

**558 Seventh Ave. Corp. v E&B Barbers, Inc.**

2023 NY Slip Op 30854(U)

March 16, 2023

Supreme Court, New York County

Docket Number: Index No. 155764/2021

Judge: Mary V. Rosado

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

-----X  
558 SEVENTH AVE. CORP.,  
Plaintiff,  
- v -  
E&B BARBERS, INC., EMONIEL MULOKANDOV  
Defendant.

INDEX NO. 155764/2021  
MOTION DATE 04/04/2022  
MOTION SEQ. NO. 002

**INTERIM DECISION + ORDER  
ON MOTION**

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70  
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, and after oral argument, which took place on January 10, 2023, where Joshua Nadelbach, Esq. appeared for the Plaintiff 558 Seventh Ave. Corp. (“Landlord”) and Diana Rubin, Esq. appeared for Defendants E & B Barbers, Inc. (“Tenant”) and Emoniel Mulokandov (“Guarantor”) (collectively “Defendants”), Plaintiff’s motion and Defendants’ cross-motion are decided as follows:

The branches of Landlord’s motion seeking to amend the pleadings to conform to the evidence pursuant to CPLR § 3025(c) and dismissing Defendants’ affirmative defenses pursuant to CPLR § 3211(a) are granted. The branch of Landlord’s motion seeking summary judgment, pursuant to CPLR § 3212 is denied without prejudice against Tenant, and upon review of the record, summary judgment dismissing the Complaint is granted to Guarantor pursuant to CPLR § 3212(b).

The branch of Defendants’ cross-motion seeking leave to amend the Answer to add an affirmative defense alleging constructive eviction is denied, and the branch seeking leave to amend

Defendants' answer to add the Guaranty Law as an affirmative defense is granted. The branch of Defendants' cross-motion seeking renewal of its pre-answer motion to dismiss pursuant to CPLR § 2221 is moot.

### **I. Factual and Procedural Background**

Landlord is the deed owner of the building located at 200 West 40<sup>th</sup> Street a/k/a 558 7<sup>th</sup> Avenue in New York, New York (the "Building") (*id.* at ¶ 2). Pursuant to a written lease agreement dated December 30, 2016 (the "Lease"), Tenant leased the lower-level retail space of the Building (the "Premises") from Landlord (NYSCEF Doc. 39). It is undisputed that to enter the Premises, individuals need to go through a lower-level corridor that leads to the subway. In Article 66 of the Lease Rider, Tenant agreed to take the premises "as is" and that Landlord was under no obligation to perform any work in the Premises for Tenant's continued occupancy (*id.* at § 66). However, in the same paragraph, Landlord did agree that it "shall maintain the lower-level corridor at the building and install new lighting therein as soon as reasonably practical" (*id.*).

The lease term commenced on January 1, 2017 and was to end on December 31, 2021 (*id.*). The Lease was guaranteed by a written guaranty executed by Guarantor wherein Guarantor personally obligated himself to pay for Tenant's lease obligations (NYSCEF Doc. 40).

Tenant defaulted on the Lease in March 2020 (NYSCEF Doc. 35 at ¶ 14). In October of 2020, Landlord and Tenant agreed to an amendment of the Lease (the "Lease Amendment") (NYSCEF Doc. 41). The Lease Amendment extended the Lease term to December 31, 2026 (*id.*). In the Lease Amendment, the Tenant and Landlord agreed there was unpaid rent from April 1, 2020 through October 30, 2020 equaling \$35,712.53, not including any late fees (*id.* at ¶ 5). However, paragraph 5 of the Lease Amendment forgave Tenant's default and explicitly extended Tenant's time to cure its prior defaults so long as it remained timely in its rent payments. Tenant

purportedly made the first few initial payments under the Lease Amendment but defaulted again in January of 2021 (NYSCEF Doc. 35 at ¶ 16). Tenant then, without Landlord's permission, unilaterally abandoned the premises in breach of the Lease on May 28, 2021 (*id.*).

Landlord initiated this action via summons and complaint on June 16, 2021 (NYSCEF Doc. 1). On August 27, 2021, Defendants responded with a pre-answer motion to dismiss (NYSCEF Doc. 5). Defendants argued that the causes of action against Tenant should be dismissed because Tenant was constructively evicted by the Landlord (NYSCEF Doc. 6). Defendants argued that the causes of the action against the Guarantor should be dismissed because they are barred by the Guaranty Law (*id.*).

As to their constructive eviction argument, Defendants claimed that the entrance and lower-level corridor leading to the Premises became overrun with drug addicts and aggressive individuals who threatened Tenant's employees and customers with violence (NYSCEF Doc. 7 at ¶¶ 11-12). Defendants asserted that individuals would "barge into the Premises" to use the restroom, "stay there for a long time" and scare Tenant's clients "by their looks, aggressive behavior and a strong stench they emanated" (*id.* at ¶ 17). Defendants claimed the lower-level corridor "was filled with used syringes, needles, human feces, and an awful stench of urine" (*id.* at ¶ 19). Defendants argued that Landlord failed to alleviate these problems (*id.* at ¶ 14). Thus, Defendants assert they were forced to abandon the premises in May of 2021 (*id.* at ¶ 24).

As to their Guaranty Law argument, Defendants claimed they were forced to shut down their business in March of 2020 pursuant to Executive Order 202.3 (*id.* at ¶ 6). Defendants also argues that while they eventually re-opened, it was at a limited capacity per government regulations (*id.* at ¶ 6).

Defendants' motion to dismiss was denied by Hon. Alexander Tisch by order dated February 1, 2022 (NYSCEF Doc. 29). Defendants then filed their Answer on February 15, 2022 (NYSCEF Doc. 31). Shortly thereafter, on March 28, 2022, Landlord made the instant motion for summary judgment (NYSCEF Doc. 32). This case was then transferred to this part.

In this motion, Landlord first seeks to amend its Complaint to conform to the evidence pursuant to CPLR § 3025(c) (NYSCEF Doc 45). Landlord then argues it is entitled to summary judgment against Tenant as it is undisputed that Tenant has defaulted in paying rent and impermissibly unilaterally abandoned the Premises. Landlord seeks summary judgment against Guarantor by arguing that Defendants have not asserted the Guaranty Law as an affirmative defense. Landlord argues that the affirmative defenses that are pleaded are all boilerplate and conclusory and should therefore be dismissed. Finally, Landlord seeks attorneys' fees against both Defendants.

In opposition, Defendants cross-move for renewal of their prior motion to dismiss (NYSCEF Docs. 47-48). Defendants also seek leave to amend their Answer to assert as affirmative defenses the Guaranty Law and constructive eviction. Defendants argue summary judgment is inappropriate because of the application of the Guaranty Law and because Tenant was constructively evicted.

In reply, Landlord argues Defendants failed to proffer any admissible evidentiary proof in opposition to Landlord's motion for summary judgment (NYSCEF Doc. 64). Landlord further argues that Defendants have failed to dispute any amounts due and failed to submit a counter statement of facts. Landlord also asserts that because Defendants have not opposed Landlord's motion seeking to dismiss Defendants' twenty-five (25) pled affirmative defenses, those

affirmative defenses should be considered abandoned. Landlord argues that renewal of the prior motion to dismiss is inappropriate.

Landlord opposes Defendants' cross-motion to amend their Answer, arguing that the new affirmative defenses in the proposed amended answer are patently devoid of merit and are conclusory. Landlord argues that Tenant waived a constructive eviction defense pursuant to paragraph 9(f) of the Lease, and in any event, the Landlord has no control over the congregation of drug addicts in the lower-level corridor near the entrance of the Premises, and therefore constructive eviction is inapplicable. Landlord argues that the Guaranty Law does not bar all claims against Guarantor because Landlord seeks to recover rents owed after the Guaranty Law's protection lapsed and was not intended to protect guarantors of leases where a tenant unilaterally abandons the Premises and skirts all its contractual obligations.

In further support of their cross-motion, Defendants argue that they have submitted admissible evidence by including the prior affidavits included on their motion to dismiss in opposition to Landlord's motion and in support of Defendants' cross-motion (NYSCEF Doc. 65). Defendants also argue that they should be entitled to assert the Guaranty Law and constructive eviction as affirmative defenses since they already asserted them as a basis for their pre-answer motion to dismiss. Finally, Defendants argue that recent First Department case law supports their position that the Guaranty Law warrants dismissal of the Complaint against Guarantor.

## **II. Discussion**

### **A. Landlord's Motion to Amend Pursuant to CPLR § 3025(c)**

The Court will first address the portion of Landlord's motion which seeks to amend its Complaint to conform to the evidence. Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinsky*

*v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit (*Greenburgh Eleven Union Free School Dist. V National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]). Delay alone is not sufficient to deny leave to amend (*Johnson v Montefiore Medical Center*, 203 AD3d 462 [1st Dept 2022]).

As Landlord simply seeks leave to amend to further allege its damages, the Court grants this branch of Landlord's motion. There is little to no delay and the proposed amendment is based on the operation of the Lease and Guaranty which Defendants are parties to, and Defendants cannot claim surprise or prejudice, especially where Landlord put Defendants on notice in paragraphs 48 and 54 of the Complaint that its damages would increase as litigation progressed.

**B. Landlord's motion seeking dismissal of Defendants' Affirmative Defenses**

Landlord seeks dismissal of Defendants' twenty-five (25) affirmative defenses, arguing they are all boilerplate and conclusory. A review of Defendants' affirmative defenses shows they are all merely one sentence long and consist of bare legal conclusions. Dismissal of these affirmative defenses is therefore appropriate (*Bankers Trust Co. v Fassler*, 49 AD2d 855[1st Dept 1975]; *366 Audubon Holding, LLC v Morel*, 22 Misc.3d 1108[A] [Sup. Ct., NY County 2008]). Moreover, Defendants have not addressed Landlord's motion seeking dismissal of their affirmative defenses, and therefore they can be considered abandoned (*Joon Song v MHM Sponsors Co.*, 176 AD3d 572 [1st Dept 2019]; *Wing Hon Precision Indus. Ltd. v Diamond Quasar Jewelry, Inc.*, 154 AD3d 550, 551 [1st Dept 2017]).

### C. Defendants' Cross-Motion Seeking Leave to Amend Their Answer

The Court next addresses Defendants' cross-motion seeking leave to amend their Answer to plead the Guaranty Law and constructive eviction as affirmative defenses, as these affirmative defenses may be dispositive of Landlord's motion for summary judgment. The portion of Defendant's cross-motion which seeks leave to amend their Answer to include constructive eviction as an affirmative defense is denied, but the portion of Defendants' cross-motion which seeks to amend their Answer to assert the Guaranty Law as an affirmative defense is granted.

While motions for leave to amend are to be liberally granted, a Court still should examine the sufficiency of the merits of a proposed amendment when considering whether to grant leave to amend (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]). Landlord is correct that the proposed constructive eviction defense is patently devoid of merit. An amendment is devoid of merit where allegations are legally insufficient (*Reyes v BSP Realty Corp.*, 171 AD3d 504 [1st Dept 2019] citing *Mosaic Caribe, Ltd. V AllSettled Group, Inc.*, 117 AD3d 421, 422 [1st Dept 2014]). Moreover, Tenant waived constructive eviction as a defense in paragraph 9(f) of the Lease, which provides "Tenant hereby waives the provisions of Section 227 of the Real Property Law ("RPL") and agrees that the provisions of this article shall govern and control in lieu thereof." (See NYSCEF Doc. 39).

Pursuant to RPL § 227:

"[w]here any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises....and he or she is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender."

Where a tenant in a commercial lease agrees to waive the protections of RPL § 227, that tenant will be bound by the terms of its lease and cannot be relieved of its obligation (*Dance Magic, Inc. v Pike Realty, Inc.*, 85 AD3d 1083 [2d Dept 2011]; *Hudson Towers Housing Co., Inc. v Vip Yacht Cruises, Inc.*, 63 AD3d 413 [1st Dept 2009] [holding that where commercial tenant waived RPL § 227 in lease, commercial tenant could not claim constructive eviction arising from September 11, 2001 terrorist attack]; *Schwartz, Karlan & Gutstein v 271 Venture*, 172 AD2d 226, 227-228 [1st Dept 1991]).

As there are plain, unambiguous, and clear provisions in the Lease which waive Defendants' proposed constructive eviction affirmative defense, the Court must enforce the Lease and Lease Amendment and deny Defendant leave to plead constructive eviction (*George Beck Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]; *Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020]). This is especially true where a commercial tenant expressly waived the protection of RPL § 227 in its lease. For the aforementioned reasons, Defendants' motion seeking leave to plead constructive eviction is denied.

However, Defendants are granted leave to assert the Guaranty Law as an affirmative defense. The Guaranty Law prohibits the enforcement of personal guaranties of commercial leases if a commercial tenant was required to cease operation under executive order 202.3, was a non-essential retail establishment subject to in-person limitations under the guidance issued pursuant to executive order 202.6, or was required to close to members of the public under executive order 202.7. Further, the Guaranty Law requires the default causing the guarantor to become liable to have occurred between March 7, 2020 and June 30, 2021. The Landlord concedes that the Defendants may satisfy the requirements of the Guaranty Law. Therefore, the Guaranty Law as an affirmative defense is not patently devoid of merit. Moreover, Landlord cannot claim to be

prejudiced or surprised by the Guaranty Law defense, as it formed the basis of Defendants' prior motion to dismiss. Finally, there has hardly been any delay in seeking leave to assert this affirmative defense, as it was made a mere few months after Defendants served their Answer. Therefore, Defendants are granted leave to amend their Answer to plead the Guaranty Law as an affirmative Defense.

#### **D. Landlord's Motion for Summary Judgment**

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). 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 [1<sup>st</sup> 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]). Pursuant to CPLR § 3212(b) "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion" (*Dunham v Hilco Const. Co., Inc.*, 89 NY2d 425 [1996]).

To show prima facie entitlement to summary judgment on a breach of contract claim, 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]). "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, 592-93 [1st Dept 2022], quoting *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

Landlord has not met its prima facie burden. The existence of the Lease and Lease Amendment are not in dispute. However, there are currently material issues of fact as to Landlord's performance under the terms of the Lease. Landlord agreed to maintain the lower-level corridor (*see* NYSCEF Doc. 39 at § 66). Moreover, Landlord agreed that so long as Tenant performed all the terms, covenants, and conditions of the Lease, it "may peaceably and quietly enjoy the premises hereby demised" (*id.* at § 23). It is undisputed that Tenant's defaults by failure to pay rent under the Lease were conditionally waived in October of 2020 via execution of the Lease Amendment (NYSCEF Doc. 41). Further, pursuant to the affidavit of Mr. Schmookler, the conditional waiver in the Lease Amendment remained in force until January 2021, when Tenant again allegedly failed to pay rent (NYSCEF Doc. 35 at ¶ 16). Therefore, as Tenant was not in default from October 2020 through January 2021 by operation of the Lease Amendment, it was entitled to quiet enjoyment of the premises pursuant to § 23 of the Lease. Moreover, pursuant to § 66 of the Lease, Landlord expressly agreed to maintain the lower corridor.

Affidavits from multiple individuals, including the Guarantor and his employees indicate that the lower corridor was so unsafe and in such an unsanitary condition that employees and clients were unable to safely enter and exit the Premises (NYSCEF Docs. 9 and 60). The affidavits swear that the unsafe and unsanitary conditions existed beginning in July 2020 and up until May 2021 when Tenant vacated (*id.*). Further, the affidavits swear that the right to quiet enjoyment was

violated as aggressive individuals under the influence of drugs would barge into the premises and occupy it, forcing Tenant's employees to physically remove these individuals from the premises (*id.*).

Therefore, there are triable issues of fact as to whether Landlord failed to perform under the terms of the Lease due to the presence of unsanitary and unsafe conditions in the lower corridor, which led to multiple physical intrusions into the Premises, and disrupted the Tenant's right to quiet enjoyment (*see Hudson Towers Housing Co., Inc. v Vip Yacht Cruises, Inc.*, 63 AD3d 413 [1st Dept 2009] ["genuine issues of material fact existed as to impact of terrorist attack on tenant's ability to re-enter and use leased premises, precluding summary judgment in landlord's action for unpaid rent"]; *Incredible Christmas Store-New York, Inc. v RCPI Trust*, 307 AD2d 816 [1st Dept 2003] [Genuine issues of material fact existed as to whether parties held in public concourse in front of tenant's store substantially and materially deprived tenant of the beneficial use and enjoyment of its store and whether landlord used reasonable efforts to ameliorate the impact of the parties on tenant's business]).

This motion for summary judgment was made a little over one month after Defendants filed their Answer (*see* NYSCEF Docs. 31-32). While Tenant does represent in the Lease Amendment that Landlord was not in default of its obligations as of October 2020, this does not eliminate the possibility that the right to quiet enjoyment or promise to maintain the lower-level corridor was breached by Landlord sometime between October 2020 and January 2021. There has been no discovery related to the course of performance in maintaining the lower corridor, and Defendants hotly contest whether Landlord met its obligations in maintaining the lower corridor which inhibited Tenant's right to quiet enjoyment of the Premises. Therefore, based on the record before the Court, summary judgment is premature, and this denial is without prejudice.

Similarly, the Court cannot grant summary judgment against Guarantor. Although there exists an unconditional and absolute guaranty as well as an underlying debt, Landlord has not established that Guarantor failed to perform under the Guaranty. It is undisputed that the Tenant's defaults occurred within the proscribed time of the Guaranty Law, that the Tenant, a barber shop, had to close due to Governor Cuomo's executive orders. Therefore, Landlord has failed to establish that the Guaranty Law does not bar enforcement of the Guaranty (*274 Madison Company, LLC v Vieira*, 205 AD3d 403 [1st Dept 2022]; *3rd & 60<sup>th</sup> Assoc. Sub LLC v Third Ave. M & I, LLC*, 199 AD3d 601, 602 [1st Dept 2021]).

Although Landlord argues it should be entitled to rents due and owing after the expiration of the Guaranty Law, this argument ignores the operation of the liquidated damages clause contained in the Lease, which Landlord argues entitles it to base rent from June 2021 through December 31, 2026 (*see* NYSCEF Docs. 35 at ¶ 44 and Doc. 39 at ¶ 18). According to Landlord, the liquidated damages became due upon Tenant unilaterally vacating the premises prior to the Lease's expiration on or about May 28, 2021 (*see* NYSCEF Doc. 35 at ¶¶ 35-37).

Therefore, the liquidated damages became due during the statutorily protected period of the Guaranty Law. Landlord cannot argue that the liquidated damages clause, which went into effect by operation of Tenant's default, entitles them to accelerated base rent for the remainder of the lease term (which would bar imputing this debt to Guarantor), but simultaneously argue that it can collect this debt from the Guarantor because the base rent sought is outside the period protected by the Guaranty Law. Nor can the Court read into the Guaranty Law Landlord's argument that the protections of the Guaranty Law are only meant for businesses that reopened and did not abandon their premises, as this reading contravenes precedent (*see 274 Madison Company, LLC v Vieira*, 205 AD3d 403, 404-405 [1st Dept 2022]) ["Because the tenant was required to cease operations

under Executive Order 202.6, and because defendant became liable for tenant's accelerated rent during the statutory period, defendant is protected by Administrative Code § 22-1005").

Therefore, summary judgment against Guarantor is denied, and summary judgment dismissing the Complaint against Guarantor is granted pursuant to CPLR § 3212(b). The papers presented on this motion for summary judgment, the undisputed facts, as well as a plethora of binding and persuasive precedent, requires dismissal of the Complaint as to Guarantor (*see* 274 *Madison Company, LLC v Vieira*, 205 AD3d 403, 404-05 [1st Dept 2022]; *3rd & 60<sup>th</sup> Assoc. Sub LLC v Third Ave. M & I, LLC*, 199 AD3d 601, 602 [1st Dept 2021]; *Tamar Equities Corp. v Signature Barbershop 33 Inc.*, 2023 WL 2213724 at \*1 [Sup. Ct. NY County 2023] [dismissing Complaint to enforce guaranty against guarantor of barbershop pursuant to the protections of the Guaranty Law]; *111 Fulton Street Investors, LLC v Fulton Quality Foods LLC*, 2022 N.Y. Slip Op. 34226[U] at \*\* 3-4 [Sup. Ct. NY County 2022]). Indeed, based on the motion papers, it is undisputed that (a) Tenant operated a barbershop which was a non-essential business forced to close due to Governor Cuomo's pandemic-related executive orders; (b) Tenant became liable for the rent arrears sought during the time covered by the Guaranty Law; and (c) Tenant's commercial lease was guaranteed by Guarantor, a natural person. As a matter of law, the Guaranty Law bars enforcement of the Guaranty for the Tenant's arrears sought by Landlord. Guarantor is granted summary judgment dismissing the Complaint against him.

#### **E. Defendants' Motion to Renew/Reargue**

Finally, the Defendants' cross-motion to renew their prior motion to dismiss pursuant to CPLR § 2221 is now moot.<sup>1</sup> Defendants seek leave to renew their motion to dismiss on the grounds of constructive eviction and the guaranty law. In the interests of judicial economy, and in

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<sup>1</sup> Pursuant to CPLR § 2221, the motion to renew/reargue should have been made on notice to Hon. Alexander Tisch, who decided the underlying motion to dismiss, but it becomes academic as this decision resolves that motion.

determining the issues presented in the motion and cross-motion, the Court has already resolved the issues which would be presented on a motion to renew. Defendants' prior motion to dismiss was based on two grounds: constructive eviction and the Guaranty Law (*see* NYSCEF Doc. 6). In determining Defendants' cross-motion seeking leave to amend their Answer, the Court has already found that the constructive eviction defense is waived pursuant to the express terms of the Lease. On Landlord's motion for summary judgment, the Court found that the Complaint should be dismissed against Guarantor pursuant to the Guaranty Law. As such, the issues to be determined on the renewed motion to dismiss are now moot.

Accordingly, it is hereby,

ORDERED that Plaintiff 558 Seventh Ave. Corp.'s motion seeking leave to amend its Complaint to conform to the evidence adduced on the instant motion for summary judgment is granted; and it is further

ORDERED that Plaintiff 558 Seventh Ave. Corp.'s motion to strike Defendants' twenty-five affirmative defenses is granted, and those affirmative defenses are stricken from Defendants E & B Barbers, Inc. and Emoniel Mulokandov's Answer; and it is further

ORDERED that Defendants E & B Barbers, Inc. and Emoniel Mulokandov's motion for leave to amend its Answer is granted, in part, as follows: leave is granted to amend their Answer to plead the Guaranty Law as an affirmative defense, and to this extent the proposed amended Answer in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed constructive eviction affirmative defense, and that affirmative defense is stricken; and it is further

ORDERED that Plaintiff 558 Seventh Ave. Corp.'s motion for summary judgment is denied against Defendant E & B Barbers, Inc., without prejudice; and it is further

ORDERED that upon review of the record and pursuant to CPLR § 3212(b), Guarantor is granted summary judgment pursuant to the Guaranty Law, and Landlord's causes of action against Guarantor are dismissed; and it is further

ORDERED that Defendants E & B Barbers, Inc. and Emoniel Mulokandov's cross-motion for renewal of their prior motion to dismiss on the grounds of constructive eviction and the Guaranty Law is dismissed as moot; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff 558 Seventh Ave. Corp. shall serve a copy of this Decision and Order, with notice of entry, on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the interim Decision and Order of the Court.

3/16/2023  
DATE

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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE