.To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

----------x

PRG Associates Limited Partnership,

Plaintiff,

-against-

DECISION & ORDER
Index No. 60469/2018
Motion Sequence 1 & 2

Planet Organic Holding Corp., and Mrs. Green's of Larchmont, Inc., and Harold Hochberger,

Defendants.

----------x

The following papers were received in connection with the above-captioned matter:

Notice of Motion/Affidavit/Exhibits A-H	1-10
Memorandum of Law in Support	11
Notice of Cross-Motion/Affirmation/Exhibits 1-13	12-26
Memorandum of Law in Support of Cross-Motion	27
Memorandum of Law in Opposition to Cross-Motion/Exhibits A-C	28-31
Memorandum of Law in Further Support of Motion	32
Memorandum of Law in Reply[1]	33

Upon the foregoing papers, it is ordered that the motion is granted in part and denied in part.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, PRG Associates Limited Partnership ("PRG"), commenced this action on July 9, 2018 by filing a summons and verified complaint alleging the breach of a commercial lease. PRG alleges that on or about November 17, 1994, it entered into a

[1] CPLR 2214 does not provide for a reply on a cross-motion

Lease Agreement with Larchmont Organic Inc., to lease certain premises identified in the lease. The lease was assigned and assumed by Mrs. Green's of Larchmont, Inc. ("Mrs. Green's"), the predecessor in interest to Planet Organic Holding Corp ("Planet Organic"). The Lease Agreement was extended on or about March 19, 2004 for a period of ten years commencing February 15, 2005 and ending February 14, 2015, by a Lease Extension Agreement between PRG and Mrs. Green's and included a personal guaranty signed by the defendant, Harold Hochberger ("Hochberger").

The lease expired, Mrs. Green's failed to vacate the premises and continued to occupy the premises without a lease, paying monthly rent. PRG commenced an action against Hochberger based on the guaranty and a separate breach of lease action against Mrs. Green's, which the parties settled by Stipulation of Settlement, whereby the parties in that action agreed to a judgment in the amount of $413,800.87, but provided that PRG would not execute the judgment as long as the defendants comply with the terms of the Lease and a Second Lease Extension Agreement which PRG entered into on May 18, 2016, with Planet Organic Holding Corp. ("Planet Organic"), successor to Mrs. Green's, assignee of Larchmont Organic Inc and was effective June 1, 2016 for seven years seven months, to end on December 30, 2023. Hochberger was not a party to the Second Lease Extension Agreement.

PRG alleges that Planet Organic or Mrs. Green's has not paid rent since June 1, 2018, is in default of the Stipulation of Settlement and has breached the Second Lease Extension. PRG also seeks payment from Hochberger as guarantor of the Lease Extension Agreement.

Hochberger now files a motion for summary judgment arguing that his guaranty does not extend to the agreements between PRG and Mrs. Green's after the expiration of the 2004 lease extension, because he was not aware of and did not consent to those agreements. Hochberger argues that the plaintiff impermissibly seeks to hold him liable for Mrs. Green's breach of the 2016 Second Lease Extension Agreement and consented to Mrs. Green's remaining in the leased premises, accepting the rent paid for six months, thereby creating a month-to-month tenancy.

PRG files a cross-motion also seeking summary judgment against all defendants and in opposition to Hochberger's motion, arguing that Mrs. Green's is liable to PRG for the terms of the lease extensions and that Hochberger is liable to the plaintiff as Mrs. Green's guarantor. PRG argues that according to the terms of the Lease Extension Agreement, Hochberger agreed to guaranty Mrs. Green's performance of the lease "until the date that there shall have been delivered to Owner a vacate instrument confirming the Premises are vacant, broom clean, free of occupants and free of Tenant and any other party claiming rights of occupancy".

The defendant, Planet Organic and Mrs Green's opposes PRG's cross-motion for summary judgment arguing that discovery has not taken place and there are material issues of fact to be determined and thus the motion is improper and premature. Those defendants also argue that without an acceleration of rent clause in the lease, PRG is not entitled to future rent and other future costs owed.

In support of the motion, Hochberger submits and relies upon, among other things, his affidavit, in which he avers that he was not a party to the initial agreement between Mrs.

Green's and PRG after the expiration of the 2004 Lease Extension and he did not guaranty the Second Lease Extension Agreement between Mrs. Green's and PRG. Hochberger also submitted the Lease Agreement and Assignment, the 2004 Lease Extension, the 2016 Second Lease Extension, the Stipulation of Settlement, and an Order by this Court (Bellantoni, J.) with regard to a prior action filed by PRG against Hochberger.

In support of the cross-motion, PRG relies upon, among other things, the affidavit of Melissa Davis ("Davis"), an employee of Joseph P. Day Realty Corp., the Managing Agent of PRG, who avers that she is familiar with the facts and circumstances of the case and asserts that Mrs. Green's defaulted under the terms of the Lease Extension Agreement, when on February 15, 2015, it held over after the expiration of the Lease Extension Agreement and failed to pay the rent due for the holdover period was set forth in the lease. Davis contends that Mrs. Green's admitted owing $413,800.87, pursuant to a stipulation entered into with PRG and the rent due. Davis states that Mrs. Green's has vacated the premises and has breached the Second Lease Extension Agreement, by not paying rent since June 1, 2018. As a result, Davis asserts that Mrs. Green's is in default of the Stipulation and has breached the Lease, the Lease Extension Agreement, and the Second Lease Extension Agreement. Davis further states that Mrs. Green's agreed that a breach of the Stipulation and Second Lease Extension would result in a judgment in the amount of $413,800.87

Discussion

A party moving for summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law (*see Winegrad v*

New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). To demonstrate its entitlement to relief, the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact, (*see McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007]). Once the moving party has established its prima facie entitlement to summary judgment, the burden shifts to the opposing party to submit evidentiary proof in admissible form to establish material issues of fact (*see Alvarez*, 68 NY2d at 324; *Winegrad,* 64 NY2d at 853).

"A guaranty is to be interpreted in the strictest manner" (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]) and cannot be altered without the guarantor's consent (*Id.*). Here, the 2016 second extension of time is a modification of the lease to which Hochberger did not give his consent. However, Hochberger also agreed to be obligated until a vacate instrument was delivered to the owner confirming the premises are vacant, broom clean, free of occupants and free of tenant and any other party claiming rights of occupancy. Such an instrument was never delivered to PRG, pursuant to the terms of the guaranty and PRG essentially argues that the terms of the guaranty are broad enough to encompass the Second Extension Lease Agreement and therefore, continues to obligate Hochberger.

Upon consideration, the Court finds that there is an issue of fact as to whether Hochberger is still liable to PRG under the terms of the 2004 lease with regard to deferred judgment and any amount owed due to Mrs. Green's holdover in 2015. However, the Court finds that there is no further obligation on the part of Hochberger with regard to the Second Extension Lease Agreement, as the terms of the lease were altered and not consented to

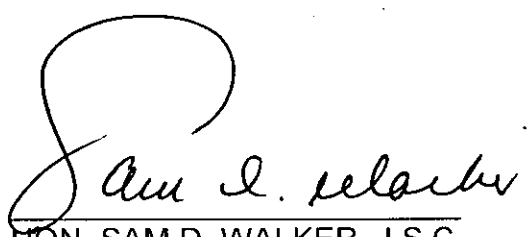
by Hochberger. A guarantor is not to be bound beyond the express terms of his guarantee (*Lo-Ho LLC v Batista*, 62 AD3d 558 [2d Dept 2009]).

With regard to PRG's cross-motion, the Court finds that PRG has made out a prima facie case against Mrs. Green's and Planet Organic. In opposition, those defendants have raised issues of fact with regard to the amount of damages, however, there are no issues of fact with regard to Mrs. Green's and Planet Organic's liability. Therefore, the Court grants summary judgment to PRG against Mrs. Green's and Planet Organic's on the issue of liability.

Accordingly, based on the foregoing, the Court grants Hochberger's motion in part and denies it in part and grant's PRG's motion in part and denies it in part.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
March 20, 2019



HON. SAM D. WALKER, J.S.C.