SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

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ELK 33 EAST 33RD LLC,

Plaintiff,

- v -

STICKY'S CORPORATE LLC, STICKY'S HOLDINGS LLC and JONATHAN SHERMAN,

Defendants.

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INDEX NO. 650290/2021

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

were read on this motion to/for SUMMARY JUDGMENT.

The salient facts of this case, as alleged in the complaint, are set forth as follows. Plaintiff, the owner of the premises located at 33 East 33rd Street, New York, NY 10016 ("premises") (NYSCEF Doc. Nos. 1, *complaint*; 15, *deed*), leased the premises to defendant STICKY'S CORPORATE LLC ("Sticky's Corporate" or "tenant") for a term commencing on November 1, 2018, and expiring on October 31, 2023, for use as general, administrative, and executive offices (NYSCEF Doc. No. 16, *lease*). Pursuant to a guaranty dated October 25, 2018, defendant STICKY'S HOLDINGS LLC ("Sticky's Holdings") guaranteed the tenant's obligations under the lease, including, but not limited to, the payment of rent, additional rent, and other charges due and payable by tenant pursuant to the lease ("Sticky's guaranty" or "corporate guaranty") (NYSCEF Doc. No. 17, *Sticky's Guaranty*). Contemporaneous with the execution of both the corporate guaranty and the lease, defendant JONATHAN SHERMAN ("Sherman") executed a Good Guy Guaranty of Lease ("the Sherman guaranty" or "good guy guaranty"), wherein he, too, guaranteed tenant's obligations under the lease, including, but not limited to, the payment of rent, additional rent, and other charges due and payable pursuant to the lease through the surrender date (NYSCEF Doc. No. 18, *good guy guaranty of lease*).

On June 2, 2020, tenant notified plaintiff that it intended to surrender and vacate the premises on September 30, 2020 (NYSCEF Doc. No. 19, *June 2, 2020, notice*). However, plaintiff alleges that the surrender letter was not delivered to plaintiff at least 120 days prior to September 30, 2020. According to plaintiff, tenant has failed to pay fixed rent and additional rent due pursuant to the lease from October 1, 2020, and claims rent, and additional rent continues to accrue. It further alleges that tenant did not deliver possession of the premises in the condition called for by the lease and delivered the premises with damages to the walls and floors beyond normal wear and tear. Plaintiff also claims that, by virtue of the corporate guaranty, Sticky's Holdings is liable for tenant's obligations under the lease. As for Sherman, plaintiff maintains that, insofar as tenant failed to comply with the requirements under the good guy guaranty, it failed to effectuate a valid surrender of the premises to absolve Sherman of liability.

On January 14, 2021, plaintiff commenced this action against defendants, seeking to recover damages based on breach of contract (first and second causes of action) and legal fees (third cause of action), relating to the alleged breach of the lease, corporate guaranty, and good guy guaranty.

Defendants interposed a joint answer, wherein they assert the following affirmative defenses: that defendants satisfied their obligations under the lease and guaranty (first and second affirmative defenses); the "guaranty agreement described in the verified complaint differs from the guaranty agreement that [d]efendants agreed to with [p]laintiff, which precludes the relief [p]laintiff seeks in the verified complaint" (third affirmative defense); plaintiff failed to mitigate its damages (fourth affirmative defense); that Sherman was improperly joined as a defendant because he did not individually guaranty any obligations under the operative lease (fifth affirmative defense); that the claims against Sherman violate 22 NYCRR § 130-1.1, warranting sanctions (sixth affirmative defense); and that defendants reserve their right to interpose additional affirmative defenses (seventh affirmative defense). (NYSCEF Doc. No. 8, *amended answer*).

Plaintiff now moves the court, pursuant to CPLR 3212, for summary judgment dismissing defendants' affirmative defenses; granting plaintiff summary judgment on its first cause of action against defendants in the amount of $576,069.05, plus interest; granting plaintiff summary judgment against defendants on its second cause of action in the amount of $22,080.00, plus interest; and granting plaintiff summary judgment on its third cause of action against defendants for attorney's fees in an amount to be determined by the court. (NYSCEF Doc. No. 9, *notice of motion*).

Plaintiff submits the affidavit of Morry Kalimian, a member of agent for plaintiff, who signed the lease on behalf of plaintiff. Kalimian affirms that the lease, corporate guaranty, and good guy guaranty were prepared in the normal course of business. Kalimian also asserts that, although tenant purported to notify tenant, by letter dated June 2, 2020, that it intended to surrender and vacate the premises on September 30, 2020, the surrender letter was not delivered to plaintiff at least 120 days prior to September 30, 2020; tenant failed to provide plaintiff a signed surrender acknowledgment form; and it failed to deliver possession of the premises as required by the lease. She claims that that the "[t]enant left furniture and possessions, including desks, chairs, and a large white board affixed to the wall, remaining in the [p]remises. Tenant painted a large mural on a wall of the [p]remises and did not return said wall to its condition prior to installation of the mural. Tenant failed to repair damage to the walls of the [p]remises caused by [t]enant's removal of its fixtures. Tenant damaged the hardwood floors by using rolling chairs on top of them without any floor covering." Kalimian attaches several photos that purportedly show the condition of the premises at the time tenant vacated the premises (NYSCEF Doc. No. 20, *photos*). Kalimian affirms that plaintiff spent $22,080.00 to repair the damages in the premises, and it attaches an estimate from Allen Street Construction, LLC ("Allen") reflecting a total estimate of $22,080.00 for repairs, as well as, proof of payment to Allen in the amount of $22,080.00 (NYSCEF Doc. No. 21, *estimate and proof of payment*). Kalimian affirms that, pursuant to Article 70.11.1 of the lease, plaintiff elected to have all liquidated damages due from October 1, 2020, through the expiration of the lease on October 31, 2023, and that "[t]he total damages in the amount of $613,395.83 for fixed rent, electric, water,

sprinkler supervision, the lobby attendant, and real estate taxes discounted by four (4%) percent equals $576,069.05." (NYSCEF Doc. 11, *Kalimian's affidavit*).

Plaintiff also submits, *inter alia*, the deed (NYSCEF Doc. No. 15); the lease (NYSCEF Doc. No. 16); the guaranties (NYSCEF Doc. Nos. 17-18); the June 2, 2020, notice (NYSCEF Doc. No. 19); and pictures purportedly showing the condition of the premises after tenant surrendered possession of the premises (NSYCEF Doc. No. 20); restorations invoice from Allen Street Construction, LLC and plaintiff's alleged payment for reservices rendered (NYCEF Doc. No. 21); real estate tax bills (NYSCEF Doc. No. 22) and an amortization chart (NYSCEF Doc. No. 23).

By memorandum of law, plaintiff argues, *inter alia*, that defendants cannot prove their third, fifth and sixth affirmative defenses as a matter of law. Specifically, plaintiff argues that, as a third affirmative defense, defendants assert that the "guaranty agreement" described in the complaint differs from the guaranty agreed to by the parties but they fail to specify whether it is referring to the corporate guaranty or the good guy guaranty. Thus, plaintiff maintains that defendants' third affirmative defense is insufficiently pleaded and fails to comply with CPLR 3013. Plaintiff also argues that the fifth affirmative defense alleging that Sherman is not a proper party to the action lacks merit because plaintiff has pleaded the existence of a valid contract between Sherman and parol evidence prohibits defendants from contesting the unambiguous language of the guaranties. As for the fifth affirmative defense requesting sanctions, plaintiff argues that this is not a defense to a breach of contract and, at best, can only be read as a defense alleging failure to state a cause of action. Furthermore, plaintiff asserts that Sherman unconditionally guaranteed tenant's payment and performance of the lease through the surrender date, which never occurred here, since, as Kalimian explained, tenant failed to satisfy the conditions required for the occurrence of the surrender as defined by the good guy guaranty. Plaintiff further argues that the fourth affirmative defense, premised on plaintiff's alleged failure to re-let the premises lacks merit because, pursuant to Article 70.11.1 of the lease, plaintiff has no duty to mitigate damages and, thus, defendants are liable for all rent through the expiration of the lease. The guaranty law reflected in Executive Order 202.3 does not apply to the Sherman Guaranty. Plaintiff argues that the affidavit of Morry Kalimian, a member of agent, establishes that defendants have not satisfied their obligations under the lease and guaranty, refuting their first and second affirmative defenses. The seventh affirmative defense, which states that defendants reserve their right to interpose additional defenses, is not a defense and should be dismissed (NYSCEF Doc. No. 12, *memorandum of law*).

In opposition to the motion, defendants argue that the good guy guaranty was the result of mutual mistake and does not reflect a meeting of the minds. Specifically, they argue that the guaranty that Sherman signed is unenforceable because defendants never intended for Sherman to guarantee the lease once the tenant was switched from Sticky's Holdings to Sticky's Corporate. To this point, defendants submit the affidavit of Sherman who affirms that, originally, the lease was supposed to be in Sticky's Holdings' name with him as the guarantor. However, there were last minute modifications to the documents, the most significant being that Sticky's Corporation was substituted for Sticky's Holdings as the tenant on the lease. At 3:44 PM on October 25, 2018, plaintiff sent the following request, "[y]ou can put the [l]ease into this new entity if the other entity that the [l]ease was drafted in (Sticky Holdings LLC) guarantees the

Lease." Sherman responded, "we're ok with putting Sticky's Holdings LLC in the guarantee" (NYSCEF Doc. No. 29, *email correspondence*). Later that afternoon, Sherman arrived at Kalimian Equities' offices to sign the agreements and forms. He avers that, insofar as he believed the documents had been vetted and represented what the parties had agreed to through counsel, he signed the documents that Kalimian put in front of him. Sherman asserts: "[w]hat I did not realize at the time was that [p]laintiff included the original guaranty in my name in the stack of documents I signed on October 25, 2018 — in addition to the new guaranty by Sticky's Holdings" and that there was not supposed to be a guaranty from him once they switched the guaranty to Sticky's Holdings. He affirms: "[t]his was the arrangement that Sticky's had agreed to and had understood to be the structure when I arrived at Kalimian Equities' offices to execute the documents in the afternoon of October 25, 2018." Sherman also claims that plaintiff altered the scope and effect of the guaranty when it made the guaranty for Sticky's Holdings, arguing that the draft guaranty was not a full guaranty and did not ensure all amounts under the full term of the lease. Sherman also argues that the tenant complied with Section 22 of the lease, which only requires that the premises be "broom clean", and that the purported "damages" at the premises are part of the ordinary "wear and tear" on the premises. (NYSCEF Doc. No. 28, *Sherman's affidavit*).

Defendants further contend that several issues of fact preclude summary judgment, to wit, (i) Sticky's Corporate's surrender notice was proper (with the two-day shortfall being disregarded as a matter of New York contract law), and (ii) defendants did not damage the premises during their tenancy beyond any normal wear and tear (NYSCEF Doc. No. 27, *memorandum of law in opposition*).

In reply, plaintiff argues that Sherman is bound by the terms of the Sherman Guaranty and the Sticky's Guaranty regardless of whether he read them or not. Defendants have not pleaded a defense or claim for recission, or reformation based on mutual or unilateral mistake. Additionally, plaintiff argues that defendants admittedly did not comply with the express conditions of the Sherman Guaranty for Sherman to be released from liability, insofar as tenant did not give plaintiff 120 days' notice prior to September 30, 2020, time being of the essence, and that "[d]efendants have offered no proof, or even an allegation, as to what manner and when the letter dated June 2, 2020 was delivered to [p]laintiff." Plaintiff further reiterates that it is entitled to summary judgment on its first cause of action. (NYSCEF Doc. No. 30, *memorandum of law in reply*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (see *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party 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 Corp.*, 100 NY2d 72, 81 [2003].)

The lease, Article 22, provides, in relevant part, that:

> "[u]pon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to Owner the demised premises, 'broom-clean', in good order and condition, ordinary wear and damages which Tenant is not required to repair as provided elsewhere in this lease excepted, and Tenant shall remove all its property. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this lease." (NYSCEF Doc. No. 16).

The Sherman guaranty provides:

> "As used herein, the term 'Surrender Date' shall mean the date that Tenant shall have performed all of the following: (i) vacated and surrendered the Demised Premises to Landlord free of all subleases, licensees or other occupants, broom clean and otherwise in the condition required for the surrender of the Demised Premises at the end of the Term as set forth in the Lease, (ii) paid all Fixed Rental, additional rent, Fixed Rental given during the Free Rent Period, and other charges up to and including the Surrender Date, (iii) delivered the keys to the Demised Premises to Landlord or its managing agent, (iv) the Tenant shall have given written notice to the Landlord (the 'Tenant's Notice') not less than one hundred twenty (120) days prior to the date upon which the Tenant will be vacating the Premises and the Tenant in fact vacates and surrenders possession of the Premises to the Landlord in accordance herewith and the Lease on the date specified in the Tenant's Notice, time being of the essence, and (v) Tenant has executed and delivered to Landlord a valid, legally binding and fully enforceable acknowledgment in the form annexed hereto as Exhibit 'A', with such changes as Landlord may reasonably require to ensure that such acknowledgment is valid, legally binding and fully enforceable." (NYSCEF Doc. No. 18).

Addressing the first cause of action seeking damages based on breach of the lease, this court finds that plaintiff's proof demonstrates that tenant breached the lease and failed to comply with the conditions for delivery of the premises under both the good guy guaranty and the lease. Here, plaintiff establishes that the June 2, 2020, notice did not comply with the 120-day notice provision of the good guy guaranty. Furthermore, tenant failed to execute and deliver to plaintiff a valid and fully enforceable acknowledgment and failed to remove all furniture from the premises, as require by the lease. Photographs annexed to the moving papers also demonstrate that tenant failed to remove its furniture from the premises as required by Article 22 of the lease. Thus, plaintiff has demonstrated that there was no "surrender" under the good guy guaranty insofar as the provision requires that *all* conditions be met. As follows, plaintiff has demonstrated its *prima facie* entitlement to a judgment against defendants relating to rent and additional rent due under the lease. (NYSCEF Doc. No. 16, *lease*, Article ¶¶ 53; 56; 83; 70.11.1).

Although the burden shifts to defendants to raise a material issue of fact sufficient to deny the motion, defendants fail to meet this burden. Defendants' contention that the good guy guaranty is unenforceable based on a lack of mutual assent and/or mutual mistake lacks merit. Mutual mistake requires a showing that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement. (see *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Not only do defendants fail to plead mutual mistake as an

affirmative defense in accordance with CPLR 3016(b), but Sherman's conclusory assertion that the parties agreed to omit his good guy guaranty and that he only executed same due to his own failure to review the document before signing it is insufficient to defeat the motion (*Chimart Assoc. v Paul*, 66 NY2d 570, 571 [1986] ["(w)here a written agreement between sophisticated, counseled business[persons] is unambiguous on its face, one party cannot defeat summary judgment by a conclusory assertion that, owing to mutual mistake . . . , the writing did not express his [or her] own understanding of the oral agreement reached during negotiations"]; see also *U.S. Legal Support, Inc. v Eldad Prime, LLC*, 125 AD3d 486, 487 [1st Dept 2015]; *Hutchinson Burger, Inc. v Hutch Rest. Assoc., L.P.*, 100 AD3d 531, 532 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013]; *Vulcan Power Co. v Munson*, 89 AD3d 494, 495 [1st Dept 2011].) This court rejects defendant's contention that they effectuated a valid surrender under the good guy guaranty and that the "technical" non-compliance should be overlooked, insofar as it is clear that "[w]here a contract expressly requires written notice to be given within a specified time, the notice is ineffective unless the writing is actually received within the time prescribed." (*Provident Loan Socy. of NY v 190 E. 72nd St. Corp.*, 78 AD3d 501 [1st Dept 2010], citing *Maxton Bldrs. v Lo Galbo*, 68 NY2d 373 [1986].). Moreover, to the extent defendants argue plaintiff has an obligation to mitigate damages, this defense lacks merit insofar as "case law . . . is clear that commercial leases are not subject to the requirement to mitigate damages." (*BP/CGCENTER II LLC v Sausa*, 2019 NY Slip Op 30474[U] [Sup Ct, NY County 2019], citing *BP 399 Park Ave. LLC v Pret 399 Park, Inc.*, 150 AD3d 507, 505 [1st Dept 2017]) and it is expressly refuted by the terms of the lease (see NYSCEF Doc. No. 16, lease ¶ 70.11.1). Therefore, this court finds that plaintiff is entitled to summary judgment against defendants on its first cause of action. In accordance with the foregoing, this court also grants that branch of the motion seeking dismissal of defendants' affirmative defenses.

However, that branch of the motion seeking summary judgment on plaintiff's second cause of action seeking damages in the amount of $22,080.00 for repairs to the premises is denied insofar as this court cannot determine, on this record, whether the purported "damages" go beyond normal wear and tear.

This court also grants that branch of the motion seeking attorney's fees, as provided for under the lease (NYSCEF Doc. No. 16 ¶ article 70). However, the amount due shall be determined at the time of trial. All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that that branch of plaintiff's motion seeking summary judgment on its first cause of action against defendants, jointly and severally, in the amount of $576,069.05, plus interest, is granted; and it is further

ORDERED that that branch of plaintiff's motion seeking summary judgment against defendants on its second cause of action in the amount of $22,080.00, is denied; and it is further

ORDERED that that branch of plaintiff's motion seeking summary judgment against defendants on its third cause of action for attorney's fees is granted as to liability, but damages shall be determined at the time of trial; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this order, with notice of entry, upon defendants, as well as, on the Clerk of the Court (60 Centre Street, Room 141 B), who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties in this action are hereby directed to appear for a remote discovery conference on July 19, 2023, details which shall be provided by the court no later than July 17, 2023.

June 2, 2023

HON. VERNA L. SAUNDERS, JSC

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**