SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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BDJVEGAN 5, INC.

Plaintiff,

- v -

ARFA REJAEI,

Defendant.

----------X

INDEX NO. 150184/2017

MOTION DATE

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 97, 99, 100, 101, 102, 103, 104, 105, 107

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In this commercial landlord-tenant action, which was commenced by plaintiff seeking *Yellowstone* relief, defendant landlord Arfa Rejaei counterclaims for the rent arrears and for the damages to the premises caused by plaintiff. Defendant now moves: (1) to join Pamela Blackwell and Blossom Du Jour DBA in this action pursuant to CPLR 1002; (2) for summary judgment pursuant to CPLR 3212 to dismiss plaintiff's complaint; (3) for summary judgment on defendant's first through fifth counterclaims; (4) for an order pursuant to CPLR 3124 and 3126 to strike the complaint and render a judgment by default, "or alternatively an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with Defendant's affirmative defense and counterclaims" (NYSCEF # 46 – Def's aff in support – at ¶ 2[3]).

Plaintiff, tenant BDJVegan 5, Inc. (BDJVegan), opposes the motion and cross-moves for: (1) an order precluding the offer of evidence by defendant on any of its counterclaims and/or dismissal of the defendant's counterclaims based upon the failure of the defendant to respond to a demand for a bill of particulars or return any response to plaintiff's request for production of documents despite court orders to answer and produce; (2) an order pursuant to NY Rules of Professional Conduct § 3.7 as defendant's counsel is a fact- witness in this matter and will be called in this matter as to the lease, draft leases, and good guy guarantee issues in this matter (NYSCEF #77 – Notice of Cross-Motion).

The Decision and Order is as follows:

FACTS

This action involves a commercial lease dated March 29, 2015[1], between Arfa Rejaei, as landlord, and Pamela Blackwell doing business under the assumed name of Blossom Du Jour and/or plaintiff BDJVegan, as tenant, for an entire building located at 15 East 13th Street in the city, county, and state of New York. Blackwell operates a small chain-restaurant known as Blossom Du Jour and opened this location around September 2015. The parties submit two different leases on this motion: defendant submits a lease that is signed by Blackwell as the "owner" of Blossom Du Jour – before the BDJVegan5 entity was formed – and defendant (NYSCEF #48); plaintiff submits a lease signed only by defendant but unsigned by BDJVegan 5, Inc. (NYSCEF #80). Other than these differences, the two leases are the same.

The lease is a triple net lease, and plaintiff took possession of the building in "as is" condition (NYSCEF #48/80 – Lease at §4.1). Additionally, both lease documents indicate that: defendant was under no obligation to provide any services to plaintiff; defendant made no representations that the premise's systems or services were adequate for plaintiff's particular purposes; defendant did not represent that plaintiff would be free from any interruptions; and defendant made clear that there would be no offsets or abatement of the rent (*id.* at §§ 2.2, 4.1, 8.7, 9.2). In consideration for the lease and based on the agreement that plaintiff would transform the space into a restaurant, plaintiff received six months free rent for the premises, from April 6, 2015 until October 5, 2015 (*id.* at §2.4).

Blackwell signed a guarantee dated March 29, 2015 (NYSCEF #51 – Guarantee). The guarantee was "an absolute and unconditional guaranty of payment and performance" of the lease (*id.* at 1). The guarantee also stated that Blackwell may be joined in any action or proceeding against tenant in connection with the obligations of the lease (*id.* at 2).

Plaintiff defaulted on its rent obligations under the lease and did not pay rent between August 2016 through January 2017 nor any of the additional payments owed under the lease. The default notice of January 1, 2017 stated that plaintiff was in default in the amount of $106,705.00 (NYSCEF #59 – Various Exhibits, Notice of Default at 10).

Plaintiff responded by commencing this instant action, seeking a Yellowstone injunction and filing a complaint on January 6, 2017. Defendant opposed the injunction. On January 19, 2017, another justice of this court granted plaintiff's a Yellowstone injunction on the condition that it provide an undertaking of

[1] There is an issue regarding which "lease" is in effect; defendant submitted a signed "draft" lease – NYSCEF #48 – as part of his motion that is signed by Blackwell as the "owner" of Blossom Du Jour, whereas plaintiff has submitted a "final" lease – NYSCEF #80 – that is unsinged by plaintiff, but includes a signature line for BDJVegan 5, Inc.

$97,000.00 deposited with the Clerk of the Court by January 26, 2017 and, beginning on February 1, 2017, pay all rent due going forward (NYSCEF #20 – Decision and Order of Hon. Lucy Billings dated January 19, 2017).

Plaintiff's complaint alleges four causes of action: (1) a declaratory judgment that it is not in default under the lease; (2) a permanent injunction enjoining defendant from terminating the lease or taking any other action regarding the alleged default; (3) fraud in that defendant should have known about the long standing plumbing problems and that defendant made misrepresentations of material fact, with knowledge of their falsity and with the intent to induce plaintiff to enter the lease and that plaintiff reasonably relied on the misrepresentations; and (4) negligent misrepresentation (NYSCEF #1 – Complaint).

Plaintiff's complaint alleges that upon taking over the premises prior to its build-out of the restaurant in April 2015, it found substantial problems with the plumbing lines (*id.* at ¶¶ 14-23). The plumbing problems caused it to close operations on October 17, 2016 (*id.* at ¶ 29). Plaintiff claims that defendant knew about the plumbing problem and omitted to divulge this information to plaintiff during lease negotiations. Plaintiff asserts that it would not have entered into the lease had it known about the plumbing problems (*id.* at ¶¶ 30-31).

Defendant filed its verified answer with counterclaims on February 17, 2017 (NYSCEF #21 – Answer). Defendant's counterclaims are for: (1) rent and additional rent, in the amount of $113,029.75 plus interest and late fees; (2) ejectment; (3) damage to the building, by pouring cooking oil in the bathroom toilet, failing to maintain proper grease trap equipment, and doing poor and shoddy construction work; (4) breach of the lease due to plaintiff's failure to maintain renter's insurance as required by paragraphs 12.1 and 12.2 of the lease agreement and by cancelling insurance in the middle of the lease term; and (5) legal fees, as required by Art. 24, §24.1(t) and 24.1(r) and §18.1(d) of the lease agreement (NYSCEF #21 at ¶¶15-22). Plaintiff never filed an answer to the counterclaims.

Plaintiff also never complied with the court-imposed condition for the Yellowstone injunction as it failed to post the undertaking and pay the rent due. Hence, defendant delivered to plaintiff a Notice of Termination on February 3, 2017, terminating the lease effective February 13, 2017, with outstanding arrears of $113,029.75.

Plaintiff claims that it turned over the store to defendant around February 2017. Defendant states that plaintiff returned the keys to the store on March 13, 2017. Defendant alleges that the premises were left in a state of disrepair; plaintiff disputes this allegation. Defendant claims that plaintiff's right to limit personal liability under the guarantee (so called "Good Guy" rights) was never exercised nor

was rent paid to the date of vacatur. Defendant also states that, while not required to mitigate damages as per the lease, he found a new tenant in September 2017.

DISCUSSION

Plaintiff's Cross-Motion to Disqualify Defendant's Attorney

Plaintiff's cross-motion to disqualify defendant's attorney will be addressed first since the determination will affect defendant's motion. Plaintiff moves pursuant to Rules of Professional Conduct (RPC) (22 NYCRR 1200.0). RPC Rule 3.7(a) and (b). Rule 3.7(a) provides that a "lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact" and Rule 3.7(b) adds that the disqualification is imputed to the attorney's entire firm. An attorney can be found "necessary" by considering "such factors as the significance of the matters, weight of the testimony, and availability of other evidence (*S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 446 [1987]). The movant on a motion to disqualify opposing counsel bears the burden of showing that counsel is a necessary witness (*id.* at 445).

Plaintiff argues that since there is an issue regarding the "draft" lease versus the "final" lease here, and defendant's counsel was involved in drafting the agreement and corresponding with Blackwell, that defendant's counsel is a "necessary" witness as required by RPC 3.7. Plaintiff's argument falls short of the requirements for disqualification of counsel.

Plaintiff does not show that defendant's counsel is a "necessary" witness. There is simply no factual dispute over the issues raised by plaintiff – both parties agree that there is a signed "draft" lease and an unsigned "final" lease. There is no dispute that both leases are accurate. More importantly, plaintiff's assertions that defense counsel is a necessary witness are conclusory – plaintiff does not show why defense counsel will be required to resolve a factual issue present in this matter. As such, plaintiff fails to meet its burden on the RPC 3.7 motion, and it is denied.

Defendant's Motion for CPLR 1002 Permissive Joinder

Defendant's motion to join Pamela Blackwell and Blossom Du Jour DBA pursuant to CPLR 1002(b) is granted. CPLR 1002(b) states that "[p]ersons against whom there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, may be joined in one action as defendants if any common question of law or fact would arise." Blackwell is a proper party as she signed a Guarantee of the lease and is liable for rent, additional rent, and plaintiff's counterclaims. The Guarantee explicitly provides that Blackwell "may be joined in any action or proceeding against Tenant... and that recovery may be had against [Ms. Blackwell]

in such action... without Landlord first pursuing or exhausting any remedy or claim against Tenant or any other remedy or claim under any other security for, or guaranty of, the obligations of Tenant under the Lease (NYSCEF #51). Additionally, Blossom Du Jour DBA is a proper party as Blackwell signed on its behalf on the "draft" lease. As such, Blossom Du Jour DBA and Blackwell are proper parties per CPLR 1002(b) as defendant's counterclaims against BDJVegan5, Blossom Du Jour DBA, and Blackwell arise from the same occurrences and common questions of law and fact are present.

Plaintiff's argument that defendant is required to bring a CPLR 3025 Motion to Amend the Pleadings concurrently with the CPLR 1002 motion is unsupported by any CPLR provisions or case law (NYSCEF #79 at ¶¶ 10-11). Plaintiff takes issue that defendant's motion is late, occurring 18 months into this action, and that defendant made false allegations regarding the corporate entity, and therefore advocates for the denial of the motion (NYSCEF #79 at ¶9). However, plaintiff does not point to any case law or statutory provisions indicating that the motion is late. Further, plaintiff does not describe which allegations are false, and nothing in the record disproves defendant's claims regarding joinder. As such, the motion is granted.

Defendant's Summary Judgment Motion to Dismiss the Complaint and Grant Defendant's Counterclaims

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's principal opposition to defendant's motion for summary judgment is the lease offered by defendant in support of its motion. Plaintiff argues that defendant's lease is a "draft" and therefore cannot be relied upon for this motion (NYSCEF # 79 at ¶ 2). Plaintiff identifies some minor differences between the two contracts, but the main distinction is that the "draft" was signed by Blackwell as owner of Blossom Du Jour DBA, and the "final" was to be signed by BDJVegan5, Inc., which remains unsigned by BDJVegan. Plaintiff claims that it is improper to rely on the "unreliable" signed "draft" lease, hence, summary judgment must be denied (*id.*). Plaintiff then improperly morphs this argument in its cross-motion

reply to say that there is a fact issue here and that the parties have clearly signaled that a later formal written agreement was required for final contract formation (NYSCEF #107 – Pl's Reply at ¶3). It is noted that plaintiff relied on the unsigned lease in support for her motion for a Yellowstone injunction (NYSCEF 7).

Defendant claims that on March 29, 2015, plaintiff BDJVegan5 did not yet exist as a corporate entity. Defendant states that Blackwell signed the March 29, 2015 lease on behalf of Blossom Du Jour. Defendant's counsel claims that once their offices were informed that Blackwell was forming the BDJVegan5 entity, they changed the lease to list BDJVegan5 as the tenant and then emailed and called Blackwell multiple times to tell her that she needed to sign as BDJVegan5 (NYSCEF #100 at ¶¶ 25-26; ## 50 and 53 – Email Correspondence of Blackwell and Def's Counsel; NYSCEF #52 – Dept. of State – BDJVegan5 Entity Information). Plaintiff does not dispute this representation, and defendant avers that he never received a copy of the signed amended lease.

Here, the parties have manifested an intent to contract and be bound by the guaranty and the two leases. "To form a binding contract there must be a 'meeting of the minds' such that there is 'a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms'. In determining whether the parties intended to enter a contract, and the nature of the contract's material terms, we look to the 'objective manifestations of the intent of the parties as gathered by their expressed words and deeds'" (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448-49 [2016] [citations omitted]). "[D]isproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (*id.*).

Pamela Blackwell signed both the "draft" lease and the guaranty, and the parties acted as if that lease was in effect. The parties then acted as if the "final" lease was in effect, even if it was unsigned. Plaintiff points to no material differences between the "draft" and "final" lease to indicate that the parties were not in agreement regarding terms. Contracts, including guarantees, are to be interpreted to give effect to the parties' intentions (*see Fehr Bros., Inc. v Scheinman*, 121 AD2d 13, 15 [1st Dept 1986]). Guarantees, in particular, are to be "strictly construed" (*id.*). In sum, plaintiff's argument on this point does not preclude defendant's use of the "draft" lease for his motion for summary judgment.

Plaintiff's First and Second Causes of Action

Plaintiff's first two causes of action for (1) declaratory judgment that it is not in default under the lease, and (2) a permanent injunction to enjoin defendant from terminating the lease are dismissed as moot. They are moot because plaintiff

vacated the premises; defendant terminated the lease; the keys were handed over; and plaintiff never paid the undertaking as required by the January 19, 2017 Order (NYSCEF #20). The lease is therefore terminated which renders plaintiff's first two claims moot. As such, plaintiff's first two causes of action are dismissed.

Plaintiff's Third and Fourth Causes of Action

Next, defendant's summary judgment motion to dismiss plaintiff's third cause of action for fraud is granted. Plaintiff's fraud claim is that defendant should have known about the long-standing plumbing problems and that defendant made misrepresentations of material fact, with knowledge of the falsity and with the intent to induce plaintiff to enter the lease, and that plaintiff reasonably relied on the misrepresentations.

Plaintiff asserts that she communicated the issues regarding the leaks to defendant on April 28, 2015 (NYSCEF #82 – correspondence re the pipes). Defendant responded on May 1, 2015, that the pipes and plumbing "must be old and little disturbances or interruption can break them" and that plaintiff should install new lines (*id.*). Plaintiff "[ran] new piping since the old piping was useless and damaged" (*id.*). Defendant also stated that a French café next door had issues with bad plumbing smells and added that he never had plumbing issues except for one winter when the pipes froze (*id.*). Plaintiff asserts that rather than disclosing the problems with the pipes, defendant hid the information.

CPLR 3016(b) states that "[w]here a cause of action... is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The "purpose underlying [CPLR 3016(b)] is to inform a defendant of the complained-of incidents" (*id.*). To plead with sufficient particularity to satisfy CPLR 3016(b), "the complaint must 'allege the basic facts to establish the elements of the cause of action'" (*id.* [citations omitted]). "CPLR 3016(b) is satisfied when the facts suffice to permit a 'reasonable inference' of the alleged misconduct" (*id.*). And, "in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud" (*id.*).

Here, however, plaintiff fails to identify any specific representations by defendant to plaintiff prior to the lease signing regarding the plumbing in the building or identify any material omissions. Plaintiff merely asserts that "[i]t is clear that Defendant knew about the plumbing problems prior to entering into the Lease, and misrepresented and/or omitted pertinent facts in response to direct questions during the Lease negotiation process with regard to prior water leaks and

plumbing problems with the Building" (NYSCEF #1 – Complaint at ¶30). Plaintiff's affidavit on this motion alleges that defendant withheld a story regarding a single "frozen pipes" incident and that plaintiff should have been told about this event (NYSCEF #78 – Blackwell aff at ¶11). However, plaintiff has not plead or established the defendant's omission indicated an intent to induce reliance or that plaintiff justifiably relied on the omission. As such, plaintiff's fraud claim cannot stand and is dismissed.

Plaintiff's fourth cause of action for negligent misrepresentation must be dismissed for the same reasons as per CPLR 3016(b). Plaintiff's complaint does not specify any particular misrepresentations or omissions. As such, defendant's motion is granted. Plaintiff's claims are effectively for frustration of purpose under the lease and breach of the implied duty of good faith – but plaintiff does not articulate as such in its Complaint and this court will not read plaintiff's causes of action in that way. Accordingly, plaintiff's fourth cause of action is dismissed.

The court also notes that plaintiff's counsel argues in its Affirmation in Opposition that this action includes a breach of the duty of good faith and fair dealing and frustration of purpose, but plaintiff does not articulate as such in its Complaint and this court will not read plaintiff's causes of action in that way (NYSCEF #79 at ¶¶19-22). Accordingly, plaintiff's complaint, in its entirety, is dismissed.

With the dismissal of plaintiff's four causes of action, defendant's motion for summary judgment dismissing the complaint is granted.

Defendant's First Counterclaim for Rent and Additional Rent Arrears

Section 2.5 and 18.1 of the Lease provide that upon default of the full and timely payment of any rent installment, the entire unpaid balance of the rent due under the Lease for the remaining term is due and payable, subject to credit for any rents received upon defendant's re-renting of the premises (NYSCEF #48/80). Defendant points out that Section 2.2 of the Lease states that there shall be no offsets to the rent owed and Section 9.2 states that there shall be no abatement of rent. Defendant also points to the signed guaranty of Pamela Blackwell to establish her liability. Plaintiff does not rebut defendant's claims on these matters. Summary judgment on defendant's first counterclaim is granted.

Plaintiff's opposition appears to argue that no rent is owed because the pipe burst constituted a "casualty" under §13.1 of the lease (NYSCEF #78 at ¶¶25-26;). Under §13.1, if the premises were damaged by fire or other casualty not caused by tenant, landlord would be responsible for repairing the damage and, until the repairs were substantially completed, the rent would "be reduced in proportion to the area of the premises which tenant shall not have reasonable access or which is

unusable by tenant for the reasonable conduct of tenant's normal business in the premises" (NYSCEF #80 at §13.1). While plaintiff sent emails to defendant regarding the pipe burst, it did not claim the plumbing problems as a casualty and none of the emails sought relief obtainable under §13.1 of the lease. In any event, plaintiff did not answer the counterclaim. Plaintiff's mention of § 13.1 in its opposition does not raise an issue of fact to defendant's prima facie showing on his counterclaim for rent and additional rent arrears.

Defendant's Second Counterclaim for Ejectment

The ejection issue is moot as plaintiff already vacated the premises. While defendant does not raise the issue, plaintiff failed to file a reply to counterclaims as required by CPLR 3011.

Defendant's Third Counterclaim for Damage to the Premises

Defendant claims that plaintiff did not install a grease trap, did shoddy construction work without a construction permit, and left the premises in a state of disrepair. Defendant submitted photographic evidence and invoices for repairs to remedy the damage. Plaintiff's only response is her affidavit denying that plaintiff caused any damages and averring that grease traps were installed (NYSCEF #78 at ¶¶ 30, 40). However, plaintiff does not offer any admissible evidence to rebut defendant's claims. As such, summary judgment is warranted; defendant's third counterclaim for damage to the premises is granted. However, it is unclear from defendant's papers and submitted invoice the precise cost of the damages. Defendant must clarify this issue in a settle order.

Defendant's Fourth Counterclaim for Plaintiff's Failure to Procure Insurance

The lease required renter's insurance (NYSCEF #48 at §§ 12.1 and 12.2). Plaintiff produced no evidence that it obtained renter's insurance or that it successfully obtained a casualty payment as alleged. Thus, while plaintiff is clearly in default on this issue, it is unclear what damage defendant experienced or penalty plaintiff owes to defendant due to plaintiff's default. As such, defendant has failed to make out a prima facie showing of entitlement to summary judgment on this claim. Defendant's fourth counterclaim is denied.

Defendant's Fifth Counterclaim for Attorneys' Fees

The lease clearly requires payment of attorneys' fees in an action such as this as outlined in Sections 24.1(t), 24.1(r), and 18.1(d) of the lease. Plaintiff does not respond to this argument and thus summary judgment in favor of defendant is warranted on this issue.

Conclusion on Defendant's Counterclaims

While defendant prevails on his first, third and fifth counterclaims, the award of damages cannot be rendered. Defendant seeks to recover $330,000.00 on each counterclaim. Defendant's "Statement of Tenant Arrears" dated April 10, 2017, totals $288,236.14 for all damages, including rent, additional rents, repairs and late fees. And it appears that the statement is incorrectly dated as there are charges extending to April 2018 (NYSCEF # 49 – Statement of Tenant Arrears). A clear and delineated list of the amounts due for the first and third counterclaims will serve to clarify this confusion. It is noted that aside from defendant's submission of the exact amount in damages, the only outstanding matter is defendant's fourth counterclaim, which was denied summary judgment.

CPLR 3124 and 3126 Sanctions Motions

Both parties move for sanctions pursuant to CPLR 3124 and 3126. Defendant moves to strike the complaint and render a judgment by default, or, alternatively, an order that the issues to which the relevant information shall be deemed resolved for purposes of the action in accordance with defendant's affirmative defenses and counterclaims. Plaintiff cross-moves to preclude defendant from offering evidence on any of its counterclaims and/or dismissal of defendant's counterclaims based upon defendant's failure to respond to a demand for a bill of particulars and the outstanding discovery request for production of documents despite court orders directing defendant to comply.

This litigation has been contentious with both sides arguing that discovery is incomplete and demands have gone unheeded. Defendant claims that his first Demand for Discovery and Inspection, dated April 18, 2017, was served, and a good faith discovery letter was sent on May 23, 2017 (NYSCEF ## 64-65). Plaintiff substituted counsel on July 28, 2017 (NYSCEF #67). Defendant claims further good faith letters were sent on October 5, 2017 and January 8, 2017 (NYSCEF ## 70 and 74, respectively). Defendant also claims that a December 6, 2017 compliance conference order gave him priority in discovery (NYSCEF #71). Plaintiff, for its part, argues discovery is owed by defendant (NYSCEF #79 – Pl's Aff in Opp at ¶24).

Although it appears that discovery is incomplete in this matter as there are outstanding documentary requests on both sides, and there have been no depositions, plaintiff does not argue that summary judgment was premature at this time. In any event, "[a] grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*DaSilva v Haks Engineers, Architects and Land Surveyors, P.C.*, 125 AD3d 480, 482 [1st Dept 2015] [citing *Bailey v. New York City Transit Authority,* 270 A.D.2d 156, 157 [1st Dept.2000]).

Defendant's motion to compel pursuant to CPLR 3124 and CPLR 3126 is denied as academic. While it is apparent that plaintiff has willfully failed to respond to discovery requests, court orders, and defense counsel's letters, there is no need to address defendant's request for discovery sanctions since defendant's motion for summary judgment is granted.

Plaintiff's cross-motion is denied. Plaintiff did not attach an affirmation of good faith and thus failed to comply with 22 NYCRR 202.7 (*see Molyneaux v City of New York*, 64 AD3d 406, 407 [1st Dept 2009]). Plaintiff's Affirmation in Opposition to Motion and in Support of Cross-Motion does not reveal any "good faith effort to resolve the issues raised by the motion" and does not "indicate the time, place and nature of the consultation and the issues discussed and any resolutions" nor does it "indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYRCRR 202.7(c); NYSCEF #79).

Accordingly, it is hereby ORDERED that defendant Arfa Rejaei's motion to add as counterclaim plaintiffs Pamela Blackwell and Blossom Du Jour DBA pursuant to CPLR 1002 is granted; it is further

ORDERED that the Clerk of the Court shall amend the caption as follows:

_____X

BDJVEGAN 5, INC., PAMELA BLACKWELL,
BLOSSOM DU JOUR DBA

Plaintiffs,

- v -

ARFA REJAEI

Defendant.

_____X

It is further ORDERED that defendant's motion for summary judgment to dismiss BDJVegan 5, Inc.'s complaint pursuant to CPLR 3212 is granted; it is further

ORDERED that defendant's motion for summary judgment pursuant to CPLR 3212 on its first, third, and fifth counterclaims against BDJVegan 5, Inc., Pamela Blackwell, and Blossom Du Jour DBA is granted; it is further

ORDERED that defendant's motion for summary judgment on his second counterclaim for ejectment is denied as moot; it is further

ORDERED that defendant's motion for summary judgment on his fourth counterclaim for breach due to plaintiff's failure to maintain insurance is denied; it is further

ORDERED that defendant's motion for sanctions is denied as academic; it is further

ORDERED that plaintiff's cross-motion for sanctions is denied; it is further

ORDERED that the defendant is directed to settle order as to the damages related to defendant's first and third counterclaims within 30 days of this order; it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report on the issues of ascertaining and computing the amount due from plaintiffs BDJ Vegan 5, Inc., Pamela Blackwell, and Blossom Du Jour DBA for attorneys' fees and costs; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of the Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; it is further

ORDERED that counsel shall immediately consult one another and counsel for defendant shall, within 15 days for the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; it is further

ORDERED that the defendant shall serve a proposed accounting within 30 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; it is further

ORDERED that, the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a)) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant and the Clerk of the Court within 20 days of entry; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the decision and order of the court.

5/21/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[ ] DENIED		GRANTED IN PART	[X]	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE