SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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BLDG ABI ENTERPRISES LLC,

Plaintiff,

- v -

711 SECOND AVENUE CORP., IAN CHENG

Defendants.

INDEX NO. 110703/2011

MOTION DATE 12/11/2019

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 131, 132, 133, 134, 135, 136, 137, 138, 140, 141, 142, 145, 146, 147

were read on this motion for NEW TRIAL.

In this case, Plaintiff BLDG ABI Enterprises, LLC (Plaintiff), a commercial landlord, seeks to recover unpaid rent and other money damages under a lease with its former tenant, Corporate Defendant 711 Second Avenue Corp., and a guaranty agreement with Individual Defendant Ian Cheng (together, the Defendants). After a one-day bench trial held on March 8, 2019, the Court issued a Post-Trial Decision ruling in Plaintiff's favor on its three causes of action, and dismissing Defendants' various counterclaims (*see* NYSCEF 126). Defendants now move for a new trial, alleging mainly that Plaintiff's failure to produce one of its proposed fact witness at trial prejudiced Defendants' own defenses and counterclaims. For the reasons set forth below, Defendants' motion is denied.

DISCUSSION

Following a bench trial, "upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon," and "[i]t may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision

and direct entry of judgment, or it may order a new trial of a cause of action or separable issue" (CPLR § 4404). "A new trial in the interest of justice is warranted only if there is evidence that substantial justice has not been done" (*Schafrann v. N.V. Famka, Inc.*, 14 AD3d 363, 364 [1st Dept 2005] [denying motion for new trial]).

Principally, Defendants argue that the absence of one of Plaintiff's proposed fact witnesses at trial – Robert Rapuano, a retired BLDG executive – "was highly prejudicial to Defendants" (Defs. Mot. at 9; *see also id.* at 7 ["What was needed was witness Robert Rapuano, whose absence proved highly prejudicial to defendants[.]"]). Rapuano was originally included on Plaintiff's witness list – one of two witnesses Plaintiff proposed to produce at trial. But shortly before trial, Plaintiff's counsel advised that Rapuano "would not be available" to testify because he could not leave Florida, where he was residing at the time, for another two weeks on account of personal matters (Defs. Ex. C at 1). As a result, Plaintiff's counsel "request[ed] a continuance only for this witness, whose testimony will be limited to the scrivener's error in the body of the guaranty" (*id.*).

The Court denied Plaintiff's pre-trial request for a continuance, but noted that it would "determine after hearing the testimony at trial whether to keep the record open for one additional witness" (NYSCEF 64). At trial, the Court confirmed that "the scrivener's error issue is what [Rapuano] is going to testify to" (Trial Tr. at 179). Defendants' counsel acknowledged that "the scrivener's error has been decided," in a prior decision in this case. Plantiff's counsel then handed up a copy of a case "stand[ing] for the proposition that . . . the court under the powers that it has to interpret can correct [the alleged error in the guaranty] without [Plaintiff] bringing in a witness to testify as to reformation" (*id.* at 180-181). At that point, the Court declined to hold the trial record open for Rapuano's testimony concerning the scrivener's error (*id.* at 182).

Now, Defendants seize on Rapuano's absence to argue that he would have provided important testimony concerning, among other things: (1) the alleged date of the Guaranty; (2) what he told Defendants about the Building's Certificate of Occupancy; (3) a letter he provided to Cheng that allegedly misidentified the property at issue; and (4) the "lockout" in February 2010. These arguments are unavailing.

To begin with, it was Plaintiff, not Defendants, who sought Rapuano's testimony and sought a continuance of the trial to accommodate that testimony. Although Defendants now claim that Rapuano was "the primary material witness for both sides during the events of 2010" (*id.*), there is no indication that Defendants ever tried to depose this "primary material witness" in support of their defenses and counterclaims during discovery, or to secure his testimony for trial. Rather, Rapuano was Plaintiff's witness, "whose testimony [would] be limited to the scrivener's error in the body of the guaranty" (*see* NYSCEF 136).

As a result, Defendants would have been limited to cross-examining Rapuano, and "[c]ross-examination of a witness should ordinarily be limited to the subject matter of the direct examination and matters affecting credibility" (Guide to New York Evidence, Art. 6.10; *see People v Hadden*, 95 AD2d 725, 725-26 [1st Dept 1983]). Therefore, much of the testimony that Defendants say they would have elicited from Rapuano at trial – about "the defective C/O situation" and the "lockout," for example – would have fallen outside the ordinary scope of cross-examination.

Moreover, Defendants have not shown that Rapuano's absence prejudiced their defenses or counterclaims at trial. For example, the Court's ruling on the scrivener's error in the guaranty was based on undisputed factual findings established years earlier. In a Decision and Order dated December 20, 2012, the Court (Donna M. Mills, J.S.C.) found "the parties do not dispute

that the guaranty, signed by Cheng, mistakenly referenced the wrong date of the subject lease" (NYSCEF 15). The First Department affirmed that decision. At trial, Defendants' counsel conceded that "the scrivener's error ha[d] been decided" (Trial Tr. at 180). But now, Defendants urge that Rapuano's testimony would have "exploded" this "key allegation" as "fraud and hearsay" because "there was evidence in the record that not Rapuano, but Mr. Wolf [Plaintiff's former counsel]," wrote the affidavit relied on by Justice Mills in her opinion. The "evidence" in support of this claim is that a different person – Alan Starkman, Plaintiff's sole trial witness – admitted not writing a different affidavit, which makes it "likely" that Rapuano did not write *his* own affidavit. This convoluted argument does not warrant re-trying Justice Mills' holding that the date in the guaranty was incorrect, the basis for the Court's decision to grant reformation of the guaranty.

Defendants' fusillade of other arguments also fails. Rapuano's absence did not prejudice Defendants' arguments about "the defective C/O situation" in the Building, since Cheng did not previously allege that Rapuano had made misrepresentations to him about the C/O. And to the extent Defendants take issue with Starkman's testimony on that score, they had the opportunity to cross-examine him at trial. Similarly, Rapuano's absence did not prejudice Defendants' arguments about the lockout in February 2010, an argument which failed because of Defendants' own testimony that they were not in physical possession of the premises when the purported lockout occurred.

The Court has considered Defendants' remaining arguments and finds them to be without merit.[1]

[1] Defendants raise in their motion that the electronic version of the Post-Trial Decision on NYSCEF is missing four pages. To correct that clerical error, the Court reissued the Post-Trial Decision, in its entirety, on April 24, 2020 (NYSCEF 151).

Accordingly, it is

ORDERED that Defendants' motion for a new trial is Denied.

This constitutes the Decision and Order of the Court.

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4/27/2020
DATE

JOEL M. COHEN, J.S.C.

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