SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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W 54-7, LLC,

Plaintiff,

- v -

EUGENE ROONEY,

Defendant.

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INDEX NO. 653123/2020

MOTION DATE 02/14/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

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

In this action to recover on personal guaranties of two commercial leases, the plaintiff moves pursuant to CPLR 3212 for summary judgment on the first and second causes of action (recovery under guaranties referable to leases for each of two commercial units) and for partial summary judgment on the issue of liability on the fourth cause of action (attorney's fees). The defendant opposes the motion. The motion is granted to the extent that the plaintiff is awarded summary judgment on the first and second causes of action, respectively, in connection with the two guaranties for the recovery of rent, additional rent, and associated charges in connection with the two commercial leases. The motion is otherwise denied, but the matter nonetheless is referred to a referee to hear and report on the appropriate award of contractual costs and attorney's fees to be awarded to the plaintiff as an incident of litigation.

On or about June 1, 1995, the predecessor in interest of the plaintiff, W 54-7 LLC, as owner of premises located at 162 West 54th Street, New York, New York, also known as 835-837 Seventh Avenue (the premises), entered into a commercial lease (the initial lease) with Shelburne Bar and Grill, Inc., doing business as The Irish Pub (Shelburne), as tenant, in

connection with a portion of the premises designated as Store No. 2. The initial lease obligated Shelburne to pay rent and additional rent, and defined the term "additional rent" as "all sums of money, other than fixed rent, which become due and payable from Tenant to Landlord hereunder in any manner whatsoever, and Landlord shall have the same remedies therefor as for a default in payment of fixed rent." The term "additional rent" specifically included, among other things, Shelburne's proportionate share of any increase in the plaintiff's real estate tax obligations for the premises, insurance premiums for the leasehold incurred by the plaintiff on behalf of Shelburne, and Shelburne's proportionate share of the costs that the plaintiff incurred for capital improvements and alterations to the premises. Paragraph 18 of the initial lease provided that, if Shelburne was in default of its obligation to pay rent and additional rent, not only would it be obligated for the rent and additional rent up until the date that it vacated and the plaintiff re-entered the store, but the plaintiff could re-let the premises and recover, from Shelburne, the difference between any lower rent collected from the new lessee and that to which Shelburne had obligated itself under the lease. Nonetheless, that paragraph also provided that

> "[t]he failure of the Owner to re-let the 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 applied to said deficiency such expenses as Owner may incur in connection with re-letting, such as legal expenses, reasonable attorneys' fees, brokerage, advertising, and for keeping the demised premises in good order or for preparing the same for re-letting . . . *Owner shall in no event be liable in any way whatsoever for failure to re-let the demised premises*"

(emphasis added). Paragraph 19 provided that

> "[i]f Owner. . . in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceedings and prevails in any such action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner. . . and if Tenant's lease shall have expired at the time of making any such expenditures or incurring such obligations, such sums shall be recoverable by Owner as damages."

Paragraph 6 of the rider to the initial lease provided, in relevant part, that

> "[r]eferences to the Landlord having 'no liability to Tenant' or being 'without liability to Tenant' shall mean that Tenant is not entitled to terminate this lease, or clam actual or constructive eviction, partial or total, or to receive any abatement or diminution of rent, or to be relieved in any manner of any of its obligations hereunder."

Paragraph 10 of the rider provided, as pertinent here, that "any liability for a payment which shall have accrued to or with respect to any period ending at the time of termination" of the lease "shall survive the termination of this lease." Paragraph 41 of the rider recited that, "upon default in payment of rent installments (or other default of Tenant hereunder), then, at the option of Landlord, *the entire rent hereby reserved for the entire term shall be immediately due and payable without further notice or demand*" (emphasis added). Paragraph 56 of the rider reiterated that the plaintiff could recover attorneys' fees as damages if it sought to recover unpaid rent and additional rent subsequent either to the tenant's vacatur of the premises or the expiration of the lease term.

On or about May 28, 2005, and thus after the plaintiff acquired title to the premises, the plaintiff and Shelburne entered into an agreement with respect to the initial lease that extended that lease on a month-to-month basis. That first extension agreement carried over the definitions and obligations set forth in the initial lease, but increased the monthly rent to $25,000.00. On or about January 1, 2008, the plaintiff and Shelburne entered into another agreement with respect to the initial Store No. 2 lease that extended the term of that lease up to December 31, 2017, incorporated the prior definitions and obligations articulated in the initial lease, and fixed the monthly rent at $27,000.00 for the first year, increasing incrementally each year until the monthly rent reached a maximum sum of $36,465.00 with respect to the final year of the lease term. On that same date, the defendant, Eugene Rooney, executed a personal guaranty of Shelburne's obligations under that extension agreement "up until the end of the lease of store number two."

On or about December 15, 2009, the plaintiff and Shelburne entered into yet another lease extension agreement with respect to the initial Store No. 2 lease that extended the lease term until December 31, 2021. As with the prior extension agreements, the December 15, 2009 agreement reiterated and incorporated the definitions and obligations articulated in the initial lease. As relevant here, the monthly base rent for Store No. 2 was fixed in the sums of $38,685.72 for the period beginning on January 1, 2019 and ending on December 31, 2019, $39,846.29 for the period beginning on January 1, 2020 and ending on December 31, 2020, and $41,041.68 for the period beginning on January 1, 2021 and ending on December 31, 2021. That same date, Rooney executed a personal guaranty of Shelburne's obligations under the December 15, 2009 extension agreement, with the guaranty contingent on the plaintiff itself not being in default of its obligations. The lease and extension agreements referable to Store No. 2 required Shelburne to provide the plaintiff with at least six months' notice of any intent to surrender the store back to the plaintiff.

On December 15, 2009, the plaintiff and Shelburne also entered into a separate commercial lease for another portion of the premises, known as Store No. 3. The basic annual base rent set forth the lease agreement referable to Store No. 3 was $413,237.64 ($34,436.47 monthly) for the period beginning on January 1, 2019 and ending on December 31, 2019, $425,634.77 ($35,469.56 monthly) for the period beginning on January 1, 2020 and ending on December 31, 2020, and $438,403.81 ($36,533.65 monthly) for the period beginning on January 1, 2021 and ending on December 31, 2021. Paragraphs 6, 10, 18, 19, 41, and 56 of this lease and the relevant rider thereto were identical to the same enumerated paragraphs in the initial lease for Store No. 2.

Pursuant to paragraph SR-6 of the supplemental rider to the December 15, 2009 lease referable to Store No. 3, Rooney obligated himself to execute a "Good Guy Guaranty" of Shelburne's obligations to pay base and additional rent, as well as of Shelburne's obligations

under paragraph SR-5 regarding authorization to combine Store Nos. 2 and 3 into one unit. That same date, Rooney did, in fact, execute such a guaranty.

Paragraph SR-5 of the supplemental rider to the December 15, 2009 lease referable to Store No. 3 specifically provided that

> "(A) Landlord hereby consents to Tenant incorporating and physically connecting the Demised Premises into the other store premises now occupied by Shelburne Bar and Grill, Inc. as tenant at Store # 2 (the 'Other Premises') at 837 Seventh Avenue New York, New York (the 'Building Premises') pursuant to a lease dated June 1, 1995 and subsequently extended, on the express understanding that Tenant and the Guarantors hereby jointly and severally assume responsibility for dividing the respective spaces as of the Expiration Date of this Lease (which is Scheduled to occur on the expiration date of the lease of the Other Premises).
>
> "(B) To the extent that Tenant actually combines the Demised Premises with the Other Premises, Tenant hereby acknowledges and agrees that any default by Tenant under the lease for the Other Premises during any period that the Demised Premises are connected to the Other Premises, shall constitute default under this Lease and that any default by Tenant under this Lease, shall also constitute a default under the lease for the Other Premise."

Paragraph SR-8 provided that

> "[t]enant acknowledges and agrees that it is accepting the Demised Premises in its 'as is' condition, with all faults, if any; it being understood and agreed that Landlord shall not be obligated to make any improvements, alterations or repairs in or to any portion of the Demised Premises. Tenant further acknowledges that the certificate of occupancy for the Building Premises may not include the Demised Premises. As such, Tenant agrees that to the extent, if any, the certificate of occupancy for the Building Premises needs to be amended to include and incorporate the Demised Premises, that Tenant shall be obligated to solely bear any cost and expense of amending the certificate of occupancy. Landlord agrees to execute any and all documentations reasonably required in order for Tenant and Tenant's professional to amend the certificate of occupancy for the sole purpose of including and incorporating the Demised Premises. Tenant hereby waives an[y] objection to [or] in connection with the certificate of occupancy and further acknowledges that it shall not look to Landlord to so amend the certificate of occupancy."

The guaranty referable to the lease for Store No. 3 provided that Rooney would be relieved of his continuing obligations as a surety for Shelburne if Shelburne (a) notified the plaintiff that it was going to surrender both of the subject leaseholds at least four months before it actually surrendered them back to the plaintiff, (b) re-divided the consolidated two stores back

into individual units, and (c) allowed the plaintiff reasonable access for purposes of marketing and re-rental.

On or about July 1, 2019, Shelburne ceased paying any rent for both Store Nos. 2 and 3. On or about January 6, 2020, Shelburne sent a letter to the plaintiff alleging that it had been constructively evicted from both stores. On or about January 9, 2020, Shelburne vacated both stores and surrendered the keys thereto. At that time, Shelburne had not provided the four months' surrender notice to the plaintiff that would have relieved Rooney of his obligations as guarantor of the lease for Store No. 3, had not provided the six months' surrender notice required in the initial lease and extension agreements referable to Store No. 2, and left the two stores "as is," by, among other things, failing to reconstruct the walls that Shelburne had taken down when it combined the two units into a single unit. Moreover, the plaintiff contended that, for all but 46 days from March 10, 2016 to March 24, 2019, it had secured and had in place 12 Temporary Certificates of Occupancy (TCOs) for various portions of the premises, and that at no time during that period did Shelburne or Rooney, or anyone acting on their behalf, request it to include Store Nos. 2 or 3 in any of those TCOs. It further asserted that it secured those TCOs despite extant and uncured Building Code violations.

According to the plaintiff, as of November 28, 2022, Shelburne owed it the sum of $1,323,255.12 for base and additional rent in connection with Store No. 2, exclusive of any interest thereon, and the sum of $1,107,308.39 for base and additional rent in connection with Store No. 3, exclusive of any interest thereon.

As set forth above, the terms set forth in Paragraph 41 of both of the subject leases obligated Shelburne to pay for the entire lease term for both stores regardless of whether it vacated the leasehold prior to the end of the term; the plaintiff now seeks to recover unpaid rent, additional rent, and applicable charges under both leases from Rooney, as guarantor, for both the portion of the leases' terms that Shelburne remained in possession without paying those

obligations, i.e., from July 1, 2019 until January 9, 2020, and for the remainder of the lease term under both leases, i.e., from January 10, 2020 until December 31, 2021.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn*., 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

In moving for summary judgment to enforce two absolute and unconditional guaranties on commercial leases, the plaintiff made a prima facie showing of Shelburne's default and the amount owed under the leases' accelerated rent provisions (*see Royal Equities Operating, LLC v Rubin*, 154 AD3d 516, 517 [1st Dept 2017]; *Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept 2017]). It further demonstrated that the terms of the subject guaranties are clear, unambiguous, absolute, and unconditional. "Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement" (*Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd*., 97 AD3d 444, 446-447 [1st Dept 2012], quoting *National Westminster Bank USA v Sardi's Inc*., 174 AD2d 470, 471 [1st Dept 1991]). In opposition to the plaintiff's showing in this regard, Rooney failed to raise a triable issue of fact as to whether Shelburne was in default under the leases or as to whether the guaranties were secured by fraud, duress, or other wrongdoing. Nor does he make an argument that the guaranties were ambiguous.

Rather, Rooney contended that Shelburne was constructively evicted from both leaseholds by virtue of the plaintiff's failure to apply for and secure a public assembly certificate on behalf of Shelburne, and that he thus was relieved of his obligations as guarantor. Rooney, however, provided no legal authority for his contention that the plaintiff should have, but failed to, apply for a public assembly certificate. Although the City of New York requires a Place of Assembly Certificate of Operation for all premises in which the certificate of occupancy authorizes 75 or more members of the public to gather indoors to consume food or drink (Admin. Code of City of N.Y. §§ 28-117.1, 28-118.12; 28-303.1[A-2], 28-1028.1.1), the plaintiff never expressly assumed the obligation to apply for one, and Shelburne expressly assumed the obligation to secure any required certificates of occupancy. There is no proof that plaintiff could, in any event, have secured such a certificate, or prevailed in a CPLR article 78 proceeding if

one were denied, and its failure to apply for such a certificate or commence such a proceeding is neither a defense to the nonpayment of rent nor supports a claim for constructive eviction.

In any event, pursuant to the leases, Shelburne expressly waived the right to assert constructive eviction as a defense to the nonpayment of rent, additional rent, and related charges. In the absence of a contrary agreement, Real Property Law § 227 permits a commercial tenant to surrender a leasehold without further liability to pay rent where the leasehold has been rendered untenantable without any fault of its own. Conversely, where, as here, a tenant that entered into a commercial lease expressly waived the protections of Real Property Law § 227, that tenant will be bound by the terms of its lease, and cannot be relieved of its obligations (*see Dance Magic, Inc. v Pike Realty, Inc*., 85 AD3d 1083, 1087 [2d Dept 2011]; *Hudson Towers Housing Co., Inc. v VIP Yacht Cruises, Inc*., 63 AD3d 413, 413 [1st Dept 2009]; *Schwartz, Karlan & Gutstein v 271 Venture*, 172 AD2d 226, 227-228 [1st Dept 1991]; *558 Seventh Ave. Corp. v E&B Barbers, Inc.*, 2023 NY Slip Op 30854[U], *7-8, 2023 NY Misc LEXIS 1222, *10-11 [Sup Ct, N.Y. County, Mar. 16, 2023]). Since the relevant waiver provisions in the leases are clear and unambiguous, this court must enforce their terms (*see 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, 41-42 [1st Dept 2020]). In opposition to the plaintiff's prima facie showing that Shelburne waived constructive eviction as a defense to nonpayment, Rooney has failed to raise a triable issue of fact as to whether Shelburne was entitled to raise that defense to its nonpayment of rent and additional rent, let alone whether Shelburne was constructively evicted in the first instance by virtue of the plaintiff's alleged failure to apply for and secure a public assembly certificate.

As the Court of Appeals has explained, "the parties to a lease are not foreclosed from contracting as they please" (*Holy Properties Ltd., L.P. v Kenneth Cole Prods*., 87 NY2d 130, 135 [1995]). Here, "the parties clearly contracted to make the defaulting tenant liable for rent after . . . termination" of the lease (*Gallery at Fulton St., LLC v Wendnew LLC*, 30 AD3d 221,

222 [1st Dept. 2006]), whether effectuated by expiration of the lease term, eviction, constructive eviction, or the tenant's vacatur of the leasehold. Hence, the plaintiff established, prima facie, that it is entitled to recover rent, additional rent, and applicable charges from Shelburne until the end of the lease term, as permitted by the lease, regardless of whether Shelburne was constructively evicted and regardless of whether the plaintiff relet the premises (*see Harlorn LLC v Poy Ao Cheng*, 59 Misc 3d 1221[A], 2018 NY Slip Op 50642[U], *5, 2018 NY Misc LEXIS 1593, *14-15 [Sup Ct, N.Y. County, May 4, 2018] [guaranty survives termination of lease with respect to tenant's obligations accrued during lease term]; *cf. Centre Great Neck, LLC v Rite Aid Corp.,* 292 AD2d 484, 485 [2d Dept 2002] [in the absence of a contrary agreement, the eviction of a commercial tenant by a landlord terminates the landlord-tenant relationship and, hence, the tenant's obligation to pay rent until the end of the lease term]).

With respect to Rooney's obligations as guarantor under both leases, it is crucial to note that

> "[g]uaranties and leases are separate documents; the former impose obligations on the guarantors and the latter impose obligations on the landlord and the tenant. When a guarantor is sued on the guaranty, as is the case here, he or she cannot raise a claim or defense which is personal to the principal debtor, *such as breach of the principal contract,* unless it extends to a failure of consideration for the principal contract, and therefore for the guarantor's contract"

(*I Bldg, Inc. v Hong Mei Cheung*, 137 AD3d 478, 478 [1st Dept 2016] [emphasis added]; *see Park Towers S. Co., LLC v 57 W. Operating Co., Inc*., 96 AD3d 443 [1st Dept 2012]; *China Co. NYC, LLC v Yang*, 2019 NY Slip Op 32590[U], *3-4, 2019 NY Misc LEXIS 4798, *4-5 [Sup Ct, N.Y. County, Aug. 30, 2019] [Kelley, J.]). Consequently, the defense of constructive eviction, which involves a breach of the covenant of quiet enjoyment that is implied into every lease (*see 34-35th Corp. v 1-10 Indus. Assoc., LLC,* 16 AD3d 579, 580 [2d Dept 2005] ["to establish a breach of the covenant of quiet enjoyment, a tenant must show actual or constructive eviction"]), was personal to Shelburne. Hence, even if Rooney could have raised constructive eviction as a defense to Shelburne's nonpayment in the first instance, he remains obligated under the

guaranty. Moreover, the fact that the plaintiff did not relet the leasehold after Shelburne vacated it, especially in light of the lease terms relieving the plaintiff of the obligation to do so, cannot serve as a defense to this action on the guaranty, as any defense in this regard was personal to Shelburne as well (*see Royal Equities Operating, LLC v Rubin*, 154 AD3d at 517 [guarantor's obligation may be greater than that of obligor tenant where defenses are personal to tenant]; *China Co. NYC, LLC v Yang*, 2019 NY Slip Op 32590[U], *3-4).

Furthermore, the plaintiff established that neither Shelburne nor Rooney provided it with timely notices of surrender that might have relieved them of their obligations, and that Shelburne did not re-separate the two stores back into individual units before vacating them, another condition of relieving Rooney of his obligations as guarantor. Rooney failed to raise a triable issue of fact in opposition to that showing.

In opposition to the plaintiff's showing as to the amounts due and owing, Rooney, as guarantor, failed to refute its calculations as to the amount of rent, additional rent, and accrued charges that were owed, or challenge any specific line-item in the papers submitted by the plaintiff, thus entitling the plaintiff to summary judgment as to the amount of damages on the first and second causes of action (*see Royal Equities Operating, LLC v Rubin*, 154 AD3d at 517; *Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept 2017]). Any nonspecific argument that "plaintiff's calculations were flawed and uncertain is conclusory, and insufficient to raise a triable issue" (*Royal Equities Operating, LLC v Rubin*, 154 AD3d at 517; *see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004]) as to the rent, additional rent, and accrued charges that are due and owing.

Since Rooney's obligation to pay on his guaranties occurred monthly over a period of 30 months between July 1, 2019 and December 1, 2021, the plaintiff is entitled to an award of prejudgment interest from a reasonable intermediate date between those two dates, which the court concludes is October 1, 2020 (*see* CPLR 5001[a], [b]; *Trumbull Equities LLC v Mt. Hawley Ins. Co.,* 191 AD3d 587, 588 [1st Dept 2021]; *National Union Fire Ins. Co. of Pittsburgh, PA v*

Greenwich Ins. Co., 103 AD3d 473, 474 [1st Dept 2013]; *Baer v Anesthesia Assoc. of Mount Kisco, LLP*, 57 AD3d 817, 819 [2d Dept 2008]).

Inasmuch as Rooney guaranteed all of Shelburne's obligations under the two leases, including its obligation to pay the plaintiff's reasonable attorney's fees where the plaintiff successfully prosecuted an action to recover rent (*see RSB Bedford Assoc., LLC v Ricky's Williamsburg, Inc.*, 91 AD3d 16, 24 [1st Dept 2011]), he is obligated to pay the plaintiff's fees here. While a claim for attorney's fees may not be maintained as a separate cause of action (*see Jones v McDonalds Corp.,* 202 AD3d 476, 478 [1st Dept 2022]; *La Porta v Alacra, Inc.*, 142 AD3d 851, 853 [1st Dept 2016]; *Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 217 [1st Dept 2006]; *see also Burke v Crosson*, 85 NY2d 10, 17-18 [1995]), the plaintiff is entitled to an award of contractual attorney's fees as a component of the breach of contract claim underlying this action on the guaranties. Hence, although the court may not grant summary judgment to the plaintiff on the issue of liability on its fourth cause of action, which seeks solely to recover attorney's fees, it concludes that the plaintiff may recover such contractual fees as an incident of the litigation, and refers the matter to a referee to hear and report on the appropriate amount of fees that is warranted.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted to the extent that it is awarded summary judgment against the defendant, Eugene Rooney, in the sum of $1,323,255.12 with statutory interest at 9% per annum from October 1, 2020 on the first cause of action, and in the sum of $1,107,308.39 with statutory interest at 9% per annum from October 1, 2020 on the second cause of action, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff, W 54-7, LLC, and against the defendant, Eugene Rooney, in the principal sum of $1,323,255.12 with statutory interest at 9% per annum from October 1, 2020 on the first cause of action, and in the principal sum of $1,107,308.39 with statutory interest at 9% per annum from October 1, 2020 on

the second cause of action, for a total principal sum of $2,430,563.51 with statutory interest at 9% per annum from October 1, 2020; and it is further,

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the proper amount of costs and attorneys' fees to be awarded to the plaintiff; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel shall immediately consult one another and counsel for the plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the plaintiff shall serve a proposed accounting of the number of hours of attorneys' and paralegals' time incurred in prosecuting this action, along with a statement of the hourly billing rate for that time, within 24 days from the date of this order, and the defendant shall serve objections to the proposed accounting within 20 days from service of the plaintiff's papers, and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts and, after consideration of any such motion, and either the confirmation or modification of the Report, the court shall direct the Clerk of the court to enter an appropriate separate money judgment for costs and attorneys' fees in favor of the plaintiff and against the defendant.

This constitutes the Decision and Order of the court.

6/23/2023
DATE

JOHN J. KELLEY, J.S.C.

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