SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. JOEL M. COHEN** **PART** 45

----------X

BLDG ABI ENTERPRISES, LLC,

Plaintiff,

- v -

711 SECOND AVENUE CORP. and IAN CHENG,

Defendants.

----------X

INDEX NO. 110703/2011

DECISION AND JUDGMENT IN NON-JURY TRIAL

JOEL M. COHEN:

This is a dispute over unpaid rent. Defendant 711 Second Avenue Corp. (the "Corporate Defendant" or "Tenant") leased a storefront from Plaintiff BLDG ABI Enterprises, LLC ("Plaintiff" or "BLDG"), in hopes of opening a Japanese restaurant. The restaurant did not materialize, however, and Tenant eventually abandoned the premises. Now, Plaintiff seeks to recover unpaid rent and liquidated damages under the lease, as well as additional damages under a Guaranty executed by Defendant Ian Cheng (the "Individual Defendant" or "Guarantor").

For the reasons that follow, the Court finds that BLDG is entitled to recover $86,495.98 (plus statutory interest) on its first cause of action, for Tenant's breach of the lease, as well as $29,120.00 (plus statutory interest) on its third cause of action, for Cheng's breach of the Guaranty. However, Plaintiff may not "double recover" from both Tenant and Guarantor for unpaid rent corresponding to the months in which Tenant's and Guarantor's liability overlap.

Findings of Fact

Based upon the evidence submitted during a one-day trial held on March 8, 2019, the Court makes the following findings of fact:

8. Between September and December 2009, Cheng took steps to prepare the space for use as a Japanese restaurant. He hired an architect, Alan Chu, to design the restaurant. (Tr. at 147).

9. On November 23, 2009, the New York City Department of Buildings ("DOB") provided Chu with a Notice of Objections. (Pl.'s Ex. G) (NYSCEF Doc. No. 84). DOB had issued seven objections to Defendants' plans for the Premises. Most importantly, Objection #1 required that Defendants provide a "C/O" – a Certificate of Occupancy – for the building. (*Id.*; *see* Tr. at 166). Cheng immediately asked BLDG for the C/O. (*Id.* at 149). He was told "that there was no C of O because the building was old," and he was "not given any documents." (*Id.*) Specifically, Plaintiff faxed a note to Corporate Defendant on December 21, 2009, stating: "711 Second Avenue was built prior to the 1938 code and there is no Certificate of Occupancy for that property on file." ((Pl.'s Ex. H (NYSCEF Doc. No. 85); *see also* Tr. at 65).

10. Alan Starkman, a Vice President at BLDG, outlined at trial the process for obtaining DOB approval without a C/O. Starkman testified that he regularly advises tenants who "come to [him] with problems about getting approval for restaurants, in particular spaces where there are no certificates of occupancy." (Tr. at 66). Starkman explained: "What you have to do and what is required by the DOB . . . is you first before you apply for your permits, you have to first apply for a Certificate of No Objection," also known as a Letter of No Objection. (*Id.*) This "is a form that you fill out," to let DOB know that there is no Certificate of Occupancy on record for the building. (*Id.*) The DOB reviews the letter, confirms the absence of a Certificate of Occupancy, and "then they confirm the use of what you are putting on the form that you're building, a restaurant or whatever. And they confirm that use to make sure it is in the zone, they do all their due diligence. They give it back to you signed, sealed, stamped." (*Id.* at 67). That

approval in hand, an applicant can then "submit your paperwork and your plans and everything to the DOB, but that has to be on top and that's the same thing as if you submitted a C of O. Because now it is identified that the building has a legal right to put a restaurant . . . there." (*Id.*) "[F]rom that point," the DOB will proceed to review the architectural drawings for the space. (*Id.*)

11. A copy of a DOB Letter of No Objection form was submitted into evidence. The form states that, "[p]rior to January 1, 1938, the [DOB] did not typically require a [C/O]," and that "[a] Letter of No Objection may be issued if no [C/O] is available." (Pl.'s Ex. V) (NYSCEF Doc. No. 98).

12. Cheng never applied for a Letter of No Objection with the DOB, and did not know if Chu, the architect he hired, had done so. (*Id.* at 163).

13. In late 2009, as the Rent Commencement Date drew near, Cheng asked BLDG for another two months rent-free so that he could, among other things, "go and obtain the C of O." (*Id.*) BLDG did not grant the additional rent concession.

14. In February 2010, BLDG broke the locks on the Premises to allow Con Edison access to the space on an emergency basis. The utility company needed access to certain electrical equipment located in the Premises in order to "correct the emergency, or else the building would have burned down." (*Id.* at 80). According to BLDG, Defendants had been notified repeatedly of the need to access the Premises, but failed to respond. (*Id.* at 82). BLDG did not have keys to the Premises; neither the building superintendent nor the landlord's brokers kept such keys once a unit was occupied by a tenant. (*Id.* at 82, 84). Starkman, the BLDG executive, explained that the company purposefully broke locks as a means of entry in order to unequivocally announce their presence to tenants. "That's why we break the lock. That's why

we don't have tenant keys, because I'd rather break the lock or break your door so when you get there, you absolutely know I was there. You absolutely know that there was an emergency, and you absolutely know that there was a condition in which we had to break the lock to get into the space." (*Id.*)

Prior Proceedings

15. On March 18, 2010, Plaintiff instituted a summary proceeding in New York County Civil Court (the "Civil Court Case") to recover possession of the Premises for non-payment of rent. In addition to the judgment of possession, Plaintiff petitioned the Civil Court for a money judgment of $17,360.00, which represented "the total rent in arrears as of the date hereof." (Defs.' Ex. 2) (NYSCEF Doc. No. 75). Both Defendants here – the Corporate Defendant and Cheng –were listed as Respondents in the Civil Court Case. (*Id.*)

16. Defendants did not appear in the Civil Court proceeding. The Civil Court issued a default judgment of possession on May 24, 2010. However, the Civil Court declined to award Plaintiff the alleged amount of unpaid rent. (*See id.* ("A money judgment is hereby granted . . . in the amount of $0.00 in favor of [Plaintiff] and against [Defendants].")).[1]

17. Subsequently, a warrant of eviction was issued by the City Marshal, and Plaintiff recovered legal possession of the Premises on June 17, 2010.

The Instant Case

18. Plaintiff filed a complaint in this case dated September 16, 2011. ("First Complaint") (NYSCEF Doc. No. 8). The First Complaint alleged three causes of action, which

---

[1] Almost nine years later, on February 14, 2019, Defendants moved to vacate the Civil Court judgment "on basis of blatant fraud." (NYSCEF Doc. No. 40). The Civil Court denied that motion on March 5, 2019, concluding that "[t]he alleged infirmities do not render the proceeding jurisdictionally defective . . . and could have been brought to the court's attention earlier, as [Defendants] acknowledge knowledge of the case around 2013." (NYSCEF Doc. No. 66).

2010 and part of February 2010, which could have been paid out of Defendants' security deposit; and (3) that Plaintiff defrauded the Defendants by leasing the Premises to them despite the knowledge that it was infeasible to open a Japanese restaurant there. (*Id.*)

Conclusions of Law

A. Res Judicata Bars Parts of Plaintiff's Claims and All of Defendants' Counterclaims

24. The principle of res judicata "broadly bars the parties or their privies from relitigating issues that were or could have been raised" in a previous action, "regardless of whether or not those claims were in fact litigated." *Paramount Pictures Corporation v. Allianz Risk Transfer AG,* 31 N.Y.3d 64, 72 (2018). The doctrine "serves to bar not only every matter which was offered and received to sustain or defeat the claim or demand, but also any other admissible matter which might have been offered for that purpose." *Id.*

25. Here, "[t]he res judicata effect, if any, to be given in the instant plenary action clearly hinges on the limits of the subject matter jurisdiction which the [Civil Court] had in the original summary proceeding before it. If the [Civil Court] lacked subject matter jurisdiction to entertain the damages claims now raised, res judicata would not be a bar to the present action." *Ross Realty v. V & A Fabricators, Inc.*, 42 A.D.3d 246, 249 (2d Dep't 2007).

26. "The Civil Court Act and article 7 of the RPAPL provide the housing court with limited jurisdiction in summary proceedings, that is: actions for the recovery of possession of real property under various circumstances, and actions for the collection of rent." *Wheeler v. Linden Plaza Pres. LP*, 172 A.D.3d 608 (1st Dep't May 28, 2019). "A special proceeding to recover real property may be maintained in . . . a court of civil jurisdiction in a city." RPAPL §701. The Civil Court, in turn, has "jurisdiction over summary proceedings to recover

possession of real property located within the city of New York, to remove tenants therefrom, and to render judgment for rent due without regard to amount . . . ." N.Y. City Civ. Ct. Act §204. Following such proceeding, the Civil Court "shall direct that a final judgment be entered determining the rights of the parties." RPAPL §747.

27. In the summary proceeding, Plaintiff sought to recover possession of the Premises, and to recover "the total rent in arrears as of" March 18, 2010, a total of $17,360 (*i.e.*, 3+ months of unpaid rent). (Defs.' Ex. 2) (NYSCEF Doc. No. 75). The Civil Court issued a final judgment, granting Plaintiff a possessory judgment but granting a money judgment "in the amount of $0.00." (*Id.*) In this action, Plaintiff seeks to recover from the tenant "rent, additional rent and other charges." (Am. Compl. ¶4). Additionally, Plaintiff seeks to recover from the Guarantor damages stemming from his alleged breach of the Guaranty. (*Id.* ¶11).

28. The Civil Court judgment precludes Plaintiff from recovering, in this case, the rent amounts from Tenant previously sought in the summary proceeding. *See Reich v. Cochran*, 151 N.Y. 122, 126 (1896) ("A judgment taken by default in summary proceedings by a landlord for nonpayment of rent is conclusive between the parties as to the existence and validity of the lease, the occupation by the tenant, and that rent is due, and also as to any other facts alleged in the petition of affidavit which are required to be alleged as a basis of the proceedings."). This means that Plaintiff may not recover the $17,360 allegedly due under the Lease as of March 18, 2010, when Plaintiff filed its Civil Court petition, because the Civil Court decided the petition by awarding "[a] money judgment . . . in the amount of $0.00 . . . for a total amount of $0.00," and setting "[m]onthly use and occupancy . . . at $0.00 per month." (Defs.' Ex. 2). The Civil Court's final judgment conclusively determined the rights between Plaintiff and Corporate Defendant under the Lease as of the date of Plaintiff's petition.

29. In Plaintiff's view, the Civil Court's possessory judgment proves Defendants' liability in this case, while the monetary judgment has no effect whatsoever. But Plaintiff cannot cherry-pick the res judicata effects that benefit its position while ignoring the effects that do not.

30. Plaintiff's chief argument – that "[t]he money judgment was not available" because Defendants did not appear in the summary proceeding (Pl.'s Post-Trial Mem. of Law at 16) – is not persuasive. First, the Civil Court judgment did not indicate that a money judgment was unavailable. In fact, a money judgement was given, "in the amount of $0.00." (Defs.' Ex. 2). Second, Plaintiff does not cite to any applicable statute which prohibits money judgments in summary proceedings where one side defaults. Instead, the governing statute provides that, "[i]f the respondent fails to answer within ten days from the date of service . . . the judge shall render judgment in favor of the petitioner." RPAPL § 732. Importantly, "judgment" is not limited to a possessory judgment. *See Broadway 36th Realty, LLC v. London*, 29 Misc. 3d 1238(A) (Sup. Ct. N.Y. Cty. 2010) (noting that "the Civil Court . . . granted a default judgment against the tenant for $77,558.68"). Third, the case law also does not support Plaintiff's position that a money judgment was unavailable because of Plaintiff's purported method of service on Defendants. *See Avgush v. Berrahu*, 17 Misc. 3d 85, 90 (App. Term 2007) ("[W]e hold that service sufficient to satisfy CPLR 308(4) and, indeed, any of the CPLR 308 provisions, is sufficient to support an award of a money judgment in a summary proceeding.").

31. On the other hand, Plaintiff's claim for "additional rent and other charges" – *i.e.*, future rent amounts due under the terms of the Lease as a result of Tenant's breach – are not barred by the Civil Court judgment.

32. "Once the [P]laintiff succeeded in its summary proceeding, the parties' relationship as landlord and tenant terminated, and whatever monetary liability the tenant may

have had to the landlord at that point was no longer in the nature of rent, but was in the nature of contract damages," which "are not within the subject matter jurisdiction of courts, such as the [Civil Court], to grant." *Ross Realty*, 42 A.D.3d at 249; *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc.*, 24 N.Y.3d 528, 534 (2014) ("[W]e reject defendants' res judicata argument because the Civil Court was without authority to address a claim for the balance of rent due under the acceleration clause in Van Duzer's holdover proceeding.") (citing *Ross Realty*, 42 A.D.3d at 249); *see also Holy Properties Ltd., L.P. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130, 134 (1995) (noting that "an eviction terminates the landlord-tenant relationship").

33. Therefore, Plaintiff still may recover "additional rent and other charges" in this Court notwithstanding the Civil Court's judgment, because those amounts derive from the parties' contractual relationship as liquidated damages for Corporate Defendant's breach.

34. For similar reasons, Defendants' counterclaims are also precluded by the Civil Court judgment. When a "[d]efendant was served with the notice of the petition and the petition in the summary proceeding . . . [the] defendant is precluded from asserting any claim or defense that the tenant could have asserted in the Civil Court proceeding." *Broadway 36th Realty, LLC v. London*, 29 Misc. 3d 1238(A), at *2 (Sup. Ct. N.Y. Cty. 2010); *see* N.Y. City Civ. Ct. Act §208 ("The court shall have jurisdiction . . . (a) [o]f any counterclaim the subject matter of which would be within the jurisdiction of the court if sued upon separately. . . . (b) [o]f any counterclaim for money only, without regard to amount."). In any event, as discussed below at Part C, even if the counterclaims were not precluded by law, they still fail on the merits.

their terms. . . . It does not avail plaintiffs to describe the profit in this case as a 'windfall,' since it is the result of a formula to which the parties agreed.").

39. Plaintiff submitted evidence showing that, under the Lease's various rent provisions, Tenant owes $754,296.74 in gross unpaid rent. (Tr. at 36); Pl.'s Post-Trial Br. at 7. Plaintiff's witness testified that this amount was calculated using BLDG's accounting system, which "maintain[s] a computerized rent history for each tenant" that is updated every month to reflect charges and payments on each account. (Tr. at 36, 38). This system is "maintained in the regular course of business." (*Id.* at 38).

40. Because this gross figure includes only rent that is deemed unpaid, it cannot include the $17,360.00 in allegedly unpaid rent that was brought before the Civil Court. Otherwise, Plaintiff would be able to recover an amount barred by the Civil Court judgment. The gross figure, then, falls to $736,936.74.

41. Next, Plaintiffs must subtract the rent proceeds it collected from subsequent tenants once it re-let the Premises. BLDG's records show that the next two tenants paid $539,108.39 in rent. Pl.'s Ex. O, Q; Pl.'s Post-Trial Br. at 8. Due to a gap in Plaintiff's records – caused, apparently, by its transition to another accounting program – Plaintiff did not have a record of one tenant's rent payments between December 2010 and June 2012. (Tr. at 51-52). However, in calculating damages here, Plaintiff credits that tenant with full payment during the missing time period. (*Id.* at 52). In total, then, Plaintiff credits the subsequent tenants with $650,440.76 in rent payments. That means Tenant (*i.e.*, the Corporate Defendant) owes $86,495.98 in unpaid rent under the Lease.

42. To the extent Defendants argue that Plaintiff failed to mitigate its damages arising from Defendants' abandonment of the Premises, that argument lacks support. As evidenced by

Plaintiff, the Premises were re-rented following Tenant's abandonment. As a landlord, Plaintiff is under no obligation to mitigate damages in a certain manner – or, indeed, to mitigate damages at all. Under New York law, once a tenant abandons premises prior to the expiration of a lease, "the landlord ha[s] three options": (1) it can "do nothing and collect the full rent due under the lease," (2) it can "accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent," or (3) it can "notify the tenant that it [is] entering and reletting the premises for the tenant's benefit." *Holy Properties Ltd., L.P. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130, 133-34 (1995) (internal citations omitted). In other words, New York law does not require landlords to mitigate their damages. *85 John St. P'ship v. Kaye Ins. Assocs., L.P.*, 261 A.D.2d 104, 104 (1st Dep't 1999) ("Landlord owed no duty to re-let the premises to mitigate damages, either in law, or under the leases, which provide that 'Landlord shall in no event be liable in any way whatsoever for failure to re-let the demised premises. . . .'"); *BP 399 Park Ave. LLC v. Pret 399 Park, Inc.*, 150 A.D.3d 507, 509 (1st Dep't 2017) ("[P]laintiff was under no obligation to relet, or attempt to relet, abandoned premises."). That general rule is reinforced by the specific language in Article 18 of the Lease, which provides:

> The failure of Owner to re-let the demised premises or any part or parts thereof shall not release or affect Tenant's liability for damages. In computing such liquidated damages there shall be added to the said deficiency such expenses as Owner may incur in connection with re-letting, such as legal expenses, reasonable attorneys' fees. . . . Owner shall in no event be liable, in any way whatsoever, for failure to re-let, for failure to collect the rent thereof under such re-letting . . . .

43. Plaintiff also seeks statutory interest on the unpaid rent. Under CPLR 5001(b), when "damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." Here, damages were incurred between January 1, 2010 (*i.e.*, the earliest month of unpaid rent)

and March 8, 2019 (*i.e.*, the latest month of liquidated damages). Interest therefore shall run from the "reasonable intermediate date" of August 1, 2014. *See* Pl.'s Pre-Trial Br. at 10.

44. Under Paragraph 18 of the Lease, Plaintiff may also seek to recoup "legal expenses" and "reasonable attorney's fees" "in connection with re-letting" the Premises as part of the liquidated damages amount. Determination of that amount, however, must await a hearing before a JHO.

The Guaranty is Subject to Reformation (Second Cause of Action)

45. As to Plaintiff's claim for reformation, the Guaranty should be read to refer to the September 1, 2009 Lease. As Justice Mills previously recognized, the discrepancy between the Lease and Guaranty dates was an inadvertent error: "Plaintiff contends, and defendants do not dispute that there was a mutual mistake or scrivener's error in inserting the wrong date in the guaranty." (Dec. 20, 2012 Decision and Order). Justice Mills "granted leave to re-plead a cause of action to reform the guaranty to state the correct date." (*Id.*) Even "[i]n the absence of a claim for reformation, courts may as a matter of interpretation carry out the intentions of the parties by transposing, rejecting, or supplying words to make the meaning of the contract more clear." *82-90 Broadway Realty Corp. v. New York Supermarket, Inc.*, 154 A.D.3d 797, 799 (2d Dep't 2017). At any rate, Plaintiff prevails on its Second Cause of Action, and the Guaranty will be read in conjunction with the Lease beginning September 1, 2009.

The Guarantor is Not Liable for Unpaid Rent Following Plaintiff's Repossession of the Premises (Third Cause of Action)

46. The Guaranty provides that Cheng "guarantees . . . the full performance and observance of all the agreements to be performed and observed by Tenant in the Lease." (Pl.'s

Ex. E). At the time Plaintiff retook possession of the Premises, Tenant owed $29,120.00 in unpaid rent. (Pl.'s Ex. M (NYSCEF Doc. No. 90)).

47. Plaintiff argues that Cheng's obligations under the Guaranty continued even after Tenant lost the Premises. Under the terms of the Guaranty, however, Cheng as the Guarantor is not responsible for any additional rent amounts due after Plaintiff repossessed the Premises. The Guaranty provides that it "shall bind the Guarantor only for the payments, performance and observance of the agreements to be performed and observed under the Lease that accrue while Tenant is in possession of the premises demised under said Lease ('Premises') and prior to surrender of same."

48. Plaintiff contends that even though Defendant lost possession of the Premises, they never "surrender[ed]" it within the meaning of the Guaranty or the Lease. "As a rule, the terms of a guaranty determine its duration and guaranties generally apply to debts arising during the guaranty period, but not due and payable until after termination." *Russo v. Heller*, 80 A.D.3d 531, 531–32 (1st Dep't 2011). Here, neither the Guaranty nor the Lease expressly defines the term "surrender." Instead, Plaintiff's argument stitches together two different Lease provisions. Section 63 of the Lease requires the Premises to "be surrendered to the Landlord on the Expiration Date or sooner termination of the term of this Lease in broom clean condition." And Section 70 requires "[a]ny notice, request, or demand permitted or required to be given under the terms of this Lease, or by any law or government regulation shall be in writing . . . via certified or registered mail." Based on these provisions, Plaintiff questions whether Defendants surrendered the Premises. *See* Pl.'s Pre-Trial Mem. of Law at 19 ("There are no communications from the [C]orporate [D]efendant to [P]laintiff after February 23, 2010. How could the tenant have surrendered?"). But Plaintiff's argument is unpersuasive. Plaintiff did not adduce any

evidence to show: (i) that Tenant violated terms of surrender under the Lease, (ii) that Tenant was required to provide notice of surrender, or ultimately (iii) that Tenant could have lost possession of the Premises without also "surrender[ing]" it.

49. Indeed, if anything, the Lease suggests that possession and surrender go hand in hand. For example, Section 63 goes on to refer to "surrendering possession of the demised premises." By contrast, in cases relying on a narrower view of "surrender," that view is based on clear contractual terms. *See Cleo Realty Assocs., L.P. v. Papagiannakis*, 151 A.D.3d 418, 419 (1st Dep't 2017) ("[P]aragraph 6 of the guaranty says, 'Upon surrender of possession as aforesaid [*i.e.*, pursuant to the procedures set forth in paragraph 6], this Guaranty shall be deemed revoked.' The tenant did not give plaintiff 30 days' written notice that it was going to surrender possession [as set forth in that paragraph].").

50. Plaintiff wrested legal possession of the Premises from Defendants by winning the judgment of possession and then obtaining a Marshal's notice which announced, "The Landlord has legal possession of these Premises." (Defs.' Ex. 3) (NYSCEF Doc. No. 72).

51. Therefore, Cheng is not personally liable under the Guaranty for the liquidated damages set out in Article 18 of the Lease.

52. As with the First Cause of Action, Plaintiff also seeks statutory interest on the amount owed under the Guaranty. Such "interest is recoverable from the date of the [lessee's] breach." *Bryant Park Bldg. v. Richmond*, 85 N.Y.S.2d 531, 532 (Sup. Ct. N.Y. Cty. 1948). And, as with the First Cause of Action, the breach and resulting damages occurred over a period of time – between January 1, 2010 and May 1, 2010 (*i.e.*, the last month Tenant was in legal possession of the Premises). (*See* Pl.'s Ex. M). Interest therefore shall run from the intermediate date of April 1, 2010. *See* CPLR 5001(b).

53. However, Plaintiff may not obtain a double recovery against both Tenant and Guarantor "for the same amount, for the same time period," because that would "result in an unjust windfall." *Traders Co. v Ast Sportswear, Inc.*, No. 107300/04, 2006 WL 5111060 (Sup. Ct. N.Y. Cty. Jan. 11, 2006); *see Cty. Glen, L.L.C. v. Himmelfarb*, 4 Misc. 3d 1015(A), at *7 (Sup. Ct. N.Y. Cty. 2004) (noting, in action for breach of guaranty involving commercial lease, that the plaintiff cannot "su[e] to recover rent that [the lessee] paid" since "[s]uch an action would lead to an improper double recovery" by landlord). Accordingly, to the extent Plaintiff's judgment is satisfied as against Tenant (*i.e.*, the Corporate Defendant), Plaintiff's judgment against Guarantor (*i.e.*, the Individual Defendant) may be subject to reduction by a corresponding amount.

54. The Guaranty provides that Plaintiff may also seek to recoup "reasonable attorney's fees that the Landlord may incur in enforcing this Guaranty." Determination of that amount, however, must await a hearing before a JHO.

C. Defendants' Counterclaims Fail[2]

First Counterclaim

55. First, Defendants allege that Plaintiff's breaking and changing the locks on the Premises, in order to allow the utility company to access the space and repair an electrical problem, "was wrongful and constituted an 'illegal lockout' pursuant to RPAPL §853." (Am. Answer and Counterclaims ¶37). Defendants have not proven that Plaintiff's actions violated RPAPL §853.

---

[2] The Amended Answer also lists numerous affirmative defenses. Some of these – *e.g.*, laches, statute of frauds, the attorney-witness rule (Am. Answer ¶¶16-17, 22) – were not advanced at trial or in the post-trial briefing and will not be discussed here. Other affirmative defenses, like Defendants' allegations of fraud and illegal lockout, blend into Defendants' counterclaims.

Third Counterclaim

60. Third, Defendants allege that Plaintiff committed fraud by leasing the Premises to Defendants knowing that it was "infeasib[le]" and "impracticab[le]" to operate the space as a restaurant. (*Id.* ¶¶52-63). Defendants have failed to prove, however, that Defendants made a misrepresentation about the Premises.

61. The Lease provides that "Tenant shall use and occupy demised premises as a Japanese restaurant only and for no other purpose." (Lease ¶2). Under the Lease, it was Defendant's responsibility to, "at its [own] expense, obtain all permits, approvals and certificates required by any governmental or quasi-governmental bodies." (*Id.* ¶3). Plaintiff did not conceal the fact that the Premises lacked a Certificate of Occupancy. In fact, Plaintiff informed Corporate Defendant on December 21, 2009, that: "711 Second Avenue was built prior to the 1938 code and there is no Certificate of Occupancy for that property on file." ((Pl.'s Ex. H; *see also* Tr. at 65). But as Plaintiff credibly explained at trial, lessees of certain commercial properties without a C/O may still apply to the Department of Buildings for approval by filing a Letter of No Objection. (Tr. at 66-67). Defendants did not show that they attempted this procedure. Instead, Cheng testified that he believed the lack of a C/O doomed his plans for a restaurant: "Because this floor plan was not approved, then I was not able to get any permit to do anything." (*Id.* at 166). While Cheng's belief was understandable, it does not prove that the Premises were in fact unusable for the purposes of operating a restaurant. Therefore, the evidence does not support Defendants' counterclaim for fraud.

Accordingly, it is:

ORDERED and ADJUDGED that on the First Cause of Action for breach of contract against 711 Second Avenue Corp., the Clerk is directed to enter judgment in favor of Plaintiff in

the principal sum of $86,495.98, with interest at the legal rate of nine (9) percent per annum from August 1, 2014, until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk;

ORDERED and ADJUDGED that on the Second Cause of Action for reformation, the Guaranty is hereby reformed to refer to the September 1, 2009 lease;

ORDERED and ADJUDGED that on the Third Cause of Action for breach of contract against Ian Cheng, the Clerk is directed to enter judgment in favor of Plaintiff in the principal sum of $29,120.00, with interest at the legal rate of nine (9) percent per annum from April 1, 2010, until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk, subject to any appropriate set-off from the judgment as against Tenant to avoid double recovery for Plaintiff;

ORDERED and ADJUDGED that on the First and Second Causes of Action, Plaintiff is entitled to reasonable attorneys' fees. The calculation of attorneys' fees is referred for hearing and determination by a JHO.

It is further:

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the designated issues set forth herein; and it is further

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

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 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 this Court at www.nycourts.gov/supctmanh at the

"Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that Plaintiff's counsel shall serve a copy of this order with notice of entry on Defendants within five days and that counsel for Plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212–401–9186) or email an Information Sheet (which can be accessed at http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf) 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 Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may 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 Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the Order, Decision and Judgment of the Court.

11/20/2019
DATE

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