SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

----------X

NEXT TO 92 EQUITIES OWNER L.L.C.,

Plaintiff,

- v -

MEIR MOSHE,

Defendant.

----------X

INDEX NO. 652713/2021

MOTION DATE 11/04/2021

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, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for DISMISS DEFENSE.

The plaintiff landlord in this breach of contract action seeks to recover damages due pursuant to a guaranty agreement with the defendant guarantor, along with contractual attorneys' fees. The plaintiff now moves pursuant to CPLR 3212 for summary judgment on the first cause of action seeking unpaid rent and additional rent in the sum of $399,481.45, on the second cause of action seeking accelerated rent in the sum of $1,036,035.52, and on the third cause of action seeking attorneys' fees on the issue of liability. The plaintiff further seeks to strike and dismiss the defendants' affirmative defenses pursuant to CPLR 3211(b). The defendant opposes the motion. For the following reasons, the motion is granted in part.

It is well-settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of its motion, the plaintiff submits, *inter alia*, the pleadings; a commercial lease agreement between Next to 92 Equities, LLC, and Amsterdam Bagels, LLC (Amsterdam Bagels), dated April 24, 2014 (the lease); an assignment agreement dated February 24, 2016, whereby Amsterdam Bagels assigned its rights and obligations under the lease to Sunflower

Amsterdam, LLC (Sunflower Amsterdam); an amendment to the lease dated February 24, 2016, extending the lease term and providing for the guaranty of all of Sunflower Amsterdam's obligations due under the lease by the defendant, Meir Moshe (the guaranty); a second amendment to the lease dated March 15, 2017, wherein Sunflower Amsterdam acknowledged and agreed to pay certain rent arrears; an assignment and assumption agreement dated February 13, 2020, whereby Next to 92 Equities, LLC, assigned its rights and obligations under the lease to the plaintiff; a rent ledger; property tax statements and calculations; water/sewer invoices attributable to the subject property; the affidavit of Yehuda Mendlowits, a member of the plaintiff and officer of the plaintiff's management company; and the affidavit of Elliot Neumann, another of the plaintiff's members.

The plaintiff's proof establishes, *prima facie*, its entitlement to judgment on the first cause of action, seeking unpaid rent and additional rent through June 2020 due under the lease and pursuant to the guaranty, in the total sum of $399,481.45. Specifically, the plaintiff's proof demonstrates (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). "[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446–47 (1st Dept. 2012) (quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 [1st Dept. 1991]). The terms of the subject guaranty, executed by the defendant, are clear, unambiguous, absolute, and unconditional. The defendant has not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiff in regard to the guaranty. The ledger and supporting documentation submitted by the plaintiff establishes that as of June 1, 2020, the plaintiff was owed a balance of $399,481.45 in unpaid rent and additional rent from Sunflower Amsterdam.

As to the second cause of action seeking accelerated rent through the unexpired term of the lease, which is April 30, 2024, no provision in the lease or lease amendments permits the plaintiff such recovery. To be sure, "no action can be brought for future rent in the absence of an acceleration clause." Beaumont Offset Corp. v Zito, 256 AD2d 372, 373 (2nd Dept. 1998); see also Islip U-Slip LLC v Gander Mtn. Co., 2 F Supp 3d 296, 303 (NDNY 2014) ("New York law states that absent an acceleration clause in a lease, the breach of a lease does not entitle a landlord to make a claim for all future rents under the lease.") The lease at issue here contains a liquidated damages clause requiring the tenants to pay "any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the [subsequent] lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term [of] this lease." Further, "Any such damages shall be paid in monthly installments by Tenant on the rent day specified in this lease…" The first page of the lease indicates that the "rent day" is the first day of each month. Thus, the lease requires the plaintiff to wait until future rents accrue on the first of each month in order to recover them.

At this juncture, the plaintiff can recover only rents that have become due through the date it filed the notice of motion, which is August 4, 2021. Pursuant to the lease and the affidavit of Yehuda Mendlowits, that amount is $303,478.72, constituting $214,929.40 for the ten months between July 2020 and April 2021 plus $88,549.32 for the four months between May 2021 and August 2021. The plaintiff establishes entitlement to such relief notwithstanding the provision in the guaranty limiting liability until 30 day after the date of the tenant's surrender, since, pursuant to the express terms of the guaranty, such limitation is premised on the tenant's payment of all rent and other amounts due through the surrender date. There is no dispute that as of the tenant's alleged date of surrender, a balance was owing under the lease. That balance has not been paid, to date.

The plaintiff further establishes its entitlement to judgment on the issue of liability on the second cause of action seeking attorneys' fees pursuant to Section 19.03 of the lease. However, the plaintiff is entitled to judgment only to the extent of fees incurred in recovering rent and additional rent due and owing through August 4, 2021.

In opposition to the plaintiff's motion, the defendant fails to raise a triable issue of fact as to his liability for the amounts described. The defendant's arguments with respect to the sufficiency and admissibility of the proof adduced by the plaintiff are unpersuasive. Similarly, the defendant's conclusory statement that he disputes the amounts claimed to be due for rent, water charges, and taxes, not on any concrete basis but because he simply doesn't know if the amounts indicated in the invoices are accurate is insufficient to defeat the plaintiff's motion. This is particularly so in light of the parties' representation that they have already had the opportunity for discovery on the issue of damages in a related case filed under Index No. 653791/2020.

The branch of the plaintiff's motion seeking to strike the defendant's affirmative defenses is granted. Pursuant to CPLR 3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011). For the reasons discussed in the plaintiff's moving papers, the plaintiff meets this burden.

The plaintiff cannot maintain an action on the remainder of the second cause of action insofar as it only seeks future rents. Therefore, the remainder of the second cause of action is dismissed without prejudice to assert new claims for rent due under the lease once those claims accrue, i.e., become due, in a new action.

Accordingly, it is

ORDERED that the plaintiff's motion is granted, without opposition, to the extent that (1) the plaintiff is awarded summary judgment in the sum of $$399,481.45 on the first cause of

action; (2) the plaintiff is awarded summary judgment in the sum of $303,478.72 on the second cause of action; (3) the plaintiff is awarded summary judgment on the issue of liability on the third cause of action only to the extent of attorneys' fees incurred in connection with the plaintiff's recovery of rent and additional rent through August 4, 2021; and (4) the defendant's affirmative defenses are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendant, on the first and second causes of action in the sum of $702,960.17, plus statutory interest from the date of judgment; and it is further

ORDERED the plaintiff may submit supplemental documentation in support of any claimed damages under the third cause of action, to the extent incurred in connection with the recovery of rent and additional rent under the subject lease through August 4, 2021, within 60 days of this Decision and Order, by filing the same on e-courts and e-mailing a copy to the Part 42 Clerk at SFC-Part42-Clerk@nycourts.gov, and failure to adhere to the foregoing deadline shall result in any such damages being waived; and it is further

ORDERED that the remainder of the plaintiff's second cause of action, seeking future rent and additional rent that may become due under the subject lease after August 31, 2021, is dismissed without prejudice to the plaintiff's bringing such claims, as well as any claim for attorneys' fees arising from such claims, in a new action once such claims accrue; and it is further

ORDERED that the preliminary conference scheduled for April 7, 2022, at 10:00 a.m., is cancelled.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

3/25/2022
DATE

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