SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

----------X

MOON 170 MERCER, INC.,

Plaintiff,

- v -

ZACHARY VELLA,

Defendant.

----------X

INDEX NO.	155605/2012
MOTION DATE	
MOTION SEQ. NO.	010 and 011

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

The Court heard extended oral argument on December 8, 2022 via Microsoft Teams on the parties' competing post-Note of Issue motions for summary judgment. In motion sequence 010, plaintiff Moon 170 Mercer, Inc., as Landlord ("the Landlord"), seeks the entry of a judgment against the defendant Zachary Vella, the Guarantor under a lease ("the Guarantor"), in the amount of $800,282.00 for the period from January 1, 2016 through August 1, 2022, plus interest thereafter. In motion sequence 011, the Guarantor seeks an order dismissing the claims against him and awarding him restitution in the sum of $1,002,801.83, which represents sums he allegedly paid after the purported wrongful eviction of the Tenant Mephisto Management LLC ("the Tenant or Mephisto"). In accordance with the December 8, 2022 transcript of proceedings, both motions are denied based on triable issues of fact.

The parties here have been litigating this action for ten years and have taken four trips to the Appellate Division, First Department. In the most recent decision dated February 19, 2019 (NYSCEF Doc. No. 299), the Appellate Division reversed this Court's decision denying the Guarantor's motion to vacate the judgment that had been entered against him. In that decision, the Appellate Division held that, in light of that court's reinstatement of the Tenant's wrongful

eviction claim in a related case between Mephisto and the Landlord, this Court "should have allowed the guarantor to avail himself of a defense based on an alleged failure of consideration. New York law specifically preserves failure of consideration as a defense available to a guarantor, even under an unconditional guaranty." The Appellate Division added that "the guarantor was not collaterally estopped from raising the defense because he had not had a full and fair opportunity to have the issue litigated and determined." An earlier decision of the Appellate Division dated January 12, 2017, stated that:

> Defendant's argument that the tenant was unlawfully evicted, and that therefore he is liable only for rent accrued until the tenant's eviction, is barred by the doctrine of collateral estoppel. The claim of unlawful eviction was dismissed on the merits in a separate action between the tenant and plaintiff, and a motion to renew and reargue was denied based on the same purportedly new evidence defendant cites here. Since the unlawful eviction issue was raised in the prior action and decided against the tenant, with whom defendant, as a guarantor of the lease, stands in privity, defendant is precluded from relitigating it in this action.

146 AD3d 537, 537-38. Subsequent to that decision, the judgment in the *Mephisto* action was vacated, but, thereafter in September 2018, Mephisto entered into a settlement agreement which was not part of the record presented in connection with the most recent Appellate Division decision that provided that the tenant was discontinuing its claim for wrongful eviction (NYSCEF Doc. No. 377).

In all events, the Appellate Division remanded the case to this Court for further proceedings, stating that: 'The guarantor should be afforded the opportunity to present evidence before the IAS court to determine 1) whether the facts and circumstances from which the alleged wrongful eviction arose prevented him from exercising his rights under the guaranty, and 2) the extent to which those facts and circumstances bear on the amounts due post-eviction under the guaranty."

Citing various documents and deposition testimony, the Landlord argues that the Guarantor can neither prove a wrongful eviction, nor that he was prevented from exercising his rights under the guaranty. But the Guarantor has countered with evidence to the contrary, suggesting that the eviction was arguably wrongful, which would have suspended the Guarantor's obligation to pay rent because a wrongful eviction constitutes a failure of consideration under the prevailing case law. Specifically, the Guarantor argues that the issuance of the Warrant of Eviction in February 2011 annulled the landlord-tenant relationship under RPAPL § 749(3) and that the Landlord's execution of the Warrant two years later without notice was a wrongful eviction. The Guarantor points to evidence after issuance of the Warrant such as rent invoices sent by the Landlord to the Tenant, the Landlord's alleged acceptance of more than $250,000 in rent payments, and the Landlord's commencement of various proceedings in which the Landlord purportedly stated that the Lease was still in effect. Ultimately, in February 2013 with no prior notice, the Landlord executed the Warrant, which the Guarantor asserts was stale and null and void based on the Landlord's prior conduct. The Guarantor argues that, had the Landlord given notice before executing the Warrant in 2013, the Tenant could have given notice to vacate which would have limited the Guarantor's liability to rent then due in the amount of $175,716.79, as opposed to the approximately $800,000.00 the Landlord claims today.

However the Landlord cites alleged stipulations entered into in Civil Court proceedings that directly addressed the status of the Warrant and the Tenant's acquiescence in the Landlord's handling of the Warrant, that raise an issue of fact as to whether the tenancy was reinstated. And as the Guarantor himself acknowledges on reply, when courts decide whether a landlord-tenant relationship is revived after the issuance of a warrant of eviction, the controlling factor is the intent of the landlord. Therefore, this Court cannot determine as a matter of law on the papers

presented whether either party is entitled to judgment. Even if liability could be granted as to one party or the other, neither party has definitively demonstrated a specific amount of damages upon which the Court could enter a money judgment.

The fact pattern in this case is clouded by the passage of more than a decade of proceedings that were not unraveled in the papers submitted in connection with the motions for summary judgment. And, to the extent the Guarantor claims he was prevented from taking steps to exercise his rights under the guaranty, his deposition testimony that he has "no idea" of what steps he could have taken to exercise his rights under the guaranty, certainly precludes granting him judgment as a matter of law.

Therefore, both motions for summary judgment are denied, and the parties shall proceed with the bench trial on June 14, 2023, as previously scheduled. The parties shall make diligent efforts to resolve the case. The enormity of the party and judicial resources expended on this case requires the parties to be proactive in seeking a consensual resolution of this 2012 case.

A pretrial conference is scheduled in early for March 2, 2023 at 12:00 p.m. at which time the Court will discuss trial procedures.

Dated: December 8, 2022

BARRY R. OSTRAGER, J.S.C.

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