Harlington Realty Co. LLC v Lawrence Plumbing Supply Inc.
2020 NY Slip Op 32671(U)
August 16, 2020
Supreme Court, New York County
Docket Number: 156301/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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HARLINGTON REALTY CO. LLC,

Plaintiff,

- v -

LAWRENCE PLUMBING SUPPLY INC. and EDWARD HONIG,

Defendants.

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INDEX NO. 156301/2016

MOTION SEQ. NO. 002, 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 70, 85, 86, 90, 124

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

In this action by plaintiff/landlord Harlington Realty Co. LLC seeking, among other things, to recover allegedly past due rent on a commercial lease, defendants Lawrence Plumbing Supply Inc. ("LPS"), the tenant, and Edward Honig ("Honig"), the lease guarantor (collectively "defendants"), move (motion sequence 002): 1) in effect, pursuant to CPLR 3124 to compel plaintiff to produce additional discovery; 2) for sanctions; 3) to recover the costs of the motion; and 4) for such other and further relief as this Court deems just and proper. Plaintiff opposes the motion and cross-moves (motion sequence 002): 1) pursuant to CPLR 3212, for summary judgment against defendants on its first and third causes of action for breach of contract in the amount of $257,222.58, plus interest; 2) to sever its second and fourth causes of action for

attorneys' fees, and scheduling a hearing to determine the amount of such fees; and 3) for such other relief as this Court deems just and proper. Defendants also move (motion sequence 003), in effect, pursuant to 22 NYCRR 202.21(e), to vacate the note of issue, as well as for reimbursement of the costs of the motion, and plaintiff opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

In August 2007, plaintiff leased to LPS commercial premises located at 450 Sheridan Boulevard, Store No. 1, in the Inwood section of Manhattan ("the premises") for use as a hardware store. Doc. 31 at par. 4; Doc. 76. The lease term began on September 1, 2007, the day LPS took possession of the premises, and was to end on August 31, 2017. Doc. 31 at pars. 4, 6; Doc. 76. The monthly base rent for the lease year September 2015 - August 2016 was $11,974.98 and was $12,453.98 for the lease year September 2016 - August 2017. Doc. 76, Rider at 11.

By executing the lease, LPS acknowledged that it had inspected the premises, accepted them "as is", and agreed to "make all of the required repairs" to the premises, "including maintaining the roof." Doc. 76 at par. 15; Rider at par. 40. The lease also required LPS to reimburse plaintiff for any costs and attorneys' fees incurred by plaintiff as a result of LPS' breach of the lease, along with interest on such an amount (Doc. 76 at par. 66), and prohibited LPS from surrendering the premises unless plaintiff accepted the surrender in writing. Doc. 76 at par. 24.

Paragraph 17 of the lease provided that, in the event of a default and failure to cure by LPS, plaintiff was permitted to serve a five day notice of cancellation and, upon the expiration of five days, the lease was to end and LPS was to vacate the premises, although it "shall remain liable as hereinafter provided." Doc. 76 at par. 17. Paragraph 18 of the lease provided that, if LPS

defaulted, the lease expired, and/or LPS was dispossessed, then a) rent would be due through the date of the expiration or dispossession, b) plaintiff could re-let the premises, and/or c) LPS shall pay plaintiff any deficiency between the rent due under the lease and any amounts collected under a subsequent lease through the remainder of the lease term. Doc. 76 at par. 18. That paragraph also provided that "[t]he failure of [plaintiff] to re-let the demised premises or any part thereof shall not release or affect [LPS'] liability for damages." Doc. 76 at par. 18. Paragraph 19 provided that plaintiff was permitted to seek attorneys' fees from LPS in the event the latter defaulted under the lease. Doc. 76 at par. 19.

The lease further provided that LPS "shall not be entitled to any set off or reduction of rent by reason of any failure of owner to comply with this or any other article of this lease" and that LPS' "sole remedy at law in such instance will be by way of an action for damages for breach of contract." Doc. 76 at par. 4.

Additionally, the lease provided that "[i]n the event [LPS] shall fully and faithfully comply with all of the terms, provisions, covenants and conditions of this lease, the security [deposit of $35,000] shall be returned to [LPS] after the date fixed as the end of the lease and after delivery of entire possession of the demised premises to [plaintiff]." Doc. 76 at par. 31.

The lease rendered LPS liable for all non-structural repairs and defined structural repairs "only as the building foundation, separating walls enclosing the leased premises (excluding the store front), vertical supporting beams, [and] horizontal supporting beams of the floor and roof." Doc. 76, Rider, at par. 46. It also provided that defendant had "no right of offset or defense to its liability for the payment of rent" under the lease. Doc. 76, Rider, at par. 52.

On or about September 9, 2015, Lawrence Supply Inc., an entity with the same business address as LPS, entered into a lease with UE Burnside Plaza LLC ("Burnside") for space at 603

Burnside Avenue in Inwood. Doc. 79. Plaintiff alleged that, on or about December 1, 2015, LPS allegedly defaulted under the lease by failing to pay rent and additional rent and, on or about April 5, 2016, it abandoned possession of the premises. Doc. 31 at pars. 7-8.

At or about the time the parties entered into the lease, Honig, an owner of LPS, signed a Limited Lease Guaranty ("the guaranty"). Doc. 31 at par. 5; Doc. 78. The guaranty contained a "good guy" clause which excused Honig from personal liability after surrender of the premises by plaintiff in the event certain conditions were met. Specifically, the guaranty provided, in relevant part, that it:

> shall terminate with respect to any and all obligations after the date [LPS] surrenders and delivers possession to [plaintiff] in the condition required under the terms and conditions of the Lease and the Annual Base Rent and Additional Rent is paid in full to the surrender date and [LPS] pays [plaintiff] the additional sum of $66,150 (the "Termination Sum"), said sum representing the brokerage commission and rent concession allotted to [LPS] under the terms of the Lease. Notwithstanding the foregoing, provided [LPS] is not in default under the terms and conditions of the Lease, [LPS'] obligation to pay the Termination Sum shall expire on the date which is 5 years after the date that [LPS] shall pay the fourth month's rent as required under the terms of the Lease.
>
> In the event [LPS] has not given [plaintiff] at least 120 days' prior written notice, via certified mail-return receipt requested, specifying the date on which [LPS] will surrender the space, Guarantor's liability under this Guaranty shall continue in full force and effect, regardless of [LPS'] surrender of the Premises, for the remainder of the Lease Term. After [plaintiff] receives [LPS'] notice, [plaintiff] shall have the right to install on the exterior of the Premises, the customary "For Rent" sign, and during such time, [LPS] shall permit [plaintiff] to show the Premises and all parts thereto to prospective tenants during normal business hours. In the event [LPS] does not surrender the premises on the date specified in [LPS'] notice, Guarantor's liability under this guaranty shall remain in full force and effect regardless of [LPS'] surrender of the premises, for the remainder of the Lease term.

Doc. 78.

The guaranty also rendered Honig liable for any damages and expenses incurred as a result of LPS' nonpayment, including attorneys' fees and disbursements. Doc. 78.

On November 30, 2015, LPS' attorney wrote to plaintiff by certified mail, return receipt requested, as required by the guaranty, to advise that it would be surrendering possession of the premises on April 5, 2016, over 120 days later. Doc. 80. LPS's attorney also requested that plaintiff apply the security deposit toward the payment of rent for the months remaining until the surrender date, and that it provide LPS with the balance for rent due through the surrender date after crediting it with the amount of the security deposit. Doc. 80. By correspondence to defendants' attorney dated December 4, 2015, Leora Magier ("Ms. Magier"), a manager and member of plaintiff, stated that plaintiff rejected the notice of surrender "since it [did] not comply with the guaranty and terms and conditions of the [l]ease." Doc. 80. In a January 14, 2016 response, counsel for defendants insisted that the surrender notice complied with the lease and that LPS was not indebted to plaintiff. Doc. 80. Defendants did not pay rent from December 1, 2015 through March 30, 2016. Doc. 72 at par. 26. In January 2016, plaintiff sent LPS a "Five (5) Day Notice to Tenant" demanding payment of the arrears or the surrender of the premises but LPS neither paid any more rent nor surrendered the premises at that time. Doc.72 at par. 28. LPS finally surrendered possession on April 5, 2016. Doc. 72 at par. 26. The lease expired according to its terms on August 31, 2017 with an unpaid rent balance of $257,228.58. Doc. 72 at par. 28.

Plaintiff commenced the captioned action by filing a summons and complaint on July 28, 2016. Doc. 1. In the complaint, plaintiff alleged, inter alia, that defendants owed it $114,918.96. Doc. 1 at par. 10. Although defendant immediately moved to dismiss the complaint, the motion was denied by order entered December 1, 2017 and defendants filed their answer on December 18, 2017. Docs. 1, 28. A preliminary conference was then held, at which the parties were directed, inter alia, to serve discovery demands by March 15, 2018 and to respond to the demands by April 25, 2018. Doc. 29.

In May 2018, the parties stipulated to allow plaintiff to amend the complaint to allege that the amount defendants owed for rent and additional rent had increased to $298,223.48, and the amended complaint was filed on May 4, 2018. Docs. 32-33. As a first cause of action, plaintiff alleged that LPS owed the aforesaid sum due to their breach of the lease. Doc. 31 at par. 11. As a second cause of action, plaintiff alleged that LPS owed it any attorneys' fees, costs, disbursements, plus interest, that it incurred as a result of the breach. Doc. 31 at par. 11. As a third cause of action, plaintiff alleged that Honig owed it the aforesaid sum due to his failure to honor the terms of the guaranty. Doc. 31 at pars. 14-15. As a fourth cause of action, plaintiff alleged that Honig was liable for any attorneys' fees, costs, disbursements, plus interest, it incurred as a result of his failure to honor the guaranty. Doc. 31 at pars. 16-17.

In their answer to the amended complaint filed May 24, 2018, defendants denied all substantive allegations of wrongdoing and asserted several affirmative defenses, including an offset for any amounts previously paid by defendants, including the security deposit; breach of the duty of good faith and fair dealing; failure to timely and/or properly notify defendants of the amounts owed; waiver; barring of plaintiff's claims by the "good guy" clause and early termination options in the lease and guaranty; and failure to provide necessary repairs. Doc. 33.

On or about October 24, 2018, defendants served plaintiff with their first request for production of documents ("FRPD"). Doc. 44. Plaintiff failed to respond to the FRPD in a timely manner and were directed to do so by order dated November 20, 2018. Doc. 45. Although defendants responded to the FRPD on December 5, 2018, plaintiff maintained that the responses were deficient. Docs. 46-47.

At a discovery conference on January 28, 2019, plaintiff's counsel represented to this Court that plaintiff had performed a search for additional documents responsive to defendants' FRPD

but that no additional documents had been found. Doc. 41 at par. 13. An order issued by this Court that day directed, inter alia, that defendants provide, by February 17, 2019, records regarding leaks at the foundation or roof, documents substantiating any charges made by plaintiff to LPS from 12/1/15-8/1/17, and any correspondence pertaining to the condition of the premises for the two year period before LPS vacated the premises. Doc. 48. The order further directed that depositions be conducted on March 6 and 7, 2019. Doc. 48.

Plaintiff thereafter provided additional documents to defendants, but the latter still found plaintiff's response deficient. Doc. 41 at pars. 17-19. Nevertheless, the deposition of Ashley Washington, a property manager for plaintiff, proceeded as scheduled on March 6, 2019, although she was unable to provide much relevant information about the premises or the documents sought by defendants. Docs. 48, 51.

Abe Gellis, an owner of LPS, was produced for deposition on March 7, 2019. Doc. 59. At his deposition, Gellis admitted that LPS did not pay any rent due after November 2015. Doc. 59 at 54-55. Gellis also admitted that he knew the amount of base rent owed and acknowledged that his bookkeepers received invoices from plaintiff regarding additional rent and charges owed. Doc. 59 at 56.

By order dated June 19, 2019, this Court directed that the depositions of Jeffrey Stern, a manager for plaintiff, and Ms. Magier be conducted by July 16, 2019. Doc. 52. The order further directed plaintiff to provide several items of discovery by July 9, 2019 or, in lieu of producing them, an affidavit of an individual with knowledge attesting to the fact that the item(s) did not exist or could not be located. Doc. 52. These items included, inter alia, emails from April 2013 through April 2016 relating to the condition and/or repair of the premises and computations regarding rent and additional rent owed; rent invoices for December 2015 through August 2017; photographs of

the premises taken in 2015 and 2016; documentation of any complaints about the condition of the premises; and correspondence regarding whether plaintiff gave defendants permission to apply the security deposit towards the rent payments; any correspondence or other documents regarding whether defendant was obligated to pay rent after the premises were vacated. Doc. 52. Within the same time frame, defendants were to provide plaintiff with a copy of their new lease with U.E. Burnside, along with any application for, or documents pertaining to, the lease. Doc. 52.

In an affidavit dated July 9, 2019, Stern "verif[ied] that [plaintiff] produced all documents in [its] possession and subject to [its] control that presently exist that are responsive to [defendants'] requests." Doc. 53. However, at his deposition on July 16, 2019, Stern testified that, in searching for documents relevant to this action, he had only looked at his own emails for correspondence with LPS, and did not search any other email addresses, or any paper or electronically stored files. Doc. 54 at 42-44. Nor did he know whether anyone else made such a search. Doc. 54 at 44-45.

Ms. Magier also appeared for deposition on July 16, 2019, testifying, inter alia, that she had not conducted a search for the documents demanded by defendants and was not sure whether someone else did. Doc. 56 at 46-47.

On July 19, 2019, plaintiff's counsel wrote to defendants' attorney to apologize for Stern's testimony, insisting that he "was as surprised as [defendants' attorney] by some of the answers" given by Stern "about searches made for documents pursuant to the court's June 19 Order." Doc. 55. Plaintiff's counsel also provided defendants' attorney with additional documents, consisting of several emails regarding LPS' rent arrears, located during a further search performed following Stern's deposition. Doc. 55.

On September 23, 2019, defendants moved, in effect, pursuant to CPLR 3124 (motion sequence 002): 1) to compel defendants to provide outstanding discovery; 2) for sanctions against plaintiff for submitting a "perjurious" affidavit to the court and for its repeated failure to provide discovery; and 3) to recover the costs and disbursements, as well as attorneys' fees, incurred by defendants in bringing the motion. Doc. 40. In support of the motion, defendants argue that there is relevant discovery outstanding and that this Court must compel plaintiff to produce the items enumerated in the January 28 and June 19, 2019 orders. Additionally, defendants assert that this Court should direct plaintiff to allow a search of its emails by a "forensic examiner" so that emails relevant to the FRPD can be located. Doc. 41 at 14. Further, defendants maintain that they are entitled to production of the deed to the premises since it is relevant to whether plaintiff has standing to bring this action (Doc. 41 at 19); they are entitled to obtain the last known address of Koren Kennedy a/k/a Koren Schroeder, who was manager of the subject premises during the relevant time period (Doc. 41 at 19-20); and that they are entitled to inspect and take photographs of the premises (Doc. 41 at 20-21).

The same day, plaintiff filed a note of issue and certificate of readiness attesting that all discovery was completed. Doc. 61.

On October 13, 2019, defendants moved, in effect, pursuant to 22 NYCRR 202.21(e), to vacate the note of issue (motion sequence 003) based on the outstanding discovery they claimed was owed. Doc. 65. Defendants also sought the costs, disbursements and legal fees incurred in filing the motion, as well as sanctions against plaintiff based on the plaintiff's misrepresentation in the certificate of readiness that all discovery had been completed. Doc. 65.

On November 22, 2019, plaintiff cross-moved (motion sequence 002): 1) pursuant to CPLR 3212, for summary judgment against defendants on its first and third causes of action for

breach of contract in the amount of $257,222.58, plus interest; 2) to sever its second and fourth causes of action for attorneys' fees, and scheduling a hearing to determine the amount of such fees; and 3) for such other relief as this Court deems just and proper. Doc. 71.

In support of its cross motion, plaintiff submits, inter alia, the pleadings, the affidavit of Mr. Magier, the lease, the guaranty, and Gellis' deposition testimony. Plaintiff argues that it is entitled to summary judgment against LPS based on the lease and the affidavit of David Magier ("Mr. Magier"), a member of plaintiff, who attests that LPS failed to pay rent from December 1, 2015 through March 30, 2016 and surrendered the premises on April 5, 2016; that the lease term ended on August 31, 2017; and that LPS failed to pay rent for the 17 months after the surrender, from April 1, 2016 through August 31, 2017. Doc. 72 at par. 44; Doc. 73. Indeed, argues plaintiff, Gellis admitted at his deposition that LPS did not pay any rent due after November 2015. Doc. 59 at 54-55; Doc. 72 at par. 45. Mr. Magier further represents that plaintiff was unable to re-let the premises. Doc. 73.

Plaintiff also opposed defendants' motion to compel and for sanctions (mot. seq. 002), as well as their motion to vacate the note of issue (mot. seq. 003), asserting that it had produced three witnesses for deposition and had produced all documents in its possession relevant to the captioned action. Doc. 72 at 17-19; Doc. 85.

In opposition to plaintiff's cross motion, defendants argue, inter alia, that the motion must be denied as premature because discovery remains outstanding. Doc. 91 at 3-4. Defendants further assert that they lawfully exercised their option to terminate the lease by notifying plaintiff at least 120 days in advance that they intended to surrender the lease. Doc. 91 at 4-8. They further assert that, because they gave plaintiff 120 days' notice that they were going to surrender the premises,

they were only obligated to pay the rent through the surrender date but were unable to do so due to plaintiff's breach of the covenant of good faith and fair dealing, specifically that plaintiff failed to provide defendants with a calculation of the amount of additional rent that they owed. Doc. 91 at 4-6. Additionally, defendants argue that plaintiff cannot prevail on its breach of contract claim because it failed to perform its own obligations under the lease, specifically that it breached the warranty of quiet enjoyment and constructively evicted LPS. Doc. 91 at 23-24.

In reply, plaintiff argues that, although the guaranty allowed Honig the opportunity to limit his liability if LPS satisfied certain conditions, such as paying the rent in full until the surrender date, the lease did not allow LPS to terminate and avoid liability for future rent. Doc. 125 at 3. Plaintiff further asserts that defendants' argument that it prevented LPS from paying its rent in full through the surrender date by failing to tell LPS how much additional rent it owed is without merit since LPS did not have the right, pursuant to the lease, to early termination. Doc. 125 at 3. Further, asserts plaintiff, LPS' contention that it was waiting for plaintiff to give it the amount owed for additional rent is disingenuous since LPS never paid the base rent. Doc. 125 at 4. Plaintiff further asserts that, even assuming it breached the lease, which it denies, defendants' sole remedy was to commence an action against plaintiff for damages. Doc. 125 at 5. Further, plaintiff maintains that defendants cannot use constructive eviction to defeat its motion since it was not pleaded as an affirmative defense. Doc. 125 at 6.

In a reply affirmation in further support of their motion to compel and to vacate the note of issue, defendants reiterate that they are entitled to the discovery they demanded from plaintiff. Docs. 123-124.

LEGAL CONCLUSIONS:

Plaintiff's Motion To Compel and Defendants' Cross Motion for Summary Judgment Motion Sequence 002

It is well established that the proponent of a summary judgment motion "must 'make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 (2015), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action." *Nomura Asset Capital Corp.,* 26 NY3d at 49 (internal quotation marks and citation omitted); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *See Vega v Restani Constr. Corp.,* 18 NY3d 499 (2012); *Negri v Stop & Shop*, 65 NY2d 625, 626 (1985); *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Plaintiff's Motion for Summary Judgment Against LPS

Plaintiff has established its prima facie entitlement to summary judgment as to liability against LPS on its first cause of action for breach of the lease. "The obligation to pay rent pursuant to a commercial lease is an independent covenant, and thus, cannot be relieved by allegations of a landlord's breach, absent an express provision to the contrary." *Universal Commc'ns Network, Inc. v 229 W. 28th Owner, LLC*, 85 AD3d 668, 669 (1st Dept. 2011) *citing Westchester County Indus. Dev. Agency v Morris Indus. Bldrs.*, 278 AD2d 232 (2nd Dept. 2000), *lv dismissed* 96 N.Y.2d 792

(2001). Since such a contrary provision does not exist in the lease, LPS is liable for the unpaid rent and additional rent, which it was required to pay until the end of the lease term. Doc. 76 at par. 18. Nor do defendants argue, because they cannot, that the lease contains any provision relieving them of the obligation to pay rent in the event of a breach by plaintiff. Indeed, contrary to defendants' contention, the lease specifically provided that LPS was not entitled to a set off for any breach by plaintiff. Doc. 76 at par. 4. Further, although defendants maintain that plaintiff breached the lease and/or constructively evicted them, they overlook that they took the premises "as is" and, with the exception of structural repairs, were responsible for maintenance of the unit. Doc. 76, Rider, at pars. 40, 46.

Since Gellis admitted at his deposition that LPS did not pay any rent after November 2015 (Doc. 59 at 54-55), LPS must pay plaintiff rent and additional rent from December 1, 2015 until the expiration of the lease on August 31, 2017. Although Mr. Magier attests to the amount of base rent due for that period, his affidavit is silent regarding additional rent. Doc. 73. Additionally, although plaintiff submits notices for additional rent sent to LPS, they are not properly authenticated by Mr. Magier or anyone else, and only pertain to some, but not all, of the period during which LPS' rent went unpaid. Thus, this Court refers this matter to a referee to determine the total amount of rent and additional rent owed by LPS between December 1, 2015 and August 31, 2017. The referee shall also determine the amount of legal fees, costs, disbursements, and interest awardable to plaintiff as a result of LPS' breach, as demanded in its second cause of action.

Although defendants strongly urge that plaintiff's motion must be denied because they gave plaintiff over 120 days' notice that they were going to surrender the premises, this argument is incorrect since the 120-day prior notice provision of the guaranty was clearly meant to protect

the guarantor, Honig, and not LPS. Doc. 78 at 14. As plaintiff correctly maintains, "[g]uaranties and leases are separate documents; the former impose obligations on the guarantors and the latter impose obligations on the landlord and the tenant…" *I Bldg, Inc. v Hong Mei Cheung*, 137 AD3d 478 (2016) (citations omitted).

Additionally, although defendants claim that plaintiff's motion for summary judgment must be denied on the ground that plaintiff breached the covenant of good faith and fair dealing by failing to advise LPS exactly how much it owed, this Court finds that LPS did not act with clean hands. Initially, in his November 30, 2015 letter to plaintiff, counsel for defendants represented that LPS was surrendering the premises in accordance with pages 13 and 14 of the lease. Doc. 80. This was clearly incorrect, since the lease did not contain any pages so numbered; rather, counsel was actually referring to the guaranty. Additionally, in his motion papers, defendants' attorney represents that the lease rider provided LPS with an early termination option. Doc. 91 at 6. Not only is this contention false, but the document relied on by counsel is the guaranty and not the rider or any other portion of the lease. Moreover, counsel's request that plaintiff apply LPS' security deposit to the rent arrears directly contradicted the terms of the lease which, as noted previously, provided that the security deposit would be refunded at the expiration of the lease term if LPS was in compliance with all of the lease provisions. Doc. 76 at par. 31. Thus, this Court rejects defendants' argument that plaintiff's motion must be denied on the ground that it acted in bad faith.

Additionally, this Court rejects defendants' argument, based on CPLR 3212(f), that plaintiff's motion is premature because discovery is outstanding. That section provides that, where "facts essential to justify opposition may exist but cannot then be stated, the court may deny

the motion or may order a continuance" to allow for additional discovery." CLPR 3212(f). In its discretion, this Court declines to deny the motion or to order that further discovery be conducted since it is not persuaded that defendants have specified in their opposition (Doc. 91 at 3-4) any outstanding discovery which would enable them to oppose plaintiff's motion. *See Abe v NY Univ.*, 169 AD3d 445, 448 (1st Dept 2019). Indeed, as plaintiff notes, defendants conducted the depositions of three witnesses on behalf of plaintiff. Docs. 113-115.

Plaintiff's Motion for Summary Judgment Against Honig

Plaintiff is also entitled to summary judgment against Honig on its third cause of action pursuant to the guaranty. However, contrary to plaintiff's contention, Honig is not liable on the guaranty for the entire amount of unpaid rent and additional rent. Rather, he is only liable for the unpaid rent from December 1, 2015 until April 30, 2016 since defendants surrendered the premises on April 5, 2016.

In reaching this conclusion, this Court focuses on two provisions of the guaranty. The first provides that the "guaranty shall terminate with respect to any and all obligations after the date [LPS] surrenders" provided, inter alia, that the base rent and additional rent were paid in full to the surrender date. Doc. 78 at 13. This condition was not met since LPS clearly did not pay its rent between December 1, 2015 and the surrender date of April 5, 2016. LPS's instruction to plaintiff to apply its security to the amount owed is not tantamount to the payment of the moneys owed, since the lease specifically provides that the security was to be returned to LPS at the end of the lease term provided LPS was in compliance with all of the provisions of the agreement. Doc. 76 at par. 31. However, a separate paragraph of the guaranty provided that Honig's liability as

guarantor would terminate if LPS provided plaintiff with 120 days' notice of its intention to surrender the premises, which it did. Doc. 78 at 14; Doc. 80. Therefore, to hold Honig liable on the guaranty for all rent and additional rent from the date of the surrender, April 5, 2016, until the date the lease expired, August 31, 2017, would defeat "the reasonable expectations of the parties, which [was] to make sure there [were] no arrears before the guarantor [was] released." *150 Broadway N.Y. Assoc., L.P. v Shandell*, 27 Misc3d 1234(A) (Sup Ct New York County 2010) (citation omitted), *affd* 90 AD3d 498 (1st Dept 2011). Although in *150 Broadway N.Y. Assoc., L.P.*, the rent was paid, and thus the conditions of the guaranty satisfied, LPS could not pay the total amount of the rent and additional rent due herein since plaintiff failed to provide it with a calculation of the additional rent owed. Although this does not excuse LPS' failure to pay the base rent, it prevented LPS from satisfying the conditions necessary to terminate the guaranty. "The guaranty's requirement that [LPS' rent and additional rent must be paid in full] at the time [the guaranty terminates] is not to be interpreted in a hypertechnical manner that is contrary to the purpose of the guaranty and would have the effect of broadening [Honig's] obligations [pursuant to the guaranty]." *150 Broadway N.Y. Assoc., L.P. v Shandell*, 90 AD3d at 498 (citation omitted).

This Court refers to a referee the issue of damages owed by Honig for the period of December 1, 2015-April 30, 2016, including rent and additional rent, as well as attorneys' fees, costs, disbursements, and interest on a pro rata basis.

In opposing plaintiff's motion, defendants rely on the case of *Blue Water Realty, LLC v The Salon Mgt. of Great Neck, Corp*., 2016 NY Slip Op 30483(U), *4 (Sup Ct, NY County 2016). Doc. 116. In that case, this Court (Mendez, J.) held that issues of fact existed regarding whether flooding which affected the roof and foundation of the demised premises entitled defendants to a

rent reduction where the lease contained a provision allowing such a reduction in the event of a fire or other casualty. Although the lease between plaintiff and LPS contains a casualty clause, it requires LPS to provide plaintiff with "immediate" notice of the occurrence of such a casualty, as did the lease in *Blue Water*. Doc. 76 at par. 9(a). *Blue Water* is silent, however, regarding whether defendants gave the landlord in that case immediate notice. Here, when asked when he gave such notice to plaintiff, Gellis was unable to answer. Doc. 95 at 34-36. Therefore, the clause cannot be invoked. Additionally, paragraph 9(a) provided that, in the event of such a casualty, the lease "shall continue in full force and effect", subject to an exception inapplicable herein. Doc. 76 at par. 9(a). LPS clearly ignored this provision, however, conceding that it instead looked for another space to rent. Doc. 95 at 43-44. It then surrendered the premises on April 5, 2016 despite the fact that it violated the lease by doing so without obtaining plaintiff's written consent. Doc. 76 at par. 24. Therefore, it is evident that *Blue Water* is not controlling herein.

Plaintiff's Motion To Compel

Given the conclusions above, plaintiff's motion to compel further discovery is denied. *Abe v NY Univ.*, 169 AD3d 445, 448 (1st Dept 2019).

Defendants' Motion to Vacate the Note of Issue

Motion Sequence 003

Given the conclusions set forth above, this Court denies defendants' motion to vacate the note of issue.

The parties' remaining contentions are either without merit or need not be addressed in light of the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the cross motion by plaintiff Harlington Realty Co. LLC for summary judgment on its first cause of action against defendant Lawrence Plumbing Supply Inc. pursuant to CPLR 3212 (motion sequence 002) is granted on the issue of liability only; and it is further

ORDERED that the branch of the cross motion by plaintiff Harlington Realty Co. LLC for summary judgment on its third cause of action against defendant Edward Honig pursuant to CPLR 3212 (motion sequence 002) is granted on the issue of liability only; and it is further

ORDERED that the motion by defendants to compel plaintiff to produce discovery (motion sequence 002) is denied in its entirety; and it is further

ORDERED that the motion by defendants to vacate the note of issue (motion sequence 003) is denied in its entirety; and it is further

ORDERED that this matter is referred to a JHO/Special Referee for the purpose of conducting a hearing on the issue of damages, attorneys' fees, costs, disbursements and interest owed to plaintiff by each defendant, with damages against defendant Edward Honig to be calculated on a pro rata basis in accordance with the holding of this decision; 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 JHO/Special Referee to hear and report 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 (available at http://www.nycourts.gov/courts/ljd/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 the parties or their attorneys of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

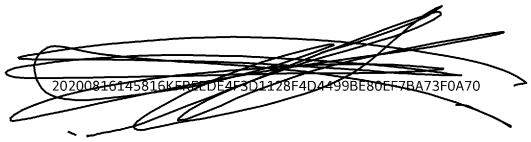
ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses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

ORDERED that the JHO/Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the JHO/Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

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

ORDERED that this constitutes the decision and order of the court.



8/16/2020
DATE

KATHRYN E. FREED, J.S.C.

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