SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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805 THIRD NEW YORK, LLC,

Plaintiff,

- v -

ABBY FLAMHOLZ and MATT STACK

Defendants.

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INDEX NO. 154618/2021

MOTION DATE 11/15/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22

were read on this motion to/for DISMISS.

In this action to recover damages for breach of contract and under a guaranty of a commercial lease, the defendant Abby Flamholz moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against her. The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed insofar as asserted against Flamholz.

Flamholz is a member of Worth Venture Partners, LLC (Worth). The plaintiff, 805 Third New York, LLC, is a limited liability company, with its corporate headquarters located at 750 Lexington Avenue in Manhattan, that owns 805 Third Avenue in Manhattan. On June 1, 2016, the plaintiff leased out a portion of the 15th floor of that building to Worth, jointly and severally with XLP Corp., as tenants. The term of the lease was six years and three months, commencing July 15, 2016, in accordance with a Rent Commencement Date Agreement dated Juuly 21, 2016. The plaintiff, among other things, seeks to recover the sum of $129,766.33 from Flamholz under a guaranty that she executed on behalf of Worth, representing accrued unpaid rent, additional rent, and contractual charges beginning as of August 1, 2020.

Section 42.01 of the lease provided that

> "At any time after Year 3 of the Term, and provided that Tenant is not then in default in the performance of any of its monetary or material nonmonetary obligations under this Lease, upon written notice delivered to Landlord, Worth Venture Partners, LLC may terminate its obligations under this Lease arising from the date of such notice."

Section 31.02 of the lease provided that

> "Except as provided in Section 31.03, any notice, statement, certificate, request, approval, consent or demand required or permitted to be given under this Lease *shall be in writing sent by registered or certified mail, return receipt requested (or reputable, commercial overnight courier service), addressed, as the case may be, to Landlord, at 750 Lexington Avenue, New York, New York 10022,* and to Tenant prior to the Commencement Date at 850 Third Avenue, Suite 20B, New York, New York 10022, and after the Rent Commencement Date at the Demised Premises, or to such other addresses as Landlord or Tenant respectively shall designate in the manner herein provided. *Such notice*, statement, certificate, request, approval, consent or demand *shall be deemed to have been given on the date when received* or refusal to accept delivery"

(emphasis added). On May 26, 2016, Flamholz executed a so-called "good-guy" guaranty, agreeing personally to guarantee Worth's obligations under the lease. Paragraph 24 of the guaranty provided, however, that

> "Notwithstanding anything to the contrary contained in this Guaranty, if Worth Venture Partners LLC is entitled to exercise, and exercises, pursuant to the provision of Section 42.01 of the Lease, its right to terminate its obligations under the Lease, the such exercise shall be effective to terminate the obligations of Abby Flamholz arising from and after the date of such termination."

In a letter dated March 25, 2020, addressed to "Charles S. Cohen, President, 805 Third New York, LLC," at "750 Lexington Avenue, New York, New York 10022," and dispatched by certified mail, Flamholz wrote

> "Worth hereby gives written notice of Worth's termination of its obligations under the Lease pursuant to Section 42.01 of the Lease, effective immediately. The obligations of Abby Flamholz under the Guaranty are also hereby terminated."

The green and white United States Postal Service (USPS) Certified Mail Receipt, which was date stamped on March 25, 2020 by the USPS at its post office in Englewood, New Jersey, reflects that the correspondence was "sent to . . Charles Cohen 805 Third NY, LLC," that the street number to which it was addressed was "750 Lexington Avenue," and that the city, state, and zip code to which it was addressed was "NY, NY 10022." The computer-generated receipt

reveals that the sender paid the sum of $9.84 for the certified mail fee, first-class postage, and a 6" by 10" mailer. The USPS tracking printout for the letter, designated by tracking number 70192970000182846152 on both the green and white receipt and the computer-generated receipt, indicates that the "item was delivered at the address at 1:28 p.m. on March 30, 2020 in NEW YORK, NY 10022."

Under CPLR 3211(a)(1), a dismissal is warranted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" *(Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see Ellington v EMI Music, Inc.*, 24 NY3d 239 [2014]). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and "essentially undeniable" (*Dixon v 105 W. 75th St., LLC,* 148 AD3d 623, 629 [1st Dept 2017], citing *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). In other words, to be considered "documentary," evidence not only must be unambiguous, but of undisputed authenticity (*see* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22; *Fontanetta v John Doe 1*, 73 AD3d at 86). Documents such as deeds, which reflect out-of-court transactions and are essentially unassailable, qualify as "documentary evidence" (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]; *Suchmacher v Manana Grocery*, 73 AD3d 1017, 1017 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d at 86). Conversely, affidavits do not qualify as documentary evidence (*see Serao v Bench-Serao,* 149 AD3d 645, 646 [1st Dept 2017]; *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]; *Granada Condominium III Assn. v Palomino*, 78 AD3d at 997; *Suchmacher v Manana Grocery*, 73 AD3d at 1017; *Fontanetta v John Doe 1*, 73 AD3d at 85). Nor do e-mail messages or transcripts of trial testimony constitute documentary evidence (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]). If the evidence contained in records may be controverted, the evidence cannot be considered "documentary" (*see Phillips v Taco Bell*, 152 AD3d 806, 807 [2d Dept 2017]).

Here, the notice of termination letter, which the plaintiff admits having received, constitutes documentary evidence, as do the USPS receipts and tracking printout, as they cannot be controverted.

The plaintiff opposes the motion with the affidavit of Stephen M. Cherniak, the chief operating officer for Cohen Brothers Realty Corporation, which is the plaintiff's managing agent. He asserts that the termination notice was not properly transmitted because it allegedly was not actually received at the plaintiff's corporate offices at 750 Lexington Avenue until April 6, 2020 and, thus, suggests that it must have been dispatched or initially delivered to the incorrect address. Cherniak also asserts that, inasmuch as the plaintiff did not receive the notice of termination before April 1, 2020, and Worth had yet to pay rent for April 2020, which was due on April 1, 2020 pursuant to section 3.03 of the lease, Worth was in default under the terms of the lease, thus rendering the termination notice null and void.

Cherniak's statement, however, is insufficient to refute the documentary evidence showing that Flamholz properly addressed both the letter and the green and white USPS certified mail receipt to the plaintiff at 750 Lexington Avenue, that the USPS delivered it to "the address" indicated on the mailing forms on March 30, 2020, and that the plaintiff thus actually received it on that date. Inasmuch as Flamholz established that USPS delivered the certified letter of termination to the plaintiff at 750 Lexington Avenue on March 30, 2020, the mere fact that the plaintiff stamped it "received" on April 6, 2020 is of no moment, as documentary evidence established that the plaintiff actually "received" the notice of termination at its corporate offices on March 30, 2020 within the meaning of section 31.02 of the lease. Nor has Cherniak established that Worth was in default of any material nonmonetary obligation under the lease.

A lease is a contract (*see Vermont Teddy Bear Co. v 538 Madison Realty Co*., 1 NY3d 470, 475 [2004]; *Genovese Drug Stores, Inc. v William Floyd Plaza, LLC*, 63 AD3d 1102, 1103 [2d Dept 2009]). Thus, where the terms of a lease are clear and unambiguous, it "must be

enforced according to its terms" (*Genovese Drug Stores, Inc. v William Floyd Plaza, LLC*, 63 AD3d at 1103, 1104). Similarly, "[a] guaranty is a contract, and in interpreting it we look first to the words the parties used" (*Louis Dreyfus Energy Corp. v MG Ref. & Mktg., Inc*., 2 NY3d 495, 500 [2004]; *see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]). The unambiguous language of both the lease and guaranty require the conclusion that Flamholz dispatched the notice of termination to the plaintiff at the correct address by the means required by the lease, that the plaintiff received it at its corporate offices on March 30, 2020, that, as of that date, Worth was not in default of any of its obligations under the lease, that the notice of termination was effective to terminate Worth's obligations to pay rent, additional rent, and additional charges under the lease as of April 1, 2020, and that the notice of termination was effective to terminate any obligation that Flamholz may have had as the guarantor or surety of Worth's obligations under the lease.

Hence, although the complaint stated a cause of action against Flamholz to recover against her under the lease and guaranty (*see Cucco v Chabau Café Corp*., 99 AD3d 965, 966 [2d Dept 2012]; *Chemical Bank v TRP Energy Sensors, Inc*., 166 AD2d 171, 172 [1st Dept 1990]; *see generally Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]), documentary evidence established a complete defense to the action insofar as asserted against her.

In light of the foregoing, it is

ORDERED that the motion of Abby Flamholz to dismiss the complaint insofar as asserted against her is granted, and the complaint is dismissed insofar as asserted against her.

This constitutes the Decision and Order of the court.

1/13/2022
DATE

[redacted], J.S.C.

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