SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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18 EAST 41ST STREET PARTNERS LLC

Plaintiff,

- v -

ITAY GAMLIELI,

Defendant.

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INDEX NO. 153624/2021

MOTION DATE 01/17/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, Plaintiff 18 East 41st Street Partners LLC's ("Landlord") motion for summary judgment is granted in part and otherwise denied without prejudice.

I. Background

Landlord owns the building located at 18 East 41st Street New York, New York 10017 (the "Building") (NYSCEF Doc. 1 at ¶ 1). Non-party Gamlieli Zweig, Inc. ("Tenant") leased the tenth floor of the Building (the "Premises") pursuant to a written lease (the "Lease") dated December 15, 2016 (*id.* at ¶ 5). Defendant Itay Gamlieli ("Guarantor") executed a written guaranty of the Lease on December 12, 2016 (*id.* at ¶ 6). Landlord alleges that Tenant defaulted and owes arrears, and therefore Guarantor is liable to Landlord for the Tenant's arrears.

Landlord initiated this action via summons and Complaint on April 15, 2021 (*id.*). On May 21, 2021, Guarantor filed a pre-answer motion to dismiss (NYSCEF Doc. 3). Guarantor claimed the Complaint should be dismissed pursuant to New York City Admin Code § 22-1005 (the "Guaranty Law") (NYSCEF Doc. 4). Guarantor also argued that the Complaint should be dismissed pursuant to the doctrine of impossibility (*id.*). On July 15, 2022, Justice Tisch issued

Decision and Order denying Guarantor's motion to dismiss (NYSCEF Doc. 28). Thereafter, Guarantor filed his Answer with affirmative defenses on August 15, 2022 (NYSCEF Doc. 31).

On December 22, 2022, Landlord filed the instant motion for summary judgment (NYSCEF Doc. 32). Landlord argues that summary judgment is appropriate because it is undisputed that there is an enforceable and absolute guaranty as well as an underlying debt (NYSCEF Doc. 33). Landlord also argues that Guarantor's affirmative defenses should be dismissed because they are boilerplate and conclusory (*id.*).

In support of its motion, Landlord provided the affidavit of Mark Torre ("Torre"), who is the Landlord's managing agent (NYSCEF Doc. 35). Torre provided sworn testimony regarding the terms of the Lease, the Guaranty, and the amount owed by Guarantor as a result of Tenant's defaults (*id.*). According to Torre, Tenant defaulted on the Lease by failing to pay rent on March 1, 2020 (*id.* at ¶ 8). Torre testified that Tenant sent an email giving notice of its intention to vacate on June 7, 2021 (*id.* at ¶ 9). Torre alleges that Guarantor's liability continued for another 90 days until September 7, 2021 (*id.*). Tenant vacated the premises on June 18, 2021 (*id.* at ¶ 10). Torre alleges that while Tenant was provided a rent credit under Paragraph 2(D) of the Lease, Tenant's default forfeited the credit and entitled Landlord to reimbursement of the credit (*id.* at ¶ 11). Torre provided a "calculation" which he says reflects the amount of arrears owed (*id.* at ¶ 14). Torre claims that the $76,266.67 paid as a security deposit has already been applied to the arrears (*id.*). Torre alleges that Guarantor has not honored its obligations in paying for Tenant's defaults (*id.* at ¶ 15).

Guarantor submitted opposition on January 16, 2023 (NYSCEF Doc. 42). Guarantor claims there was a verbal agreement between the parties that if Tenant provided significant improvements to the Premises, Tenant would be provided significant rebates (*id.* at ¶ 5). Guarantor claims that

he, acting on behalf of Tenant, spent over $400,000.00 in remodeling the Premises (*id.* at ¶ 8). Guarantor claims it would be unjust to hold him accountable for $290,000.00 in forfeited rent credits in lieu of the fact he spent $400,000.00 in improvements to the Premises (*id.* at ¶ 13).

Guarantor also alleges that Landlord has not submitted sufficient documentary proof of the arrears which are due and owing (*id.* at ¶ 14). Guarantor further alleges that Torre has failed to provide an adequate foundation to make the "Calculation" spreadsheet admissible for purposes of this summary judgment motion (*id.* at ¶ 17-18). Guarantor also claims the alleged oral promise creates a genuine issue of fact which warrants denying the instant motion.

Landlord filed its reply on January 18, 2023 (NYSCEF Doc. 46). Landlord argues that Guarantor has not rebutted Landlord's prima facie showing of entitlement to summary judgment. Landlord also argues that Guarantor waived any defenses in the Guaranty. Finally, Landlord asserts that the spreadsheet containing unpaid rent is admissible and sufficient to award summary judgment.

II. Discussion.

A. 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 [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]).

"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]).

The existence of the absolute and unconditional guaranty is not seriously in dispute (NYSCEF Doc. 37). However, the Court agrees with Guarantor that summary judgment must be denied due to procedural errors in Torre's affidavit. Torre's affidavit purports to admit an exhibit it titles as "Calculation" (NYSCEF Doc. 35). Torre's affidavit is insufficient to authenticate the "Calculation" it seeks to admit in support of Landlord's motion (*Oldham v City of New York*, 155 AD3d 477, 478 [1st Dept 2017]).

Pursuant to CPLR § 4518(a), a document may be considered a business record and therefore exempt from the rule against hearsay if there is testimony which shows it was made in the regular course of any business at the time of the act, transaction, occurrence or event. However, as Guarantor points out, the Torre affidavit does not provide any of this necessary information to authenticate Exhibit 4 as a reliable business record (*see* NYSCEF Doc. 35). Torre's reply affidavit likewise does nothing to remedy the reliability issue with the "Calculation" that is submitted as evidence of the underlying debt (*see generally* NYSCEF Doc. 47). While the reply affidavit might address Torre's personal knowledge of the facts of this case, it fails to properly authenticate the "Calculation" as a business record pursuant to CPLR § 4518(a). This failure is fatal to Landlord's

evidentiary burden on a motion for summary judgment (*see Muslar v Hall*, 185 NYS3d 45, 49-50 [1st Dept 2023] [finding denial of summary judgment appropriate where affidavits failed to lay proper foundation for certain records, making the documents inadmissible]; *US Bank N.A. v 532 W. 187 Realty LLC*, 211 AD3d 596 [1st Dept 2022]; see *also O'Connor v Restani Const. Corp.*, 137 AD3d 672, 673 [summary judgment properly denied where affidavit failed to lay sufficient foundation as to whether document was a business record]).

As Landlord has not met its evidentiary burden in proving, through admissible evidence, the existence of an underlying debt, the motion for summary judgment is denied. Since this denial is based on a procedural technicality, the denial is without prejudice.

B. Dismissal of Affirmative Defenses

Landlord also moves to dismiss Guarantor's affirmative defenses pursuant to CPLR §3211(b). The standard of review on a motion to dismiss pursuant to CPLR § 3211(b) is similar to that used under CPLR §3211(a)(7) (*87th Street Realty v Mulholland*, 62 Misc3d 213, 215 [Civ Ct, New York City 2018]). The movant bears the burden of establishing the defense or counterclaim is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). This burden is a heavy one (*Alpha Capital Anstalt v General Biotechnology* Corporation, 191 AD3d 515 [1st Dept 2021]). The allegations in the answer must be liberally construed and viewed in the light most favorable to the non-movant (*182 Fifth Ave v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]). It is inappropriate to dismiss a defense where there remain questions of fact requiring trial (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD2d 479, 481 [1st Dept 2015]). However, conclusory and boilerplate affirmative defenses should be dismissed (*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]).

Guarantor's first affirmative defense, which is a mere sentence long, states that Landlord's Complaint should be dismissed for failure to state a claim. This affirmative defense is meritless as Landlord has clearly stated a claim by laying out the alleged provisions of the Lease and Guaranty which have been breached (NYSCEF Doc. 1). It can also be deemed abandoned, as Guarantor failed to proffer any opposition to Landlord's motion to dismiss this affirmative defense. This affirmative defense is dismissed. Guarantor's second affirmative defense asserts breach of the duty to act in good faith and fair dealing. However, this affirmative defense is a mere sentence long and does not provide any facts as to how Landlord breached the duty to act in good faith and fair dealing. Moreover, Guarantor has not provided any opposition to Landlord's motion to dismiss this affirmative defense. Dismissal of this boilerplate, conclusory, and abandoned affirmative defense 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]).

Guarantor's third affirmative defense alleges that Landlord breached the terms of the contract and voided any rights Landlord has under the contract. However, Guarantor does not state how Landlord breached or what provisions Landlord breached. To sufficiently allege breach of contract, the specific provisions which were breached must be alleged (*Sud v Sud*, 211 AD2d 423 [1st Dept 1995]). As Guarantor has failed to do so, this affirmative defense is dismissed. The fourth affirmative defense, which alleges laches and collateral estoppel, is likewise dismissed. Again, this affirmative defense is just one sentence long and provides no specific facts or allegations as to why Landlord is collaterally estopped or barred by laches. Moreover, Guarantor has failed to defend dismissal of this affirmative defense in the instant motion. Therefore, this conclusory, boilerplate, and abandoned affirmative defense is dismissed. The fifth affirmative defense alleges unclean hands. Like the preceding affirmative defenses, this affirmative defense is a mere sentence long

and devoid of any specific facts. It is boilerplate and conclusory (*366 Audubon Holding, LLC v Morel*, 22 Misc.3d 1108[A] [Sup. Ct., NY County 2008]). It is also abandoned as their dismissal has not been addressed in Guarantor's opposition (*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]).

The sixth affirmative defense, which alleges that Landlord has suffered no damages because of any conduct by Guarantor survives. As explained above, Landlord has not yet succeeded in proving its damages through admissible evidence, and therefore it is premature to dismiss this affirmative defense.

However, the seventh affirmative defense, which claims that damages may be limited by Landlord's failure to mitigate, is barred by binding precedent. This was a commercial lease, and Landlord was under no duty to mitigate (*Holy Props. v Cole Prods.*, 87 NY2d 130 [1995]). The eighth affirmative defense claiming the statute of limitations is devoid of any merit, as the alleged breach began on March 1, 2020 and this action was initiated on May 24, 2021. The eighth affirmative defense is dismissed. The ninth affirmative defense which asserts lack of standing is also dismissed. Landlord clearly has standing to enforce the Guaranty since it is a named party in the contract. The tenth affirmative defense, which asserts lack of personal jurisdiction over "Wooter Apparel, Inc." is dismissed. Its boilerplate and conclusory nature is affirmed by the fact that Guarantor's counsel has not even pleaded the correct name of the party it is defending

Accordingly, it is hereby,

ORDERED that the branch of Landlord's motion which sought to strike Guarantor's affirmative defenses is granted in part and denied in part, and Guarantor's affirmative defenses are

stricken from his Answer except for Guarantor's sixth affirmative defense which survives Landlord's motion to dismiss; and it is further

ORDERED that the remainder of Landlord's motion is denied without prejudice; and it is further

ORDERED that the parties are directed to appear for a conference with the Court on May 31, 2023 at 9:30 a.m. in 60 Centre Street Room 442. The purpose of the conference is to discuss any discovery which may remain outstanding and the deadline by which to file the note of issue. Should the parties agree on a stipulation regarding outstanding discovery and the note of issue deadline prior to the conference date, the parties may submit a proposed stipulation via e-mail to SFC-Part33-Clerk@nycourts.gov, which will obviate the need for an appearance; and it is further

ORDERED that within ten days of entry, counsel for Guarantor shall serve a copy of this Decision and Order, with notice of entry, on Landlord.

This constitutes the Decision and Order of the Court.

5/5/2023
DATE

Mary V Rosado JSC
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