment of Fixed Rent, Additional Rent or any other payments or performance of any of its other obligations under this Lease and any renewals or extensions thereof, Landlord may at his sole option, after the expiration of applicable grace, notice and cure periods, retain, use, or apply any part of the Security Deposit to the extent required for payment of any: Fixed Rent; Additional Rent; any other amounts Tenant is obligated to pay under this Lease; any reasonable out of pocket third party costs and expenses that Landlord may expend or may be required to expend by reason of Tenant's default under this Lease; loss or damage that Landlord may suffer by reason of Tenant's default, including, without limitation, any damage incurred by Landlord or deficiency resulting from the reletting of the Demised Premises, whether such damages or deficiency accrues before or after summary proceedings or other reentry by Landlord; and/or costs incurred by Landlord in connection with the cleaning or repair of the Premises upon expiration or earlier termination of this Lease.

It is well settled that a security deposit "remains the property of the tenant unless and until he has defaulted in his obligations under the lease Upon such default, of course, the deposit may be used to offset actual damages or, if the lease contains an enforceable liquidated damages clause, as liquidated damages" (*Rivertower Associates v Chalfen*, 153 AD2d 196, 199 [1st Dept 1990] (emphasis added)). "After the security deposit is applied to the landlord's actual or liquidated damages, then the balance, if

any, must be returned to the tenant" (*Prudential Westchester Corp. v Tomasino*, 5 AD2d 489, 493 [1st Dept 1958]).

In conclusion, plaintiff is entitled to recover its actual damages, minus the \$22,400 security deposit and the \$11,200 first month's rent, in an amount to be determined at trial.

Attorneys' Fees

A party is not entitled to an award of an attorney's fee absent an agreement between the parties, statutory authorization, or court rule (*Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]; *Crispino v Greenpoint Mortg. Corp.*, 2 AD3d 478 [2d Dept 2003] citing *Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68 [2d Dept 1998]).

Here, Paragraph 1 of the Guaranty and Paragraph 21.1(c) of the Lease provide for plaintiff's recovery of attorneys' fees in this action upon Tenant's default, (see e.g. *BNY Financial Corp. v Clare* at 205 ["With respect to attorneys' fees, the guaranty expressly provided for them if the indebtedness was placed with an attorney for collection. Therefore, liability for attorneys' fees on the second cause of action is clear and remand is required for a determination of a reasonable amount to be awarded"]; *Solow Mgmt. Corp. v Tanger*, 19 AD3d 225, 226 [1st Dept 2005] ["As a general matter, case law establishes that where a landlord has a right to recover attorneys' fees pursuant to a lease provision, the recoverable fees are those that are reasonable"]). Accordingly, the branch of plaintiff's motion for summary judgment on liability for

attorneys' fees is granted, with the exact amount to be determined at the trial on damages.

Dismissal of Affirmative Defenses

According to CPLR § 3211(b) a "party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit." The "standard of review on a motion to dismiss an affirmative defense pursuant to CPLR 3211(b) is akin to that used under CPLR 3211(a)(7), i.e., whether there is any legal or factual basis for the assertion of the defense (see *Winter v Leigh-Mannell*, 51 AD2d 1012 [1976]). The truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied" (*Matter of Ideal Mutual Ins. Co. v Becker*, 140 AD2d 62, 67 [1st Dept 1988]). "'If there is any doubt to the availability of a defense, it should not be dismissed' [citations omitted]" (see *Nahrebeski v Molnar*, 286 AD2d 891 [4th Dept 2001]).

Further, statements that will not defeat, mitigate or reduce the plaintiff's remedy are insufficient as a defense (see NY Jur, Pleading § 138; *Walsh v Judge*, 223 AD 423, 425 [1st Dept 1928]). Thus, allegations of a plaintiff's wrongdoing are insufficient as defenses if the alleged wrongdoing is unrelated to the claim made against the defendants; instead the plaintiff's actions must in some way justify the defendant's actions to be properly pleaded as defenses (*TNT Communications Inc. v Management Television Systems, Inc.*, 32 AD2d 55 [1st Dept 1969], order affd, 26 NY2d 639 [1970]). Finally, if a defendant asserts an affirmative defense, he also must be able to prove it. "General denials in an answer are insufficient to raise triable issues" (*Iandoli v Lange*,

35 AD2d 793 [1st Dept 1970]; *Cornell Univ. v Dickerson*, 100 Misc2d 198 [Sup Ct Tompkins Cty 1979]).

Defendants' First, Second and Fourth Affirmative defenses all allege that the Lease never "commenced," as plaintiff failed to deliver possession.

Defendant's Third Affirmative Defense claims that ¶ 21(c) of the Lease doesn't permit acceleration of the Lease and requires damages to be paid monthly following a default by the Tenant. Counsel misreads this provision. The sentence immediately following states "In lieu thereof, Landlord may immediately accelerate such deficiency."

Defendants fail to assert any facts in either their Answer or their opposition papers to support their affirmative defenses alleging that plaintiff failed to deliver possession pursuant the "delivery condition" in ¶ 2.1 of the Lease, so the Lease never commenced, prior to defendants' alleged termination of the Lease.

Therefore, plaintiff's request that the court dismiss the defendants' affirmative defenses is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion is denied in its entirety, and it is further

ORDERED that plaintiff 1710 Realty LLC's cross motion for summary judgment against defendants Portabella and Karl Ashmawy is granted in part only, as the court hereby determines only defendants' liability for the breach of the Lease and Guaranty; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied on the issue of damages, which must await trial; and it is further

ORDERED that plaintiff's cross motion for an order dismissing the defendants' affirmative defenses contained in defendants' Answer is granted; and it is further

ORDERED that an assessment of attorneys' fees and costs incurred by plaintiff in this action shall be held at the time of the trial on the issue of damages, and it is further

ORDERED that this matter is set down for a Preliminary Conference for January 16, 2018 at 9:30 a.m. in the Intake Part, 2nd floor at 360 Adams Street, Brooklyn, NY; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties and the Clerk of the Intake Part, within 20 days of entry.

This shall constitute the decision and order of the Court.

Dated: Brooklyn, New York
November 29, 2017

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**