691 Tenth, LLC v A&M Healthy Grill NYC Inc.
2022 NY Slip Op 32716(U)
August 11, 2022
Supreme Court, New York County
Docket Number: Index No. 155701/2021
Judge: Mary V. Rosado

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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691 TENTH, LLC,

Plaintiff,

- v -

A&M HEALTHY GRILL NYC INC.,AYMAN HAMOUD

Defendant.

INDEX NO. 155701/2021

MOTION DATE 10/19/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. MARY V. ROSADO:

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

were read on this motion to/for JUDGMENT - SUMMARY

Oral argument was held on May 25, 2022 with David B. Rosenbaum appearing on behalf of 691 Tenth, LLC ("Landlord") and Jennifer Addonizio Rozen appearing on behalf of A&M Healthy Grill NYC Inc. ("Tenant") and Ayman Hamoud ("Guarantor") (collectively "Defendants"). Upon the foregoing documents, it is ordered and decided as follows.

I. Procedural Background

On June 15, 2021, Landlord filed a Complaint initiating this action (NYSCEF Doc. 1). Landlord alleges that Plaintiff has failed to pay base rent or late fees since September of 2019, and owes water charges and real estate tax charges (*id.* at ¶¶ 35-43). Landlord also alleges that the Tenant unilaterally vacated the premises on January 14, 2021, without written notice, breaching the terms of the Lease, which has led to application of the accelerated damages clause of the Lease (*id.* at ¶¶ 47-51). Landlord further alleges Guarantor has not paid for any of Tenant's deficiencies (*id.* at ¶¶55-61).

Defendants filed an Answer with Counterclaims on July 23, 2021 alleging that Landlord breached the Lease (NYSCEF Doc. 7). Defendants allege that the fire occurred due to Landlord's negligence in maintaining the pipe work for electricity and gas at the Building and that Tenant was forced to go without gas for more than two months and pay out-of-pocket to repair damages to the walls, ceilings and kitchen of the premises (*id.* at ¶¶ 75-80). Defendants claim that due to this fire and the inability to operate the premises for its intended purpose, Defendants were constructively evicted and were forced to relinquish possession of the premises to Landlord (*id.* at ¶ 80-82). Defendants also assert as counterclaims and affirmative defenses breach of the implied covenant of good faith and fair dealing and breach of the covenant of quiet enjoyment as a result of the fire and Landlord's failure to maintain the Building, as well as impracticability and impossibility of performance due to Covid-19 (*id.* ¶¶ 89-99).

Landlord filed a Reply to Defendants' Counterclaims on August 10, 2021 denying the fire impacted Tenant's business and that pursuant to the terms of the Lease it was the Tenant's obligation to make all non-structural repairs to the Premises at Tenant's sole cost and expense (NYSCEF Doc. 9 at ¶¶ 4, 7). Landlord also claims that pursuant to the terms of the Lease, "there shall be no allowance to the Tenant for the diminution of rental value and no liability on the part of [Landlord] by reason of inconvenience, annoyance or injury to business arising from [Landlord], Tenant or others, making or failing to make any repairs" (*id.* at ¶ 9). Landlord also claims that the terms of the Lease state that "[Landlord] or its agents shall not be liable for any damage to the property of the Tenant." (*Id.* at ¶ 10). Landlord also denied that its conduct caused the fire damage to the Building and that pursuant to the Lease, Tenant was obligated to maintain gas and electricity at the Premises at its own expense (*id.* at ¶ 23).

On October 21, 2021, Landlord moved for summary judgment seeking (1) to amend the pleadings to include updated damages; (2) money judgments against Tenant and Guarantor; (3) attorneys' fees; (4) dismissal of Defendants' affirmative defenses, and (5) dismissal of Defendants' counterclaims (NYSCEF Doc. 10).

Defendants opposed Landlord's motion for summary judgment, arguing there are material issues of fact as to Landlord's performance under the terms of the Lease (NYSCEF Doc. 24 at ¶ 15-17). Defendants also argue that Landlord's liquidated damages clause and late fees clause are unenforceable penalties (*id.* at ¶¶ 23-32). Moreover, Defendants argue that the Guaranty Law makes the guaranty against Guarantor unenforceable for unpaid rent for the duration of time the Guaranty Law was in effect (*id.* at ¶¶33-35). Defendants also oppose Landlord's motion to dismiss Defendant's affirmative defenses and Counterclaims

II. Factual Background

Landlord owns 691 Tenth Avenue, New York, New York 10036 (the "Building") (NYSCEF Doc. 1 at ¶ 4). Tenant leased a commercial storefront of the Building known as "Store #1" (the "Premises") to operate a restaurant pursuant to a lease with Landlord executed December 15, 2015 (the "Lease") (*id.* at ¶¶ 5, 7). Tenant's obligations under the Lease were guaranteed by Guarantor pursuant to the guaranty found in ¶ 74 of the Lease (*id.* at ¶ 8).

The Lease term began January 1, 2016, and was to end December 31, 2025 (*id.* at ¶ 6). Tenant promised to pay Landlord rent each month, in advance, on the first day of each month (*id.* at ¶ 9). Tenant also agreed to install meters to track water usage at the Premises and to pay for Tenant's actual water usage (*id.* at ¶¶ 17-18). Tenant further agreed to pay as additional rent a percentage of real estate tax increase above the base tax years of the real estate taxes assessed in 2016-2017 (*id.* at ¶¶19-20). The Lease also provided that Tenant will reimburse Landlord for costs

and fees expended to enforce the Lease (including attorneys' fees) in the event Landlord is found to be the prevailing party, and to pay Landlord as liquidated damages the rent and additional rent for the term constituting the balance of the Lease, offset by any rent collected by Landlord from a new tenant (*id.* at ¶¶ 22-24).

The Guaranty limits Guarantor's liability if Tenant provides notice of its intention to cancel the Lease, if Tenant returns to Landlord vacant and empty possession of the Premises free of all occupants and contents, and if Tenant or Guarantor pay Landlord all rent and additional rents due through the date of lease cancellation (*id.* at ¶ 29).

Defendants assert that there was a major fire in a residential unit of the Building on September 12, 2020, which caused a gas and water outage at the Premises (NYSCEF Documents 25 at ¶ 5, 26-27, 36). According to a fire incident report by the New York Fire Department ("NYFD"), the fire occurred on September 12, 2020, at 3:03 p.m., which started on the first floor in the bathroom of apartment 2 and then spread to the second-floor bathroom of apartment 6. The cause of the fire was determined to be electrical wiring in the walls between the first and second floors (NYSCEF Doc. 36).

The New York City Department of Housing Preservation and Development ("HPD") cited numerous violations in residential premises after the fire in September of 2020, including unsafe electric wiring conditions on the fourth and first floors, fire damage to apartments on the first, second, third, fourth and fifth floors, a lack of gas to apartments on the third and fifth floors, and defective fire-retardant material on the first, second and fourth floors (NYSCEF Doc. 27).

Defendants allege that the fire occurred due to Landlord's negligence in maintaining the pipe work for electricity and gas at the Building and that Tenant was forced to go without gas for

more than two months and pay out-of-pocket to repair damages to the walls, ceilings and kitchen of the premises (NYSCEF Doc. 25 at ¶¶ 8-10).

Defendants claim that due to the fire and the inability to operate the premises for its intended purpose, Defendants were constructively evicted and were forced to relinquish possession of the premises to Landlord (*id.* at ¶ 12). In an email dated September 24, 2020, Defendants provided notice to Landlord of the difficulties they were facing due to the fire and that if there was not a plan to make adequate repairs Defendants would need to relocate (NYSCEF Doc. 28). As of September 2021, there were two Environmental Control Board ("ECB") violations issuing partial stop-work orders on repair work being done to the Building (NYSCEF Doc. 30).

III. Discussion

A. Motion to Amend the Pleadings

Landlord seeks to amend its Complaint to conform to the evidence. Pursuant to CPLR 3025(b), absent prejudice, a party may amend its pleading at any time upon such terms as may be just (*see also Hancock v 330 Hull Realty Corp.*, 225 AD2d 365 [1st Dept 1996]). CPLR 3025(c) provides that "the 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." Defendants have not opposed this branch of Landlord's motion, nor have they shown how they might be prejudiced. Therefore, Landlord's motion seeking to amend its Complaint to conform to the evidence in the record is granted.

B. Summary Judgment

i. 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 (*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 is 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 (*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]).

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]).

"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." (*L. Raphael NYC C1 Corp. v Solow Building Company, L.L.C.*, 206 AD3d 590, 592-593 [1st Dept 2022], quoting *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

ii. Tenant's Liability for Rent from September 2019- September 2020

Landlord is entitled to a money judgment for unpaid rent against Tenant from September 2019 to September 2020. Landlord has made a prima facie showing of entitlement to unpaid rent as the existence of the Lease is not in dispute, there is no dispute over whether Landlord performed its obligations under the Lease, and it is undisputed that Tenant was in breach by failing to pay rent. Landlord has been damaged since it has lost expected income from the Lease and allowing Tenant to use and occupy the Premises (*Jimenez v Henderson*, 41 NYS3d 26, 27 [1st Dept 2016]).

iii. Tenant's Liability for Rent after September 2020

While Defendants assert that their premises were damaged by the September 2020 fire, and that they were unable to operate as a restaurant due to an alleged failure in gas connection stemming from the fire, when considered alongside the plain and unambiguous terms of the Lease, which Tenant negotiated and agreed to, Defendant's arguments fail to raise an issue of material fact sufficient to deny summary judgment.

Specifically, Article 4 of the Lease provides that:

> "[Landlord] shall maintain and repair the public portions of the building, both exterior and interior. Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and at its sole cost and expense, make all non-structural repairs thereto as and when need to preserve them in good working order and condition." (NYSCEF Doc. 19).

Article 64 of the Lease, found in the Rider, which supplements Article 4, states:

> "Tenant covenants and agrees to maintain in good order and condition and repair the exterior of the demised premises including the store front, windows, doors, fittings, any signs, awnings and/or any other equipment, as well as the interior of the demised premises, in a manner reasonably satisfactory to the Landlord."

Article 9 of the Lease, titled "Destruction, Fire, and Other Casualty" provides that:

> "(a) If the demised premises or any part thereof shall be damaged by fire or other casualty, Tenant shall give immediate notice thereof to Owner and this Lease shall continue in full force and effect except as set forth (b) If the demised premises are partially damaged or rendered partially unusable by fire or other casualty, the damages thereto shall be repaired by and at the expense of owner, and the rent and other items of additional rent, until such repair shall be substantially completed, shall be apportioned from the day following the casualty to the part of the demised premises which is usable (c) If the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, then the rent and other items of additional rent as hereinafter provided expressly provided shall be proportionally paid up to the time of the casualty and thenceforth shall cease until the date when the demised premises shall have been replaced and restored by Owner (or sooner occupied in part by Tenant, then rent shall be apportioned as provided in subsection (b) above." (*Id.*)

However, Article 67 of the Lease, found in the Rider, states:

> "If by reason of strikes or other labor disputes, fire or other casualty (or reasonable delays in adjustments of insurance), accidents, orders or regulations of any Federal, State, County or Municipal authority, or any other cause beyond Landlord's reasonable control, whether or not such other cause shall be similar in nature to those herein above enumerated, Landlord is unable to furnish or is delayed in furnishing any utility or service required to be furnished by Landlord under the provisions hereof or any collateral instrument, or is unable to perform of make or is delayed in performing or making any installations, decorations, repairs, alterations, additions or improvements, whether or not required to be performed or made under this Lease or under any collateral instrument, or is unable to fulfill or is delayed in fulfilling any of Landlord's other obligations under this Lease or any collateral instrument, no such inability or delay shall constitute an actual or constructive eviction, in whole or in part, or entitle Tenant to any abatement or diminution of rent, or relieve Tenant from any of its obligations under this Lease, or impose any liability upon Landlord or its agents by reason of inconvenience or annoyance to Tenant or injury to or interruption of Tenant's business, or otherwise. (*Id.*)

Decisively, Article 73 of the Lease, found in the Rider, provides:

> "If there is any conflict between the provision contained in the attached Rider to this Lease and the provisions contained in the printed portion of these lease, the provisions of this Rider shall prevail."

Moreover, Article 46 of the Lease, found in the Rider, dealing with gas and electric meters states that:

> "Landlord represents that there are separate gas and electric meters in the leased premises which shall be in working order at the commencement of the Lease term. Tenant shall, at Tenant's own cost and expense, throughout the Lease term, maintain such meters in working order....Landlord shall in no event be liable or responsible to Tenant for any loss or damage or expense which Tenant may sustain or incur if either quantity of character of said services are not suitable for Tenant's requirements or upon the failure of the appropriate public utility company to deliver gas, water or electrical service to the demises [sic] premises for any reason whatsoever." (*Id.*)

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*, 185 AD3d 34 [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 business entities. *Id.* Tenant expressly agreed that maintaining gas and electricity would be Tenant's responsibility and Landlord would not be responsible for any damages Tenant sustains if gas or electricity services failed to be delivered to the Premises. Moreover, Tenant expressly agreed in Article 67, which, although conflicting with Article 9, expressly overrides Article 9 by operation of Article 73, that damage stemming from a fire cannot constitute an actual or constructive eviction and will not give rise to diminution or abatement of Tenant's rent. Pursuant to the plain and unambiguous terms of the Lease negotiated at arm's length between two business entities, which this Court must enforce, the fire and subsequent impact of the alleged gas and water outage did not relieve Tenant of its obligation to pay rent (*159 MP Corp v Redbridge Bedford, LLC*, 33 NY3d 353, 360 [2019] [freedom of contact is a strong public policy interest in New York and it is a court's "usual and most important function" to enforce contracts]).

iv. Liquidated Damages and Late Fees

Defendants next argue that even if Tenant is liable, the liquidated damages clause found in the Lease is unenforceable. The liquidated damages clause is found in Article 18 of the Lease and provides:

> "Tenant or the legal representatives of Tenant shall also pay Owner, as liquidated damages, for the failure of Tenant to observe and perform said Tenant's covenants herein contained, 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. The failure of [Landlord] to re-let the demised premises or any part or parts thereof shall not release or affect Tenant's liability for damages. In computing such liquidated damages there shall be added to the said deficiency such expenses as Owner may incur in connection with reletting....Any such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in this lease...Owner shall in no event be liable, in any way whatsoever, for failure to re-let the demised premises, or in the event the demised premises are relet, for failure to collect rent thereof under such reletting" (NYSCEF Doc. 19).

Whether a liquidated damages provision is an unenforceable penalty is a question of law for the court (*JMD Holding Corp v Congress Financial Corp*, 4 NY3d 373, 379 [2005]; *Seymour v Hovnanian*, 2022 NY Slip Op 04705 at *3 [1st Dept 2022]). The party seeking to avoid liquidated damages has the burden of proving that the damages are an unenforceable penalty (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 75 [2020]). If the liquidated damages are "grossly disproportionate" to the probable loss, the provision is an unenforceable penalty (*Seymour* at *3). In the absence of public policy concerns, the freedom to contract is determinative in an arm's length transaction between sophisticated parties (*Trustees of Columbia* at 75 n.4). The Court of Appeals has found liquidated damages which were 7.5 times what plaintiff would have received if a defendant had fully complied with a surrender agreement to be "grossly disproportionate" to the actual loss (*id.* at 75). Meanwhile, where a landlord recovers two or three times the amount of the existing rent, liquidated damages were not considered "grossly disproportionate" (*Tenber Assoc. v Bloomberg L.P.*, 51 AD3d 574, 574 [1st Dept 2008]). Here, the liquidated damages clause simply seeks to make Landlord whole for what it expected Tenant to pay under the terms of the Lease, therefore, Defendants' argument that the liquidated damages provision is unenforceable is without merit.

Landlord also seeks to recoup late fees for delinquent payments which, pursuant to Article 66 of the Lease, is calculated as a sum equal to five (5%) percent of the rents due and owing each month (NYSCEF Doc. 19). According to the affidavit of Michael Bishay in support of Landlord's motion for summary judgment, as of October 12, 2021, Tenant owed late fees totaling $35,931.70 for base rent arrears of $77,447.47 (NYSCEF Doc. 11 at ¶ 43). Defendants oppose these late fees as highly punitive and unenforceable. 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; *ESRT 501 Seventh Avenue, LLC v Regine, Ltd.*, 206 AD3d 448, 449 [1st Dept 2022]; *Cleo Realty Associates, L.P. v Papagiannakis*, 151 AD3d 418, 419 [1st Dept 2017]). Therefore, Landlord is entitled not entitled to late fees.

v. Guarantor's Liability

Article 74 of the Lease provides that:

> ""[I]f default shall at any time be made by lessee in the payment of the rent and/or additional rent and the performance of the covenants contained in the within Lease, on the Lessee's part to be paid and performed, that the guarantor will well and truly pay the said rent and/or additional rent, or any arrears thereof, that may remain due unto said Lessor, and also pay all damages that arise in consequence of the non-performance of said covenants…This guaranty and the obligations of the guarantor shall be deemed cancelled and of no force and effect from and after the "Cancellation Date" as hereinafter defined, if, Lessee (i) unconditionally surrenders peaceful possession of the Premises described in this Lease in good order and condition together with any and all fixtures…and (ii) pays all rent and additional rent, and other charges that are due by Tenant under the lease through and including the Cancellation Date prorated for the month in which the Cancellation Date occurs…by certified check payable to the direct order of Landlord. Cancellation of this guaranty shall be fixed and effective as of the date on which shall last occur the events set forth above as (i) and (ii) (herein the "Cancellation Date") and thereafter the guarantor shall no longer be liable for the obligations of the Lease." (NYSCEF Doc. 19).

Landlord has made a prima facie showing that it is entitled to damages from Guarantor for Tenant's defaults and the damages associated with that default. Guarantor's liability was not cut off when Tenant vacated because the express terms of the guaranty were not complied with, namely, Tenant was still in default at the time the premises were vacated, and Guarantor had not paid Landlord for the arrears accrued as contemplated by section (ii) of the Guaranty.

Defendants argue that New York City Admin. Code §22-1005 (the "Guaranty Law") enacted during the Covid-19 pandemic prevents enforcement of the Guaranty against Guarantor. The Guaranty Law prohibits enforcement of individuals who signed guaranties for commercial leases for any defaults that occurred between March 7, 2020 through June 30, 2021 if the tenant

was required to cease serving patrons food or beverage for on-premises consumption. The terms of the Lease explicitly state that tenant operated a restaurant (NYSCEF Doc. 19). Because Tenant operated a restaurant which was prohibited from serving patrons food for on-premises consumption, the Guaranty is unenforceable against Guarantor for defaults that occurred from March 7, 2020 through June 30, 2021.

C. Dismissal of Defendants' Affirmative Defenses and Counterclaims

Landlord moves to dismiss Defendants' affirmative defenses pursuant to CPLR §3211 and Defendants' counterclaims pursuant to CPLR §§3211(a) and 3212. Tenant responds that its affirmative defenses and counterclaims have been sufficiently pleaded.

The standard of review on a motion to dismiss an affirmative defense pursuant to CPLR §3211(b) is whether there is any legal or factual basis for the assertion of the defense; in moving to dismiss an affirmative defense, the movant bears the burden of establishing that the defense is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541 [1st Dept 2011]). The allegations set forth in the Answer must be liberally construed and viewed in the light most favorable to the respondent, who is entitled to the benefit of every reasonable inference (*id.*; *182 Fifth Ave v Design Dev. Concepts*, 300 Ad2d 198, 199 [1st Dept 2002]).

Defendants' first defense and first three affirmative defenses are conclusory and only one sentence long without any supporting exhibits or evidence, therefore they are dismissed. (*170 W. Vill. Assocs. v G&E Realty, Inc.*, 56 AD3d 372, 372-373 [1st Dept 2008] [commercial tenant's challenged affirmative defenses which pleaded conclusions of law without supporting facts were properly stricken as insufficient]).

Defendants' affirmative defense and counterclaim alleging breach of contract are also dismissed. This affirmative defense/counterclaim asserts breach of contract seeking damages

related to the fire and ensuing gas and water outage. However, Defendants agreed under Article 46 of the Lease that Landlord is not liable to Tenant for any loss, damage, or expense Tenant may incur if the quantity of gas or water services were not delivered to the premises "for any reason whatsoever." (NYSCEF Doc. 19). Moreover, pursuant to Article 67, Defendants agreed that Landlord's failure or delay in effectuating repairs from a casualty would not "impose any liability upon Landlord or its agents by reason of inconvenience or annoyance to Tenant or injury to or interruption of Tenant's business, or otherwise." (*Id.*). Therefore, Defendants' affirmative defense and counterclaim must be dismissed. Similarly, Defendants' affirmative defense and counterclaim alleging constructive eviction must be dismissed because it is barred by Article 67 of the Lease.

Defendants' affirmative defenses/counterclaims alleging breach of the implied covenant of good faith and fair dealing and breach of the covenant of quiet enjoyment states that Plaintiff negligently and maliciously failed to maintain pipes in the subject building which deprived Defendants of the right to operate a restaurant. However, Defendants have not offered any further facts which indicate negligent maintenance of pipes nor any evidence of malice. Due to the conclusory nature of this allegation without any necessary supporting facts, this affirmative defense/counterclaim must be dismissed.

Finally, Defendants' affirmative defense arguing COVID-19 made Defendants unable to perform under the lease rendering their performance impractical and impossible must be dismissed. Financial difficulty or economic hardship is not sufficient to invoke the doctrine, and it has been frequently held that COVID-19 does not form a basis for invoking impracticability and impossibility as affirmative defenses (*Pettinelli Elec. Co., Inc. v Bd. Of Ed. Of City of New York (New-PS 43 and IS 44)*, 56 AD2d 520, 521 [1st Dept 1977]; *affd sub nom. Pettinelli Electric Co., Inc. v Bd. Of Educ. Of City of New York*, 43 NY2d 760 [1977]; *Warner v Kaplan*, 71 AD3d 1, 5

[1st Dept 2009] ["where performance is possible, albeit unprofitable, the legal excuse of impossibility is not available"]; *see also Hugo Boss, Retail, Inc. v. A/R Retail, LLC*, 71 Misc3d 1222(A)) [Sup Ct, New York County May 19, 2021]; *1140 Broadway LLC v Bold Food, LLC*, 2020 NY Slip Op. 34017[U], 4 [Sup Ct, New York County 2020]).

D. Attorneys' Fees and Disbursements

Where a lease for real property provides for the payment of legal fees, the prevailing party in litigation is entitled to recover fees and disbursements (*Sykes v RFD Third Avenue*, 227 AD2d 146 [1st Dept 2007]). Both the Lease and the Guaranty contain language making Tenant and Guarantor liable for costs expended in enforcing the terms of the Lease in the event of default (NYSCEF Docs. 19-20). Because Landlord has prevailed on its motion for summary judgment, Landlord is entitled to recoup reasonable attorneys' fees and disbursements.

Accordingly, it is hereby,

ORDERED that Landlord's motion to amend its pleadings to conform to the evidence of damages to the date of this Decision & Order is granted; and it is further

ORDERED that Landlord's motion to dismiss Defendants' affirmative defenses and counterclaims is granted; and it is further

ORDERED that Landlord is entitled to a reasonable amount of legal fees and costs expended in the instant action, and that this issue is referred to a Special Referee to hear and report; and it is further

ORDERED that Landlord is entitled to a money judgment against Tenant and Guarantor jointly and severally for rent arrears, including additional rent in the form of real estate taxes and water charges, from September 2019 to February 2020 in the amount of $14,628.02[1] and for

[1] Landlord showed base rent arrears for September, October, and December of 2019 at $6,410.12 per month, and $804.00 due for January of 2020. The guaranty law prohibits the enforcement of remaining arrears from March 2020

accelerated rent from July 2021 to December 2025 in the amount of $180,992.30[2] bringing the amount of the total money judgment for which Tenant and Guarantor are jointly and severally liable to $195,620.32; and it is further

ORDERED that Landlord is entitled to a money judgment solely against Tenant for rent arrears, including additional rent in the form of real estate taxes and water charges, from March 2020 to January 2021 in the amount of $57.931.31[3] and accelerated rent from February 2021 to June 2021 in the amount of $38,638.85[4] bringing the amount of the total money judgment for which Tenant is solely liable to $96,570.16.

This constitutes the decision and order of the Court.

8/11/2022
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	REFERENCE

to January of 2021 against Guarantor. Therefore, guarantor and tenant are jointly and severally liable for $20,034.36 in base rent. There is only one water charge owed prior to March 2020 in the amount of $1,600.83, and only one Real Estate Tax charge billed in October of 2019 in the amount of $5,993.66, and crediting the $13,000 security deposit applied on January 14, 2021, leading to a total of $14,628.02 (NYSCEF Doc. 32).

[2] A lease with a new tenant began December 1, 2021. Pursuant to the Guaranty Law, Guarantor became liable for accelerated rent in July of 2021 at the rate of $7,727.77 per month, totaling $46,366.62 from July to December 2021, mitigated by Landlord's new tenant paying $5,500 for the month of December for a total of $40,866.64 for the 2021. Because the Guaranty Law is not in effect after July of 2021, the Court relies on the remaining adjusted accelerated damages totals found in the Bishay Affidavit (NYSCEF Documents 37-38).

[3] Landlord showed Tenant was short on base rent in the amount of $2,040.84 for the months of March and May 2020, $1,020.42 in August of 2020, $7,430.54 for April, July, and September through December of 2020, and $7,27.77 for January of 2021 (NYSCEF Doc. 32).

[4] The base rent owed from February through June of 2021 was $7,727.77 per month, and there was no new tenant paying rent at this time to offset any deficiency.