2SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 23

L. RAPHAEL NYC C1 CORP. d/b/a RAPHAEL TEMPLE OF BEAUTY,	
Plaintiff,	Index No. 651456/2018
-against-	Motion Sequence Nos. 001 and 002
SOLOW BUILDING COMPANY, L.L.C. & BERGDORF GOODMAN, INC.,	**DECISION AND ORDER**
Defendants,	
-and-	
RONIT RAPHAEL LEITERSDORF,	
Additional Counterclaim Defendant.	

W. FRANC PERRY, J.S.C.:

Motions bearing sequence numbers 001 and 002 are consolidated for disposition. This action involves a dispute over a commercial lease entered between plaintiff tenant L. Raphael NYC C1 Corp., d/b/a Raphael Temple of Beauty (C1 Corp.) and defendant landlord Solow Building Company, L.L.C. (Solow), for the ninth floor (Premises) of the building located at 4-8 West 58th Street, in the County, City and State of New York (Building).

Background

In its complaint, e-filed on March 27, 2018 (NYSCEF Doc No. 2), C1 Corp., referring to itself as "Tenant," asserts that it is a New York corporation which maintains its principal place of business in New York County. C1 Corp. alleges that on January 29, 2013, it entered into a commercial lease with Solow, as amended by a First Amendment, entered into as of January 31, 2014, and a Second Amendment, entered into as of July 13, 2016 (collectively, the Lease), to

operate a "luxury beauty center" at the Premises, which it called Temple of Beauty or La Maison.

In connection with the Lease, Ronit Raphael Leitersdorf, C1 Corp.'s founder and chief executive officer, entered a guaranty (Guaranty) with Solow. The Guaranty, dated as of January 29, 2013, was executed by Ms. Leitersdorf (Guarantor) before a notary public on January 10, 2013. The Guaranty states that Solow, as Landlord, required Ms. Leitersdorf to deliver the Guaranty for Solow's benefit, as a precondition to Solow entering the Lease (*see* Guaranty, recitals, at 1 and ¶ 23, at 6 [NYSCEF Doc No. 54]).

In its first paragraph, the Guaranty provides, in pertinent part, that Ms. Leitersdorf, as Guarantor:

> hereby absolutely, irrevocably and unconditionally, for [herself] and [her] legal representatives, successors and assigns, guarantees to Landlord. . . the prompt, full and faithful performance and observance by Tenant. . . of all of Tenant's obligations under the Lease, including without limitation to pay rent, fixed rent, additional rent and any and all charges and damages and liabilities. . . accruing under the Lease and the performance of all other obligations of Tenant accruing from the date of the Lease through the date that Tenant delivers the Premises to Landlord vacant, broom clean and otherwise in the condition required under the Lease. . .. In furtherance (but not in limitation) thereof, Guarantor covenants and agrees that it shall forthwith pay all amounts due to Landlord and perform and comply with such term, covenant, condition, indemnification requirements or provisions of the Lease and this Guaranty and shall pay to Landlord all damages, loss or expenses that may arise or be incurred by Landlord in connection with said default by Tenant, including all attorneys' fees or disbursements incurred by Landlord in connection with the enforcement of the Lease or this Guaranty.

(*id.* ¶ 1, at 1).

In paragraph 5, the Guaranty provides that it "is an absolute, continuing and unconditional guarantee of payment (and not of collection) and performance. . .." It further provides that "Guarantor makes [herself] liable for such performance and payment as a primary obligor and not merely as a surety" (*id.* at 2).

Further, in paragraph 15, the Guaranty provides that "Guarantor absolutely, irrevocably and unconditionally waives any and all rights [she] may have to assert any claim, defense, set-off, counterclaim or cross claim whatsoever with respect to the obligations of any other party, including Tenant" (*id.* at 4).

The Guaranty also provides, in paragraph 22, that:

> Guarantor hereby expressly and unconditionally waives, in connection with any suit, action or proceeding brought by Landlord in connection with this Guaranty, any and every right [she] may have to (i) interpose any counterclaim therein (other than mandatory or compulsory counterclaims) and (ii) have any such suit, action or proceeding consolidated with or jointly tried [with] any other or separate suit, action or proceeding.

(*id.* at 6).

C1 Corp. asserts that, after it took possession and made significant improvements to the Premises, it opened La Maison for business in March 2014 and generated substantial revenues during its first months in operation. C1 Corp. claims this came to an end in the "middle of 2015," when Solow allowed extensive demolition and construction work to be performed in the Building on behalf of defendant Bergdorf Goodman, Inc. (Bergdorf), which had leased the first eight floors and was converting that space into offices for its department store next door. C1 Corp. alleges that the construction work caused significant noise and dust, which disturbed their customers, damaged La Maison's machines and furnishings, left common areas in disrepair, and led to recurring losses of electrical service, heat and air conditioning. C1 Corp. maintains that these conditions forced La Maison "to significantly curtail" its business, turn away prospective customers and contracts, and frequently cease doing business altogether.

C1 Corp. alleges that, at some point in 2016, as this construction work continued, Solow agreed that it would not require C1 Corp. to pay rent under the Lease for the rest of that calendar year. Under the Second Amendment to the Lease, however, C1 Corp. agreed that "from on and

after January 1, 2017," it would pay "all Fixed Rent and additional rent . . . without abatement." C1 Corp. contends, "upon information and belief," that construction work at the Building continued until the end of 2017, which purportedly justified its refusal to pay any rent in 2017.

On January 9, 2018, after the parties' efforts to resolve their dispute failed, Solow served upon C1 Corp. a notice of default, seeking payment of arrears due under the Lease through January 1, 2018. C1 Corp. failed to pay these arrears within the cure period allotted in the default notice, and so Solow served C1 Corp. a termination notice, which ended the Lease as of February 5, 2018 and required C1 Corp. to vacate the Premises on or before that date.

In its amended answer, e-filed on July 9, 2018, Solow alleges that C1 Corp. did not vacate the Premises until March 30, 2018. On or about February 6, 2018, Solow commenced a holdover proceeding in the Civil Court of the City of New York, New York County Housing Court, captioned *Solow Building Company, L.L.C. v L. Raphael NYC C1 Corp. DBA Raphael Temple of Beauty and "XYZ Corp."* (Index No. LT-053465-18/NY) (Housing Court Proceeding).

In its holdover petition, Solow sought possession of the Premises, and a warrant of eviction to remove C1 Corp. and its unnamed undertenant, designated "XYZ Corp.," from the Building. Solow also sought a money judgment, to include rental arrears owed by C1 Corp. as of January 1, 2018, in the principal amount of $543,576.76, plus interest, together with unliquidated use and occupancy charges, and other charges due and owing under the Lease, and an award of attorneys' fees, costs and disbursements Solow incurred in the Housing Court Proceeding.

On or about February 13, 2018, C1 Corp. answered Solow's petition, generally denying that it had defaulted and breached the Lease, and asserted counterclaims for constructive eviction, breach of contract, fraud and nuisance. C1 Corp. sought dismissal of Solow's petition, a

"100% rent abatement," and a money judgment on its counterclaims in an amount no less than $1,500,000.

Following trial, on June 18, 2018, Civil Court Judge Mary V. Rosado entered judgment in favor of Solow and against C1 Corp., awarding Solow possession of the Premises and a monetary judgment of $379,291.26, without costs (Housing Court Judgment). Solow acknowledges that amount of the money judgment reflects Judge Rosado's decision to award Solow rental arrears, reduced by a partial rent abatement granted to C1 Corp.

In motion sequence 001, Solow seeks dismissal of C1 Corp.'s complaint in its entirety, pursuant to CPLR 3211 (a) (1) and (a) (3)[1] and Business Corporation Law § 1312 (a). Solow asserts C1 Corp. lacks standing to sue, due to C1 Corp.'s status as a foreign corporation not authorized to do business in the State of New York, and its dissolution by the State of Delaware for non-payment of taxes. Solow also seeks to sever and continue its counterclaims against C1 Corp. and additional counterclaim defendant Ms. Leitersdorf, and its cross claims against Bergdorf.

C1 Corp. opposes Solow's motion to dismiss and cross-moves for leave to amend its complaint, by naming as its co-plaintiff its affiliate L. Raphael NYC, Inc. (Raphael NYC), which apparently also does business as Raphael Temple of Beauty.[2] Bergdorf submits no opposition.

Solow opposes C1 Corp.'s cross motion, asserting that it is frivolous, and cross-moves for an award of costs, sanctions and attorneys' fees against C1 Corp. and Ms. Leitersdorf, pursuant to Part 130 of the Rules of the Chief Administrator of the Courts.

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[1] Subsection (a) (1) governs motions to dismiss based upon documentary evidence and subsection (a) (3) governs motions to dismiss for lack of standing to sue.

[2] Although C1 Corp.'s papers indicate that its attorneys also represent Ms. Leitersdorf, Ms. Leitersdorf does not join C1 Corp.'s cross motion.

In motion sequence number 002, Solow moves for partial summary judgment on its fourth and fifth counterclaims against Ms. Leitersdorf as Guarantor, seeking monetary and declaratory relief. Solow also requests that Guarantor's 17 affirmative defenses be stricken as deficient. Ms. Leitersdorf opposes Solow's motion.

DISCUSSION

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*id.*).

To prevail on a summary judgment motion, the movant must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mktg. v Colonial Aluminum Sales,* 66 NY2d 965, 967 [1985]). Once this showing is made, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze,* 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-movant (*Branham v Loews Orpheum Cinemas*, 8 NY3d 931, 932 [2007]). Party affidavits and other proof must be examined closely "because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]). Still, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment" (*id.*).

Motion Sequence Number 001

Solow moves to dismiss the complaint in its entirety, under CPLR 3211 (a) (1) and (a) (3), based on C1 Corp.'s lack of capacity to sue. Solow alleges that C1 Corp. is not a New York corporation, as it avers in its complaint, but rather a Delaware corporation. Solow contends that, under Business Corporation Law (BCL) Section 1312 (a), C1 Corp., as a foreign corporation, cannot maintain this action unless and until it obtains authority to do business here and has paid to the State all the fees and taxes due and owing. Solow also maintains that C1 Corp. is barred from maintaining this action because it was dissolved by the State of Delaware for non-payment of taxes, noting that, under Section 1005 (a) (1) of the BCL, a dissolved corporation "shall carry on no business except for the purpose of winding up its affairs."

C1 Corp. opposes this motion and cross-moves, seeking leave to amend its complaint to name its affiliate, L. Raphael NYC Inc., d/b/a Raphael Temple of Beauty (Raphael NYC), as its co-plaintiff. C1 Corp. also seeks an award of costs and other relief.

C1 Corp. now concedes that it is a Delaware corporation and maintains that its claims of New York incorporation were mistakes. Relying on the affidavit submitted by the head of operations of another affiliate company, L. Raphael Geneva SA, C1 Corp. argues that, notwithstanding its foreign incorporation, it did not "do business" in New York and so it did not need to register under BCL Section 1312 (a) in order to bring this action (*see* affidavit of Thomas J. Cerulli, sworn to October 31, 2018, ¶¶ 5-6). Specifically, Mr. Cerulli asserts that, by entering into the Lease, C1 Corp. was not doing business in New York on its own behalf but was merely acting as the agent of Raphael NYC, its undisclosed principal, a New York domestic corporation and the true tenant (*id.*). C1 Corp. also asserts that it has paid its tax delinquency to Delaware, and so Solow's reliance on BCL Section 1005 is in error.

C1 Corp. also argues that leave to amend should be granted because Solow will suffer no prejudice by the addition of a co-plaintiff to this action, and that granting C1 Corp. its costs and fees on this cross motion would be appropriate because Solow refused to consent to C1 Corp.'s filing of its proposed amended complaint.

Solow replies in further support of its motion to dismiss and also cross-moves for an award of costs, sanctions and attorneys' fees against C1 Corp. and additional counterclaim defendant Ms. Leitersdorf for submitting a frivolous cross motion, inconsistent with a position it had successfully asserted in the Civil Court, which is precluded by the doctrine of judicial estoppel, and which constitutes a fraud upon the court undertaken as a contrivance to save plaintiff's complaint from dismissal under BCL Section 1312 (a).

Accepting C1 Corp.'s allegations as true, as we must on a motion to dismiss (*EBC I, Inc.*, 5 NY3d at 19), Solow's motion must be denied. Dismissal under CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002], citing *Leon v Martinez,* 84 NY2d 83, 88 [1994]).

"The phrase 'doing business,' for the purpose of the statutes regulating foreign corporations doing business within the state, making certificates of authority a prerequisite to bringing an action in this state, has been variously construed as signifying some continuous, systematic, and regular activity" (20 Carmody-Wait 2d § 121:41, *citing, inter alia, International Fuel & Iron Corp. v Donner Steel Co.*, 242 NY 224 [1926] and *Maro Leather Co. v Aerolineas Argentinas*, 161 Misc 2d 920 [App Term 1st Dept 1994]).

On this record, it does not appear that, by entering the Lease on Raphael NYC's behalf, as C1 Corp. alleges, could be construed as "doing business" in New York (*see Acno-Tec Ltd. v*

Wall St. Suites, L.L.C., 24 AD3d 392, 393 [1st Dept 2005] [motion for summary judgment denied where defendants presented evidence of single business transaction, rather than "regular and systematic business activities" needed to constitute "doing business" without authorization, so as to be deprived of capacity to sue]). Solow's dismissal motion in sequence number 001 must therefore be denied.

In its opposition to Solow's motion and in support of its cross motion to amend its complaint, C1 Corp. purports to correct its incorrect averments about its state of incorporation and asserts its status as Raphael NYC's agent. C1 Corp. maintains that it should be permitted to join its alleged principal, a New York domestic corporation in good standing, as co-plaintiff.

> It is well settled that [a] request for leave to amend a complaint should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment].

(*LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 4 [1st Dept 2019] [citations and quotation marks omitted]; *see also Matter of Allcity Ins. Co. [Russo]*, 199 AD2d 88, 88 [1st Dept 1993] [leave to amend pleadings "is freely given, absent prejudice or surprise, upon such terms as may be just, and the decision to allow an amendment is committed to the sound discretion of the trial court"] [citations omitted]).

An agent has the right to maintain an action, in its own name, where it is named as a party to its undisclosed principal's contract.

> Whether the agent is a real party in interest or can prosecute an action in his name depends upon the circumstances. If the contract was made in the name of the agent, or if the agent pledged his personal credit, whether the principal was disclosed or undisclosed, then action on the contract may be brought either by the principal or by the agent.

O'Sullivan v Jarach-Guetta Indus. Overseas Co., 194 Misc 534, 536 [Sup Ct, NY County 1949], *citing, inter alia, Ludwig v Gillespie*, 105 NY 653 [1887]). By the same token, an agent who contracts in its own name on behalf of its undisclosed principal is liable as a principal on the contract (*see, e.g., Rafner v Toplis & Harding, Inc.*, 25 AD2d 826, 826-27 [1st Dept 1966] [citations omitted]). At oral argument on this motion on February 7, 2019, C1 Corp.'s counsel admitted that the Housing Court Judgment is a binding obligation of both C1 Corp. and Raphael NYC (tr 6-11 [NYSCEF Doc No. 113]).

Solow complains about C1 Corp.'s assertions with respect to its agency status and alleges that C1 Corp. should be judicially estopped by the Housing Court Judgment from claiming that it is not the principal but merely acted as agent in entering the Lease and that the true tenant and real party in interest was its affiliate, Raphael NYC.

"The doctrine of judicial estoppel holds that a party successfully taking a position in one proceeding may not thereafter assume an inconsistent position in a subsequent proceeding" (*Kalikow 78/79 Co. v State*, 174 AD2d 7, 11 [1st Dept 1992]). Even if this doctrine would otherwise be applicable, judicial estoppel is not apposite because C1 Corp. has not engaged in wrongdoing.

Generally, the doctrine of judicial estoppel is only applied where the party to be estopped has engaged in some form of misconduct. For example, in *Guarino v Guarino* (211 AD2d 463 [1st Dept 1995]), the Appellate Division chose not to judicially estop a decedent's administrator from asserting her interest in certain realty, where she explained "that her failure to list the property as an asset in estate proceedings concerning her decedent was a mere mistake, and there [was] no evidence that she received a benefit as a result of the omission" (*id.* at 464 [citations omitted]).

C1 Corp. maintains that, in seeking amendment, it wishes to correct mistaken allegations it made in the Civil Court and repeated in its complaint in this action, and to add the real tenant and party at interest under the Lease as its co-plaintiff. C1 Corp. does not suggest that it should be relieved of its obligation to pay the amounts still due under the Housing Court Judgment, or that the joinder of Raphael NYC should affect C1 Corp.'s liability or that of Ms. Leitersdorf, as Guarantor, on any other obligations they may still owe Solow under the Lease. Furthermore, C1 Corp.'s proposed amendment of its complaint and the addition of Raphael NYC as a co-plaintiff do not appear to be attempts to gain some undue advantage.

The party seeking to bar an amendment must show that its prejudice or surprise is "significant" (6 Carmody-Wait 2d § 34:29, citing *Pike v New York Life Ins. Co.*, 72 AD3d 1043 [2d Dept 2010]). For example, to establish prejudice sufficiently significant to bar amendment of a complaint, the opposing party must show it has "incurred some change in position," (6 Carmody-Wait 2d § 34:29, citing *Best Quality Swimming Pool Svc., Inc. v Pross*, 54 Misc 3d 919 [Sup Ct, Nassau County 2016]), "or will have been hindered in the preparation of its case or prevented from taking some measure to support its position" (6 Carmody-Wait 2d § 34:29, citing *Lindo v Brett*, 149 AD3d 459 [1st Dept 2017]; *see also* Siegel, NY Prac, § 237 [6th ed] ["As a rule, mere lateness is not a barrier to the amendment [of a pleading by leave], but lateness coupled with significant prejudice is. Those are the classic elements of the laches doctrine, the major obstacle to a CPLR 3025 (b) amendment"]).

Solow contends that it will be prejudiced by the proposed amended complaint because, like the original complaint, the claims asserted therein are barred by the doctrine of judicial estoppel and contradict direct testimony by C1's employees in the Housing Court Proceeding. These allegations will not bar the proposed amendment.

Although C1 Corp. was remiss in correcting erroneous allegations about its corporate status, Solow fails to explain how C1 Corp.'s actions could be viewed as prejudicial toward it. Solow does not claim that it has changed its position in some detrimental way, in reliance on C1 Corp.'s alleged status as a New York corporation. Furthermore, Solow does not allege that joinder of Raphael NYC could have any negative effect on its ability to recover amounts owed to it under the Housing Court Judgment or to pursue its other claims against C1 Corp. and Ms. Leitersdorf, as Guarantor.

Solow also contends that the proposed amended complaint must be rejected because Raphael NYC has no contractual privity with Solow. An undisclosed principal, however, is free to sue on a contract entered in the name of its agent (*O'Sullivan*, 194 Misc at 536; *see also Kelly Asphalt Block Co. v Barber Asphalt Paving Co.*, 211 NY 68, 70 [1914] [Cardozo, J.] ["A contract not under seal, made in the name of an agent as ostensible principal, may be sued on by the real principal at the latter's election"] [citations omitted]).

Finally, Solow asserts that the proposed amended complaint should be dismissed for not complying with the procedural requirements of CPLR 3025 (b), which provides, in pertinent part, that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Solow, citing *Messersmith v Tate* (59 Misc 3d 203, 207 [Sup Ct Warren County 2018]), argues that the party seeking to amend must provide not just the entire proposed amended pleading, but must also indicate the deletions, insertions and other changes being made on the face of the proposed pleading, through the use of the "track changes" function of its word processing program. Although CPLR 3025 (b) does not expressly require a party moving to amend to redline its proposed pleading, doing so would be the best practice.

In its reply, Solow also raises the doctrine of election of remedies for the first time, arguing C1 Corp.'s election to forego payment of rent now bars it from seeking damages from Solow for alleged breaches of the Lease. In that same reply, Solow raises election of remedies in opposition to C1 Corp.'s cross motion, arguing that Solow's election should prohibit Raphael NYC from asserting any damages claims with respect to the Lease.

For the purposes of its motion to dismiss the complaint, the court need not consider arguments Solow first makes in reply (*MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 55 Misc 3d 1204(A), *6 n 15 [Sup Ct, NY County 2017], *affd as mod*, 165 AD3d 108 [1st Dept 2018], citing *PK Rest., LLC v Lifshutz,* 138 AD3d 434, 438 [1st Dept 2016]).

Accordingly, Solow's motion to dismiss C1 Corp.'s complaint, and to sever and continue Solow's counterclaims with respect to Bergdorf and Ms. Leitersdorf, is denied. C1 Corp.'s cross motion to amend the complaint is granted, on the condition that C1 Corp. e-file a redlined copy of its proposed amended complaint, clearly reflecting each deletion, insertion or other change it has made to the original complaint, within 10 days of the entry of this Decision and Order, but its request for an award of attorneys' fees and costs is denied. Solow's cross motion for Rule 130 sanctions is also denied.

Motion Sequence Number 002

In motion sequence number 002, Solow moves for partial summary judgment, pursuant to CPLR 3212 (e), with respect to the liability of Ms. Leitersdorf, as Guarantor, on Solow's fourth counterclaim, for money damages, and fifth counterclaim, for attorneys' fees and costs. Solow requests: (i) a money judgment in its favor against Guarantor in an amount equal to the amount due and owning, in principal and interest, on the Housing Court Judgment; (ii) a money judgment in its favor against Guarantor for use and occupancy charges still allegedly due and

owing, which Solow calculates to be $93,038.09; (iii) a money judgment in its favor against Guarantor for its attorneys' fees and costs incurred in the Housing Court Proceeding, which Solow calculates to be $133,284.58; (iv) a declaration that Guarantor remains liable to Solow for additional money damages and attorneys' fees and costs Solow may be awarded in connection with this action; and (v) Guarantor's 17 affirmative defenses be stricken as legally insufficient.

"A guaranty is a promise to fulfill the obligations of another party, and is subject to the ordinary principles of contract construction" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015] [citations and internal quotation marks omitted]). "Under those principles, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.* at 493 [citation and internal quotation marks omitted]).

"A guaranty must be construed 'in the strictest manner'" (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006], quoting *White Rose Food v Saleh,* 99 NY2d 589, 591 [2003]). On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the principal's debt, and the guarantor's failure to perform after principal's default (*Davimos*, 35 AD3d at 272).

(i) Housing Court Judgment

Ms. Leitersdorf argues, without citation to authority or explanation of her reasoning, that executing the Guaranty some days before the execution of the Lease gives rise to a question of whether the Guaranty is supported by consideration.

"The general rule that the adequacy of consideration is not a proper subject for judicial scrutiny applies when some benefit was received" (*Laham v Bahia Mehmet Bin Chambi*, 299

AD2d 151, 152 [1st Dept 2002] [citation and internal quotation marks omitted]). The Guaranty describes, at length, the substantial consideration Guarantor received in her bargain with Solow:

> It is a condition of the grant, execution and delivery of the Lease that Guarantor execute and deliver this Guaranty. Guarantor acknowledges and agrees that the grant, execution and delivery of the Lease by Tenant is in Guarantor's best interests and, as an owner of some of [*sic*] all of the beneficial interests in Tenant, Guarantor expects to derive benefit therefrom. Guarantor makes this Guaranty knowing that Landlord will rely hereon in leasing the Premises to Tenant. Guarantor conclusively acknowledges that the Landlord's hereon is in every respect justifiable and Guarantor received adequate and fair equivalent value for this Guaranty

(Guaranty, ¶ 23, at 6).

Even if one were to assume, for the sake of argument, that the date of the Lease's execution is an issue material to the Guaranty's validity, Ms. Leitersdorf fails to show how the lapse of time between execution of these documents deprived Ms. Leitersdorf of a benefit of her bargain. Both documents were dated "as of January 29, 2013". Ms. Leitersdorf's execution of the Guaranty was acknowledged before a New York notary public on January 10, 2013. Ms. Leitersdorf signed the Lease on behalf of C1 Corp., as its "Founder and CEO." The Lease's execution was not acknowledged. Its signature page merely states that "Landlord and Tenant have respectively executed this Lease as of the day and year first above written." Ms. Leitersdorf fails to submit any evidence, such as her own affidavit, attesting to the actual date of the Lease's execution.

Accordingly, Ms. Leitersdorf's argument, seeking to void the Guaranty because of want of consideration, fails. Ms. Leitersdorf is bound, under the express terms of the Guaranty, "absolutely, irrevocably and unconditionally," to pay and perform all obligations due Solow as Landlord under the Lease.

She is also bound to the Housing Court Judgment under the doctrine of collateral estoppel, as a privy of C1 Corp. (*see Specialty Rests. Corp. v Barry*, 236 AD2d 754, 755 [3d Dept 1997], citing *Green v Santa Fe Indus.*, 70 NY2d 244, 254 [1987] [where guarantor admits being president, shareholder and director of corporate debtor, guarantor's controlling status over debtor constitutes privity for purposes of collateral estoppel]).

Ms. Leitersdorf also argues that C1 Corp.'s unresolved damage claims against Solow for alleged breach of the Lease should prevent Solow from obtaining summary judgment against her under the Guaranty. The Guaranty, however, states that Ms. Leitersdorf "absolutely, irrevocably and unconditionally waives any and all rights it may have to assert any claim, defense, set-off, counterclaim or cross claim whatsoever with respect to the obligations of any other party, including Tenant" (Guaranty, ¶ 15, at 5). This waiver is binding upon Ms. Leitersdorf (*Chip Fifth Ave. LLC v Quality King Distribs., Inc.*, 158 AD3d 418, 418-19 [1st Dept 2018] [where guarantor waives right to raise possible defenses on obligations it guaranteed, "the guarantor's liability can be greater than that of the obligor tenant, inasmuch as the lease and guarantees were separate undertakings, and the latter is enforceable without qualification or reservation"] [citation omitted]).

Solow asserts that Guarantor's liability under the Housing Court Judgment is $379,291.26, plus 9% simple annual interest from the date of entry, June 18, 2018, until the date the Housing Court Judgment is paid in full. Ms. Leitersdorf objects to Solow's calculation, noting that Solow has failed to offset the amount claimed under the Housing Court Judgment by C1 Corp.'s security deposit, which she claims totals $165,878.41. Solow does not dispute the amount of the security deposit claimed by Ms. Leitersdorf but argues, under Article 40 (a) of the

Lease, that it has the right to retain the security deposit until C1 Corp.'s liability to Solow is finally determined in this action.

Considering this concession, Solow is entitled to recover the amount due and owing to it under the Housing Court Judgment from Ms. Leitersdorf, as Guarantor, at the conclusion of this action, reduced by the amount of C1 Corp.'s security deposit.[3]

(ii) Use & Occupancy Charges

Solow argues that it is entitled to recover from Guarantor the use and occupancy charges under the Lease which C1 Corp. incurred between February 6, 2018, the entry date of the Housing Court Judgment, and C1 Corp.'s surrender of the Premises on March 30, 2018. Solow alleges that it received two court-ordered payments during the holdover period totaling $65,537.34 but contends the use and occupancy charges which accrued through March 30, 2018 totaled $158,575.43, leaving an unpaid balance of $93,038.09.

In opposition, C1 Corp. argues that Ms. Leitersdorf cannot be held liable for these charges as Guarantor because Solow has not established C1 Corp.'s debt for use and occupancy fees, over and above the amounts that Solow admits C1 Corp. has already paid. In the alternative, Ms. Leitersdorf argues that Solow's acceptance of C1 Corp.'s two court-ordered payments during the holdover period constitutes C1 Corp.'s full satisfaction of its liability for the holdover period and that Solow's claim for additional use and occupancy charges should be treated as barred by res judicata.

In reply, Solow asserts that the first payment of use and occupancy fees was by court order and made without prejudice (*see* exhibit C to the reply affirmation of Norman Flitt, Esq.,

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[3] Counsel to C1 Corp. and Ms. Leitersdorf admitted at oral argument that, like C1 Corp., Raphael NYC is also bound by the Housing Court Judgment (tr 8:6-11).

executed November 29, 2018 [Flitt affirmation] [Housing Court file jacket annotated "U + O w/o prej"]), and that the second use and occupancy payment was memorialized by an exchange of correspondence between counsel to the parties, purportedly acknowledging that the second payment was also without prejudice to any of Solow's "rights, claims and remedies" (Flitt affirmation, exhibit D).

Solow's entitlement to additional further use and occupancy charges is not at all clear from its submissions. The Housing Court's abbreviated "without prejudice" notation on case's file jacket does not necessarily indicate that the Housing Court had determined that Solow is entitled to recover additional use and occupancy charges. It may have been intended to indicate that Solow was not barred from making a later Housing Court application for additional amounts.

The exhibits on which Solow relies for this argument also present questions of fact. For instance, the relevant annotation in exhibit C is incorrectly dated "2/28/17," considering that the "Court Action or Comments" section states the "U+O" payment in question was to be made "w/in 10 days (before 3/10/18)." On the other hand, if "3/10/18" is the payment deadline for the first court-ordered payment, as indicated in Paragraph 17 of Mr. Flitt's affirmation, the correspondence between counsel presented in exhibit D apparently involved that same first payment, as it acknowledged receipt of $32,768.67 by wire transfer on March 8, 2018. These issues of fact appear to be sufficiently material to preclude granting Solow summary judgment with respect to use and occupancy charges.

(iii) Attorneys' Fees and Costs Incurred in the Housing Court Proceeding

C1 Corp. asserts that Judge Rosado ruled, if Solow wished to recover its Housing Court attorneys' fees and costs, it should make its motion for that relief, after prevailing in the Housing

Court Proceeding, and submit an affirmation of services and present its evidence at a separate hearing in the Housing Court (Brosnick aff, exhibit 4) (tr 3/13/2018 at 61:20-62:4). C1 Corp. asserts Solow waived its right to pursue these fees and expenses by not objecting to Judge Rosado's ruling and by not seeking a special hearing in the Housing Court.

Solow responds by rejecting C1 Corp.'s waiver argument and pointing to Paragraph 1 of the Guaranty, which provides that Guarantor is responsible for all legal fees Solow incurs because of Tenant's default under the Lease. Solow also suggests further hearings may not be necessary because it had attached copies of its relevant legal invoices to its motion papers.

"Waiver is an intentional relinquishment of a known right and should not be lightly presumed. The intent to waive must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act" (*Ess & Vee Acoustical & Lathing Contrs., Inc. v Prato Verde, Inc.*, 268 AD2d 332, 332 [1st Dept 2000] [citations and internal quotation marks omitted]).

C1 Corp. has not presented evidence of any unmistakable manifestation of Solow's intent to waive its right to its attorneys' fees incurred in the Housing Court and so Solow is free to make its fee applications in this action. However, Solow's showing on this facet of its motion is insufficient.

To make an attorneys' fee application, Solow must lay a proper evidentiary foundation. Parties seeking such recovery "bear the burden to establish the reasonableness, necessity, and value of their attorneys' services. . .. The court may not make their case for them" (*Measom v Greenwich and Perry St. Hous. Corp.*, 193 Misc 2d 741, 743 (Civ Ct, NY County 2002), citing *Matter of Karp*, 145 AD2d 208, 216 [1st Dept 1989]).

As noted by the Court of Appeals:

> Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required,

> the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.

(*Matter of Freeman*, 34 NY2d 1, 9 [1974], *quoted in Matter of Karp*, 145 AD2d at 215 [citations omitted]). Solow's motion for partial summary judgment against Guarantor, to recover attorneys' fees and costs it incurs in Housing Court Proceeding must be denied, without prejudice. Solow may bring this motion again, in compliance with rules discussed above.

(iv) Declaration of Guarantor Liability

It would be an improvident exercise of the court's discretion to declare that Guarantor is liable to Solow for damages and attorneys' fees "to be recovered" by Solow in this action against C1 Corp.

Solow asks that the court declare Guarantor liable to Solow for any "further" money damages it may recover from C1 Corp. on its first, second and third counterclaims in this action. Solow's first counterclaim alleges C1 Corp. defaulted and breached the Lease by failing to pay Solow rents and other charges for the period from April 1, 2018, after C1 Corp.'s March 30, 2018 surrender of the Premises, through expiration of the Lease on December 31, 2023. Solow seeks a money judgment, in an amount to be determined but not less than $2,494,574.88.

In its second counterclaim, Solow seeks money damages from C1 Corp. for its breach of the terms of the Second Amendment to the Lease. Solow alleges that, under the terms of the Second Amendment, C1 Corp. would be granted a rent abatement for the period from November 2015 through December 2016. The Second Amendment further provided that this rent abatement would terminate on January 1, 2017, from which time forward C1 Corp. would be responsible for all rent and other charges due under the Lease. Solow alleges that, by refusing to make rent

payments from January 1, 2017, as agreed, C1 Corp. voided the Second Amendment, which purportedly entitles Solow to recover $425,992.71, representing the principal value of C1 Corp.'s rent abatement, plus interest.

In its third counterclaim, Solow asserts it is entitled under the Lease to recover the attorneys' fees, costs and expenses it has incurred and will incur defending any action or proceeding commenced by C1 Corp., such as the current action.

Solow, citing *Bank of Am. v Solow* (59 AD3d 304, 304-05 [1st Dept 2009]), asserts that it has established its entitlement to partial summary judgment with respect to Guarantor's liability by showing the existence of the Guaranty and by submitting an affidavit of nonpayment. *Bank of America*, however, sets forward the standard applicable where summary judgment in lieu of complaint is sought under CPLR 3213. The instant motion for partial summary judgment is brought under CPLR 3212 (e). The Guaranty is a guaranty of both payment and performance and so, by its terms, "it is not an instrument for the payment of money only, and thus, may not support a CPLR 3213 motion" (*Dresdner Bank AG (NY Branch) v Morse/Diesel, Inc.*, 115 AD2d 64, 68 [1st Dept 1986]).

More to the point, declaratory relief would be inappropriate in this case because Solow may be "afforded complete relief by its recovery of damages" (*Law Offices of Paul A. Chin, P.C. v Seth A. Harris, PLLC*, 159 AD3d 637, 639 [1st Dept 2018], citing, *inter alia*, *Bartley v Walentas,* 78 AD2d 310, 312 [1st Dept 1980] [a claim for declaratory relief "is unnecessary where an action at law for damages will suffice"]).

(v) Guarantor's Affirmative Defenses

Solow moves for summary judgment, asking the court to strike all 17 of Ms. Leitersdorf's affirmative defenses. "The law is established that a party opposing a motion for summary

judgment must produce evidentiary proof in admissible form adequate to require a trial of a material question of fact or else demonstrate an acceptable excuse for its failure to do so" (*US 7 Inc. v Transamerica Ins. Co.*, 173 AD2d 311, 312 [1st Dept 1991] [citations omitted]). Summary judgment cannot be avoided by asserting defective affirmative defenses in an answer (*id.* at 312 ["Since it is axiomatic that summary judgment cannot be avoided on the basis of general, conclusory and unsubstantiated allegations, plaintiff is entitled to summary judgment in its favor"]).

In her first affirmative defense, Ms. Leitersdorf repeats C1 Corp.'s assertion that Solow's own breaches of the Lease render its breach of contract claims against C1 Corp. ineffective. Ms. Leitersdorf contends that Solow's remaining breach of contract claims must therefore be dismissed because they fail to state a cause of action. She concludes that, as Solow has no viable contract breach claim against C1 Corp., its counterclaim against Ms. Leitersdorf must fail too.

Paragraph 15 of the Guaranty, however, states in pertinent part, that "Guarantor absolutely, irrevocably and unconditionally waives any and all right it may have to assert any claim, defense, set-off, counterclaim or cross claim whatsoever with respect to the obligations of any other party, including Tenant." Solow's motion to strike Ms. Leitersdorf's first affirmative defense must be granted.

Ms. Leitersdorf's assertion, in her second affirmative defense, that the Guaranty is not valid is also unfounded. She accepted substantial benefits from Solow and so she will not be heard to question the adequacy of the consideration that she received (*Laham*, 299 AD2d at 152).

Ms. Leitersdorf invokes General Obligations Law Section 5-702 in her third affirmative defense to assert that the Guaranty is void under the Statute of Frauds. GOL Section 5-702 is captioned "Requirements for use of plain language in consumer transactions" and expressly

states that it applies to contracts to which a consumer is party, like residential leases. This affirmative defense must also be stricken because Ms. Leitersdorf offers no evidence or argument to support the contention that the Guaranty is a consumer transaction (*see Cruz v NYNEX Info. Resources*, 263 AD2d 285, 289 [1st Dept 2000] ["In New York law, the term 'consumer' is consistently associated with an individual or natural person who purchases goods, services or property primarily for 'personal, family or household purposes'"], *citing, inter alia*, GOL 5–327 [1] [a]). Consequently, Solow's motion to strike Ms. Leitersdorf's third affirmative defense must be granted.

In her fourth affirmative defense, Ms. Leitersdorf asserts Solow's counterclaims are barred by documentary evidence, that is, by unspecified provisions of the Lease and Guaranty which purportedly contradict and necessarily dispose of Solow's counterclaims. Again, Paragraph 15 of the Guaranty prohibits Ms. Leitersdorf from asserting defenses belonging to C1 Corp., as Tenant under the Lease. She also cannot rely on unsuccessful arguments, discussed above, which she asserted to avoid the Guaranty. Solow's motion to strike Ms. Leitersdorf's fourth affirmative defense must therefore be granted.

In her fifth affirmative defense, Ms. Leitersdorf asserts that Solow waived the right to recover any further relief, by accepting two judicially ordered holdover payments in full satisfaction of C1 Corp.'s obligations under the Lease. The court has found issues of fact exist with respect to Solow's entitlement to additional use and occupancy payments. Still, Solow's claim to recover additional use and occupancy charges is premised on C1 Corp.'s Lease obligations. Solow's motion to strike Ms. Leitersdorf's fifth affirmative defense must be granted, in accordance with Paragraph 15 of the Guaranty.

Ms. Leitersdorf offers no evidence or argument to support her sixth affirmative defense, alleging lack of personal jurisdiction premised on Solow's alleged failure to serve her properly, or her seventh affirmative defense, alleging lack of personal jurisdiction, premised on her purported status as a non-domiciliary of the State of New York. Ms. Leitersdorf's knowing failure to oppose dismissal of the sixth and seventh affirmative defenses constitutes waiver and so Solow's motion to strike is granted as to both.

In her eighth affirmative defense, Ms. Leitersdorf asserts that Solow's causes of action are barred by its unclean hands and its other bad-faith conduct. In her opposition to Solow's motion to strike, Ms. Leitersdorf points to C1 Corp.'s complaint and excerpts of the November 9, 2018 affidavit of Keren Deutsch, the Manager of Human Resources and Operations of Raphael NYC, to attest to how Solow committed material breaches of the Lease by engaging in construction at the Building. Such allegations premised upon C1 Corp.'s alleged rights as Tenant are waived by Ms. Leitersdorf under Paragraph 15 of the Guaranty.

Ms. Leitersdorf also alleges that Solow has additional evidence of Solow's unclean hands and bad faith, which Solow has purportedly refused to produce in discovery. She supports this contention by submitting an affirmation from Richard B. Brosnick, Esq., attorney for C1 Corp., who asserts that, in addition to evidence relating to the Lease, Solow failed to produce evidence as to whether the Lease and Guaranty were executed contemporaneously. Under CPLR 3212 (f), "[s]hould it appear that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosures to be had. . .."

As noted above, the issue of whether the Lease and Guaranty were executed at the same time is immaterial and so cannot serve to prevent a grant of summary judgment (*see People ex*

rel. Spitzer v Grasso, 50 AD3d 535, 545 [1st Dept 2008] ["'[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment'"], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 248 [1986]). Accordingly, Ms. Leitersdorf's eighth affirmative defense must be stricken.

In her ninth affirmative defense, Ms. Leitersdorf argues that Solow's counterclaims are barred, in whole or in part, by the doctrines of waiver and estoppel. In her opposition, Ms. Leitersdorf concedes that her ninth affirmative defense is a reiteration of her fifth affirmative defense, which asserts that Solow's acceptance of court-ordered use and occupancy payments during the pendency of the Housing Court Action constituted C1 Corp.'s full satisfaction of its remaining Lease obligations. Accordingly, Solow's motion to strike Ms. Leitersdorf's ninth affirmative defense must be granted as duplicative.

In her tenth affirmative defense, Ms. Leitersdorf contends that Solow's breach of the Lease entitles C1 Corp. to damages. These allegations are premised upon C1 Corp.'s alleged rights and so are waived under Paragraph 15 of the Guaranty.

Ms. Leitersdorf argues, in her eleventh affirmative defense, that Solow is not entitled to recover any attorneys' fees or costs. Specifically, Ms. Leitersdorf argues that Solow waived its right to pursue attorneys' fees in the Housing Court Proceeding by failing to move for this relief from Judge Rosado. She argues further that Solow is not entitled to recover attorneys' fees and costs incurred in this action and, in any event, that Solow has failed to show its proposed fees are not excessive or unreasonable.

As noted above, C1 Corp. failed to show that Solow waived its right to recover its attorneys' fees and costs in the Housing Court Proceeding but Solow did fail to make a proper showing of its right to recovery, resulting in Solow's motion for summary judgment on its claim

for attorneys' fees and costs to be denied, without prejudice. Accordingly, Ms. Leitersdorf's eleventh affirmative defense is stricken.

In her twelfth affirmative defense, Ms. Leitersdorf asserts Solow's counterclaims, insofar as they seek to recover further rent, are barred by the doctrine of res judicata and/or collateral estoppel, based on the Housing Court Decision and Order and Judgment.

Only issues that are decided by the courts are entitled to res judicata or collateral estoppel effect (*Courthouse Corp. Ctr. LLC v Schulman*, 74 AD3d 725, 727 [2d Dept 2010] [res judicata and collateral estoppel inapplicable to landlord's claims against commercial tenant where landlord did not show issues in dispute were decided in prior actions]).

Multiple issues were raised before the Housing Court but were not decided. Solow's cause of action was for breach of the Lease, based on C1 Corp.'s failure to pay rent. C1 Corp. counterclaimed for constructive eviction, breach of contract, fraud and nuisance (June 15, 2018 Decision & Order, at 1). The only issues identified in the awards made in the Decision and Order, reflected in the Housing Court Judgment, were the rent arrears accruing through termination of the Lease, granted to Solow from C1 Corp., based on C1 Corp.'s breach of the Lease, and a partial rent abatement granted to C1 Corp., based on its counterclaim for constructive eviction (*id.* at 5-6). The June 15, 2018 Decision and Order and the Housing Court Judgment are silent on additional rent allegedly due under the Lease, and so that issue is not barred by res judicata or collateral estoppel. Ms. Leitersdorf's twelfth affirmative defense must be stricken.

Ms. Leitersdorf's thirteenth affirmative defense is that she cannot be held liable as Guarantor because of C1 Corp.'s partial constructive eviction, not only through the period covered by the Housing Court Judgment but continuing through the remainder of the term of the

Lease. Again, as this affirmative defense is premised on C1 Corp.'s rights as putative Tenant, which Ms. Leitersdorf has expressly waived under paragraph 15 of Guaranty.

In her fourteenth affirmative defense, Ms. Leitersdorf argues that any amount for which she is held liable as Guarantor must be offset by the $165,878.41 security deposit. As noted above, that security deposit will be offset against any award to Solow upon the resolution of this action. Still, the security deposit is the property of C1 Corp., as putative Tenant (*see Glass v Janbach Props., Inc.*, 73 AD2d 106, 108 [2d Dept 1980] ["It is beyond cavil that a landlord holding a security deposit under a lease covering the rental of real property does so in the capacity of a trustee. Such deposit remains the property of the tenant, and may not be mingled with the landlord's funds"]). As such, under Paragraph 15 of the Guaranty, Ms. Leitersdorf has waived the right to assert any claim premised upon it, and so her fourteenth affirmative defense must be stricken.

In her fifteenth affirmative defense, Ms. Leitersdorf alleges that any amount for which she may ultimately be held liable under the Counterclaims must be offset by Solow's failure to mitigate damages. Ms. Leitersdorf fails to oppose dismissal of this affirmative defense and so Solow's motion to strike is granted.

Ms. Leitersdorf alleges in her sixteenth affirmative defense that Solow's counterclaims are barred by its own fraud and wrongful acts, as C1 Corp. alleged in the complaint, including its fraudulent inducement of C1 Corp. to enter the Lease. In her seventeenth affirmative defense, Ms. Leitersdorf alleges that Solow's counterclaims are barred by Solow's wrongful conduct, which frustrated the purpose of the Lease and made it impossible for C1 Corp. to perform its duties thereunder. These affirmative defenses are both premised on rights C1 Corp. holds as putative Tenant, which Ms. Leitersdorf waived under paragraph 15 of Guaranty.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that, in motion sequence number 001, Solow's motion to dismiss C1 Corp.'s complaint, and to sever and continue Solow's counterclaims with respect to Bergdorf and Ms. Leitersdorf, is denied; and it is further

ORDERED that C1 Corp.'s cross motion to amend the complaint is granted, on the condition that C1 Corp. e-file a redlined copy of its proposed amended complaint, clearly reflecting each deletion, insertion or other change it has made to the original complaint, within 10 days of the entry of this Decision and Order, but its request for an award of attorneys' fees and costs is denied; and it is further

ORDERED that Solow's cross motion for Rule 130 sanctions is denied; and it is further

ORDERED that, in motion sequence number 002, Solow's motion for partial summary judgment with respect to Ms. Leitersdorf's liability as Guarantor, for the amount due and owing by C1 Corp., in principal and interest, on the Housing Court Judgment, is hereby granted; and it is further

ORDERED that Solow's motion for partial summary judgment with respect to Ms. Leitersdorf's liability as Guarantor, for use and occupancy charges still allegedly due and owning, is denied; and it is further

ORDERED that Solow's motion for partial summary judgment with respect to Ms. Leitersdorf's liability as Guarantor, for its attorneys' fees and costs incurred in the Housing Court Proceeding, is denied, without prejudice; and it is further

ORDERED that Solow's motion for partial summary judgment, seeking a declaration that Ms. Leitersdorf, as Guarantor, remains liable for future additional money damages and

attorneys' fees and costs that Solow may incur in connection with this action, is denied; and it is further

ORDERED that Solow's motion for partial summary judgment, striking Guarantor's 17 affirmative defenses, is granted; and it is further

ORDERED that counsel to the parties are directed to appear at a preliminary conference in Part 23 of this Court on October 22, 2019, at 9:30a.m.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: New York, New York
August 8, 2019

Enter:

Hon. W. Franc Perry, III