SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33**

Justice

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FEDERATION LLC,

Plaintiff,

- v -

R & D PRECIOUS METALS INC., RAFAEL DAVIDOV

Defendant.

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INDEX NO. 158365/2020

MOTION DATE 10/25/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion to/for AMEND CAPTION/PLEADINGS & JUDGMENT - SUMMARY.

Upon the foregoing documents, plaintiff moved for the following relief: (1) amending the pleadings to conform to the evidence to include all amounts due through the date the instant motion is decided; (2) summary judgment against defendant R&D Precious Metals Inc. and awarding plaintiff a monetary judgment of $81,802.36, plus statutory interest, costs, fees, and disbursements, and setting the matter down for a hearing to determine plaintiff's reasonable attorneys' fees and costs pursuant to the lease; (3) summary judgment against defendant Rafael Davidov and declaring that plaintiff is entitled to a monetary judgment of $81,802.36, plus statutory interest, costs, fees, and disbursements, and reasonable attorneys' fees pursuant to the guaranty; and (4) dismissing defendants' affirmative defenses and counterclaims.

On March 9, 2022, the Court heard oral argument from David Rosenbaum, Esq. for the plaintiff and Howard Berglas, Esq. for the defendants.

BACKGROUND

On March 1, 2016, plaintiff Federation ("Federation" or "Landlord") as landlord and defendant R & D Precious Metals Inc. ("R&D" or "Tenant") as tenant entered into a lease agreement ("Lease") to rent commercial space located at 71 West 47th Street, Room 302, New York, NY ("the Premises"). The Lease commenced on March 1, 2016 and expired on February 28, 2021. The Lease further states that R&D "shall use and occupy the demised premises for Office for a Jewelry Showroom" (NYSCEF Doc. No. 15, 28).

In connection with the Lease, on February 1, 2016, plaintiff and Rafael Davidov ("Davidov" or "Guarantor") executed a guaranty ("Guaranty"), in which Davidov personally guaranteed Tenant's lease obligations, including "the full payment of Base Rent, real estate tax increase . . . actual out-of-pocket legal fees incurred by the landlord in enforcing the guarantee" and the guaranty remained in effect "during any period when Tenant is occupying the demised premises as a 'statutory tenant'" (NYSCEF Doc. No. 16, 29).

According to plaintiff, rent and additional rent have not been paid since March 2020. Plaintiff served Tenant R&D with a written notice dated November 9, 2020, informing Tenant that based on its default pursuant to the Lease, plaintiff retained Tenant's security deposit and requested that said deposit be replenished within five days, as the Lease required (NYSCEF Doc. No. 17). Tenant did not replenish the security deposit held on account and plaintiff served R&D with a Fifteen Days' Notice of Default dated November 18, 2020, stating that Tenant breached the lease by failing to replenish its security deposit held on account (NYSCEF Doc. No. 18). Upon Tenant's failure to cure its default, plaintiff served tenant with a Five Day Notice of Cancellation dated December 8, 2020, terminating Tenant's lease as of December 16, 2020, based on Tenant's failure to cure its default (NYSCEF Doc. No. 19).

Plaintiff claims that Tenant continued to use the Premises through the date it vacated in or about January 2021 but still owed rent and additional rent (NYSCEF Doc. No. 11 at ¶ 16-17). Plaintiff is seeking damages for rent and additional rent pursuant to the Lease terms from the alleged breaches of the Lease and Guaranty.

In response, Defendant Davidov claims that Tenant was current in its payment of rent and additional rent prior to March 2020 but the pandemic "wiped out" his business operations (NYSCEF Doc. No. 27 at ¶ 5). He argues that New York City Administrative Code § 22-1005 ("Admin Code § 22-1005")[1] applies to him and relieves him of his obligations as Guarantor under the terms of the Guaranty as the Premises was a non-essential retail establishment subject to in-personal limitations because: (1) the Premises was used for a jewelry business where he sold and displayed diamonds and jewelry, customers and dealers would regularly frequent, and the trading and sale of diamonds and jewelry occurred; and (2) he was forced to reduce its in-person workforce by at least 50% because he had to lay off his three employees during the pandemic because business was slow (*id.* at ¶ 4-5). He further argues that his obligations under the terms of the Guaranty expired upon Tenant R&D's vacatur and surrender of the subject premises to the landlord when he personally delivered the keys to the building's superintendent on December 30, 2020 (*id.* at ¶ 2-3). The superintendent accepted the keys and signed a receipt confirming such receipt, and said copy of receipt was provided to the plaintiff (*id.* at ¶ 3). Davidoff further argues that the security deposit in the sum of $12,144.50 that plaintiff held on account should be credited against any judgment that may be entered against defendants.

[1] Plaintiff and defendants initially cite to New York City Administrative Code § 22-1004 rather than § 22-1005, but both parties understood the pleadings to be referring to § 22-1005 and cite to the correct section thereafter (NYSCEF Doc. No. 22 at Footnote 2).

Plaintiff moved for summary judgment against defendants on plaintiff's first, second, and third causes of action, including rent and additional rent claims in the sum of $81,802.36 through February 2021. Plaintiff also moved for summary judgment to dismiss defendants' seven affirmative defenses and two counterclaims. In addition, plaintiff moves this Court for an order amending the pleadings to conform to the evidence herein to include all amounts due through the date of disposition of this motion.

DISCUSSION

Summary Judgment Standard

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist (*See e.g.*, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*See e.g.*, *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

To sustain a cause of action for breach of contract, Plaintiff must prove the existence of a contract, Plaintiff's performance, Defendant's breach, and damages (*see Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *see A/R Retail LLC v Hugo Boss Retail, Inc.*, 2021 NY Slip Op 21139 [Sup Ct, NY County 2021]).

The Appellate Division, Second Department, recently summarized the general rules which govern the enforcement of "good guy guarantees" as follows:

> "A guaranty is a promise to fulfill the obligations of another party, and is subject to the ordinary principles of contract construction' (*Cooperatieve Centrale Raiffeisen–Boerenleenbank, B.A., 'Rabobank Intl.,' N.Y. Branch v Navarro*, 25 NY3d 485 [2015] [internal quotation marks omitted]; *see Encore Nursing Ctr. Partners Ltd. Partnership–85 v Schwartzberg*, 172 AD3d 1166, 1167 [2d Dept 2019]). 'A guaranty is to be interpreted in the strictest manner' (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]; *see Wider Consol., Inc. v Tony Melillo, LLC*, 107 AD3d 883, 884 [2d Dept 2013]; *Arlona Ltd. Partnership v 8th of Jan. Corp.*, 50 AD3d 933, 933 [2d Dept 2008]). A guarantor should not be bound beyond the express terms of the written guaranty (*see Solco Plumbing Supply, Inc. v Hart*, 123 AD3d 798, 800 [2d Dept 2014]; *Wider Consol., Inc. v Tony Melillo, LLC*, 107 AD3d at 884; *Walker v Roth*, 90 AD2d 847, 847 [2d Dept 1982]). 'On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty' (*H.L. Realty, LLC v Edwards*, 131 AD3d 573, 574 [2d Dept 2015] [internal quotation marks omitted]; *see Encore Nursing Ctr. Partners Ltd. Partnership–85 v Schwartzberg*, 172 AD3d at 1168)."

(*2402 E. 69th St., LLC v Corbel Installations, Inc.*, 183 AD3d 859, 861 [2d Dept 2020]).

Summary Judgment against Defendants R & D Precious Metals, Inc. and Rafael Davidov

Plaintiff is seeking summary judgment against the defendants based on the terms of the Lease and Guaranty agreements. It is undisputed that the Lease was executed on March 1, 2016 between plaintiff and defendant R&D (NYSCEF Doc. No. 15, 28). The Guaranty was executed on February 1, 2016 between plaintiff and Guarantor, defendant Rafael Davidov (NYSCEF Doc. No. 16, 29). It is undisputed that both the Lease and the Guaranty were in effect on March 1, 2020, the first month R&D failed to pay rent, and was therefore the point at which R&D became in breach of the Lease. R&D is similarly in breach of Paragraph 47 of the Lease for its failure to pay additional rent in the form of electric metered usage charges, Paragraph 51 of the Lease for failure to pay additional rent in the form of a percentage increase in real estate taxes, Paragraph 51 of the Lease for failure to pay additional rent in the form of cost of living rent adjustment, and Paragraph 52 of the Lease for failure to pay additional rent in the form of late fees. Pursuant to Paragraph 18

of the Lease, plaintiff is entitled to recover as liquidated damages, the rent and additional rent for the balance of the Lease Term as if tenant R&D had remained in possession.

Guarantor has not paid any rent, additional rent, or other charges incurred due to R&D's default, causing Guarantor to breach Paragraph 1 of the Guaranty (NYSCEF Doc. No. 16, 29).

Plaintiff has suffered damages due to its inability to collect base rent, additional rent, and costs incurred due to defendant R&D's breaches. Thus, plaintiff has satisfied its burden of making a prima facie case that R&D breached the Lease and the Guarantor breached the Guaranty (*Jimenez v Henderson*, 41 NYS3d 26, 27 [1st Dept 2016] ["Landlords met their prima facie burden with respect to the repair costs, staging costs, and electricity costs by submitting the lease and various invoices."]).

Plaintiff's entitlement to expenses incurred in the event of default, including reasonable attorneys' fees is based on Paragraph 19 of the Lease. Therefore, Plaintiff's entitlement to attorneys' fees and fees incurred depends on whether Plaintiff prevails on its motion for summary judgment for breach of the Lease. For the same reasons listed above, Plaintiff makes out a prima facie case for judgment as a matter of law on its claim for attorneys' fees and expenses.

Since Plaintiff has made a prima facie case for judgment as a matter of law, the burden then shifts to Defendants "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v. Citibank*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). For the reasons stated below defendant R&D failed to meet this burden for damages from their breaches until February 2021. However, as will be discussed further below, defendant Davidov's affirmative defense and counterclaim as to Admin Code § 22-1005 (which only addresses personal liability provisions in commercial leases) amounts to a material issue of fact, which warrants a denial of

summary judgment as against to him only. In addition, defendants have successfully shown that it is entitled to an offset in the amount of the security deposit retained by plaintiff.

Surrender and the Vacate Conditions

Pursuant to Paragraph 25 of the Lease, "[n]o act or thing done by Owner or Owner's agents during the term hereby demised shall be deemed an acceptance of a surrender of said premises, and no agreement to accept such surrender shall be valid unless in writing signed by Owner. No employee or Owner or Owner's agent shall have any power to accept the keys of said premises prior to the termination of the lease, and the delivery of keys to any such agent or employee shall not operate as a termination of the lease or a surrender of the demised premises" (NYSCEF Doc. No. 15, 28).

Pursuant to Paragraph 2 of the Guaranty agreement, "[a]nything herein and contained to the contrary notwithstanding upon Tenant's (a) having vacated and surrendered the demised premises to Owner free of all subleases or licenses and in a broom clean condition and as otherwise required by this lease and (b) having notified Owner or Managing Agent in writing and (c) delivered the keys to the demise premises to the Owner or its Managing Agent, Guarantor shall not be liable under this guarantee to pay rent, additional rent or other charges or payments accruing under the lease after the date of said surrender and shall be released from all obligations under the lease and this Guaranty" (NYSCEF Doc. No. 16, 29):

Guarantor argues in his Affidavit in opposition to Plaintiff's Motion for Summary Judgment that Plaintiff's motion must be denied because he surrendered the premises in compliance with the Guaranty (NYSCEF Doc. No. 27). He claims that he surrendered the Premises on December 30, 2020, when he personally surrendered the keys to the building's superintendent and the superintendent accepted the keys and signed a receipt indicating such (*id* at ¶ 3).

However, this argument fails because Guarantor did not comply with the conditions precedent for surrendering expressly listed in the Guaranty agreement, namely, Tenant had to vacate and surrender the premises as required by the Lease, and the Lease expressly provides that no agreement to accept such surrender shall be valid unless there is a writing signed by Owner. Furthermore, even after Tenant returned the keys, Tenant continued to use the Premises through the date it vacated, in or about January 2021 (NYSCEF Doc. No. 11). The Lease further provides that the delivery of keys to any agent or employee does not operate as a termination of the lease or a surrender of the premises (*Connaught Tower Corp. v Nagar*, 873 NYS2d 553 [1st Dept 2009] [vacating premises and delivery of keys to agent of landlord could not operate as a surrender of the premises where lease stated otherwise]). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 127 NYS3d 6 [1st Dept 2020]). This rule has even greater force in the context of real property transactions, in which commercial certainty is of paramount concern, especially where the instrument was negotiated between sophisticated business entities. *Id.* Here, the terms of the Lease and Guaranty are complete, clear, unambiguous, and were negotiated amongst sophisticated business entities; Defendants' failure to comply bars them from asserting they properly surrendered the premises.

Amending the Pleadings

Plaintiff seeks to amend its complaint for rent and additional rent arrears through February 2021. Pursuant to CPLR § 3025 (c), "[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances". This relief is granted as defendants do not oppose this portion of plaintiff's motion (NYSCEF D. No. 26 at 4).

Defendants' Affirmative Defenses and Counterclaims

Plaintiff moves for summary judgment to dismiss defendants' affirmative defenses and counterclaims. Defendants' affirmative defenses are: (1) plaintiff fails to state a cause of action in its amended verified complaint; (2) the court does not have subject matter jurisdiction; (3) rent and additional rent was offered to plaintiff but was refused by plaintiff; (4) R&D has vacated the premises and surrendered possession thereof and as such, defendants' obligations under the terms of the lease and the guaranty have ceased; (5) plaintiff admitted to terminating the lease in the amended verified complaint, and as such, defendants' obligations have terminated and actions under the lease and guaranty cannot be enforced; (6) due to circumstances beyond their control, defendants were unable to conduct their business operations at the premises for the period of time for which plaintiff seeks relief, and as such, defendants were evicted from the premises during that period of time; and (7) as an affirmative defense and a counterclaim, defendant alleges that this action was brought against defendant Davidov in willful violation of the New York City Administrative Code § 22-1005 and defendant Davidov is seeking an amount not less than $10,000.00 for the damages he suffered. Defendants' second counterclaim seeks attorneys' fees in an amount not less than $10,000.00 for the expenses defendants have incurred and will continue to incur in defending this alleged meritless action.

Defendants' first through third affirmative defenses are each a sentence long without any factual support. "A party opposing a motion for summary judgment must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions (*Schiraldi v U.S. Min. Prod.*, 194 AD2d 482 [1st Dept 1993]). The Court finds these affirmative defenses to be mere conclusions of law and insufficiently pled.

Defendants' fourth affirmative defense as to the vacatur and surrender of the premises was addressed earlier and is denied.

Defendants' fifth affirmative defense that they are no longer liable for obligations under the Lease and Guaranty because the Lease has terminated is denied. Paragraph 18 of the Lease and Paragraph 1 of the Guaranty state otherwise. As the parties clearly agreed to make defendant liable for damages following termination in the Lease and Guaranty, this defense fails (*Ring v. Printmaking Workshop*, 70 AD3d 480, 481 [1st Dept 2010]).

Defendants' sixth affirmative defense as to eviction is denied. Defendants allege that due to circumstances beyond their control, they were unable to conduct their business. However, defendant does not provide any factual evidence to support this claim.

Defendants' seventh affirmative defense and first counterclaim provides that defendant Davidov is entitled to recover monetary damages as plaintiff brought this action against him in violation of Admin Code § 22-1005.

New York City Administrative Code § 22-1005 provides immunity to guarantors of commercial leases only if a commercial tenant can satisfy the following conditions:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):

   (a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;

   (b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

   (c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive.

It is undisputed that the Premises was leased to R&D to use and occupy as an office for a jewelry showroom (NYSCEF Doc. No. 15, 28). Plaintiff alleges that Admin Code § 22-1005 does not apply to Davidov because the Premises was merely used as an office and is not one of the enumerated businesses the Statute intended to protect. However, Davidov argues that Admin Code § 22-1005 does apply to him because the Premises was more than just a mere office – he ran his jewelry business in the Premises where he sold and displayed diamonds and jewelry; it was a space that customers and dealers would regularly frequent, and the trading and sale of diamonds and jewelry occurred. Davidov claims that his jewelry business was a non-essential retail establishment subject to in-person limitations, which falls under Admin Code § 22-1005 and would provide him immunity from the damages incurred by Tenant R&D's default. The Court finds that this dispute of whether Admin Code § 22-1005 applies to defendant Davidov is an issue of material fact, which would preclude the granting of summary judgment against defendant Davidov.

Defendants' second counterclaim as to attorneys' fees is denied. The Lease and the Guaranty both provide for the Landlord to recover attorneys' fees in the event of Tenant's default, but there is no provision that provides Tenant the same right. Defendants do not cite to any provision or statute that would entitle them to legal fees. There is no express nor implied reciprocal right to legal fees (*Reade v Stoneybrook Realty, LLC*, 63 AD3d 433, 434 [1st Dept 2009]).

Security Deposit

Davidoff argues that the security deposit of $12,144.50, retained by plaintiff should be applied to the arrears. Plaintiff agrees with this statement and has deducted that same sum of the security deposit from its calculation of arrears in its papers. Where nothing in a lease prevents a

plaintiff seeking rent arrears from applying the security deposit to those arrears, the security deposit should be credited to the rent arrears prior to the calculation of any interest on those arrears (*Wooster 76 LLC v Ghatanfard*, 892 NYS2d 310 [1st Dept 2009]).

Late Fees

Pursuant to Paragraph 52 of the Lease, plaintiff seeks late fees for unpaid rent of 5% of the overdue amount and interest on the delinquent amount of 12% per year. This late fee provision is unenforceable as against public policy since it is in excess of the per annum rate of 25% which is prohibited as criminal usury in the second degree. (*See* N.Y. Penal Law § 190.40, *see also ESRT 501 Seventh Avenue, LLC v Regine, Ltd.*, — NYS3d — 2022 N.Y. Slip Op. 03795 [1st Dept 2022]; *Cleo Realty Associates, L.P. v Papagiannakis*, 56 NYS3d 294, 295 [1st Dept 2017]). However, the interest on the delinquent amount of 12% per year does not excess the per annum rate of 25% and is enforceable. Therefore, the damages which the plaintiff is entitled to will include interest but will not include late fees on Defendants' rent arrears.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant R&D Precious Metals Inc. is granted; and it is further

ORDERED that plaintiff's motion for summary judgment against defendant Rafael Davidov is denied, without prejudice; and it is further

ORDERED that plaintiff's motion to amend its pleadings to conform to the evidence is granted; and it is further

ORDERED that plaintiff's motion to dismiss the defendants' affirmative defenses is granted to the extent that the first through the sixth affirmative defenses are dismissed, and is otherwise denied; and it is further

ORDERED that plaintiff's motion to dismiss defendants' counterclaims is granted to the extent that the second counterclaim is dismissed, and is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant R & D Precious Metals, Inc., on the first through the third causes of action in the amount of $71,557.68, with interest from March 1, 2020 until entry of judgment, plus costs and disbursements, as calculated by the Clerk; and it is further

ORDERED that the third cause of action that seeks the recovery of attorneys' fees is severed and the issue of the amount of reasonable attorneys' fees that plaintiff may recover against defendant R&D Precious Metals Inc. is referred to a Special Referee to hear and report.

This constitutes the decision and order of the Court.

7/29/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

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