SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ISLAND PROPERTIES, LLC,

Plaintiff,

- against -

KATHLEEN CALABRETTA,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 14655/11
Motion Seq. No.: 01
Motion Date: 11/18/11

The following papers have been read on this motion:

	Papers Numbered
Pro Se Notice of Motion, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibits	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant, *pro se*, moves, pursuant to CPLR § 3211(a)(7), § 3211(a)(10) and § 3211(a)(4), for an order dismissing the Verified Complaint. Plaintiff opposes the motion.

This is a plenary action for monies due pursuant to personal guaranty by defendant. Plaintiff commenced the action by filing a Summons and Verified Complaint on or about October 13, 2011. *See* Defendant's Affidavit in Support Exhibit 1. In said Verified Complaint, it is alleged that, on December 17, 2009, plaintiff, as landlord, and The Cherubin Group Inc. ("Cherubin"), as tenant, entered into a commercial lease for the premises known as 169 South Street, Suite 100, Oyster Bay, New York. On or about December 18, 2009, defendant executed a certain limited guaranty ("Original Guaranty") wherein and whereby defendant unconditionally

and absolutely guaranteed Cherubin's full, prompt and complete payment of certain of its monetary obligations to plaintiff and/or that would become due to plaintiff in the event of a default by Cherubin, under the lease, for *inter alia*, rent, added/additional rent and prior rent abatements (hereinafter collectively "lease payments"). The Original Guaranty was annexed to the lease and made a part thereof. On or about February 17, 2010, defendant executed a certain limited guaranty which superceded and replaced the Original Guaranty ("Superseding Guaranty") wherein and whereby defendant unconditionally and absolutely guaranteed Cherubin's full, prompt and complete payment of the lease payments.

Plaintiff submits that Cherubin defaulted and continues to be in default on the subject lease. Due to its default, Cherubin presently owes plaintiff lease payments totaling $250,221.51. Accordingly, there is now due and owing the sum of $250,221.51 to plaintiff from defendant under the Superseding Lease. Additionally, pursuant to the Superceding Guaranty, defendant agreed to reimburse plaintiff for all costs and expenses incurred by plaintiff in enforcing and/or attempting to enforce the Superceding Guaranty, including, but not limited to, court costs, reasonable attorney's fees and disbursements.

In her motion to dismiss, defendant, *pro se*, submits, "[p]laintiff has also filed a baseless and frivolous complaint, 01465/201 (*sic*), against Cherubin Group's president, Lenore Malvasio, **personally** in the amount of $149,598.00 for alterations made to the premises in question, presumably, although unstated, due to the alleged default by Cherubin Group...Ms. Malvasio is integral to this lease and should be a party to this suit. Plaintiff's (*sic*) have an active Holdover Petition before the District Court, First District, file number LT2049/2011. No default has been decided, in fact, the matter is scheduled for trial on November 28, 2011....Plaintiff, therefore, has no cause of action before this court. The Plaintiff's complaint is wholly without merit as the matter of default is awaiting adjudication in a separate court, LT20489/2011....Counsel for

Plaintiff and Michael J. Menchise, Esq, in house counsel for Plaintiff are aware that this action is frivolous and without merit as, to date, no default has been found. There is no factual basis for this claim. This claim has been filed for the sole purpose of harassment and intimidation and should be dismissed. Plaintiff's Counsel should be sanctioned under FRCP Rule 11."

In opposition to defendant's *pro se* motion, plaintiff first argues that defendant's argument that a prior pending action mandates dismissal of this action is without merit. Plaintiff submits that "[a] party may move to dismiss on the ground 'that there is another action pending **between the same parties for the same cause of action** in a court of any state or the United States....' *See* CPLR § 3211(a)(4) (emphasis added)." Plaintiff contends that the only parties to the Nassau County District Court summary proceeding referenced in defendant's moving papers are plaintiff, as petitioner, and Cherubin, as respondent. Defendant in this case is not a party to the District Court summary proceeding, so there is no action pending between the "same parties" so as to fall within the purview of CPLR § 3211(a)(4).

Plaintiff further contends that there are different causes of action in the instant matter and the District Court matter. The District Court matter is a holdover proceeding in which plaintiff seeks to recover a judgment of possession of certain premises leased to Cherubin. In the instant action, plaintiff is suing to enforce a personal guaranty. The actions, therefore, are not similar nor sufficiently similar. Additionally, the relief sought in the District Court matter - a possessory judgment in the statutory summary proceeding- is different from the relief sought in the instant matter - a money judgment- and therefore not the same or substantially the same so as to warrant a CPLR § 3211(a)(4) dismissal. Furthermore, plaintiff is unable, as a matter of law, to obtain the relief sought by its Verified Complaint in the instant matter in the District Court summary proceeding because the Court, in a special proceeding pursuant to Article 7 of the Real Property Actions and Proceedings Law, has no jurisdiction to adjudicate a monetary claim other than rent

allegedly owed. The Superseding Guaranty obligates defendant for past and future rent and additional rent, as well as other items beyond that which may be heard in the summary proceeding.

Plaintiff also argues that defendant's allegation that the Verified Complaint fails to state a cause of action is without merit. Plaintiff states that "[t]he general rules of pleading in contract actions govern the pleadings of the parties in action to enforce a contract of guaranty. A Verified Complaint to enforce a guaranty must contain an allegation showing default or the happening of such an event as under the terms of the contract of guaranty renders the defendant liable." Plaintiff submits that the Verified Complaint in the instant action sufficiently states causes of action to enforce the Superseding Guaranty. "The first cause of action, seeking to enforce the Superseding Guaranty for Cherubin's default under the lease, is legally sufficient since it specifies its terms (complaint ¶ 5), the consideration (complaint ¶¶ 3-5), performance by plaintiff (complaint ¶ 6) and the default or event that rendered defendant liable (complaint ¶¶ 8-9). Plaintiff's second cause of action simply seeks to recover its enforcement costs. The Superseding Guaranty expressly states that 'Guarantor shall reimburse Owner [*i.e.*, Plaintiff] for all costs and expenses incurred by Owner in enforcing and/or attempting to enforce this Guaranty, including but not limited to court costs, reasonable attorney's fees and disbursements."

With respect to defendant's request for dismissal pursuant to CPLR § 3211(a)(10), plaintiff argues, "[o]ther than the lone conclusory allegation that 'Malvasio is integral to this lease and should be a party to this suit' (*see* Deft. Aff., ¶ 2), Defendant offers no factual or legal basis for the relief she seeks. This is an action to enforce a guaranty. Malvasio did not sign the Superseding Guaranty. Plaintiff is not aware of a reason to join Malvasio as a party to this case. She is neither an indispensable nor a necessary party."

With respect to defendant's request for sanctions under Rule 11 of the Federal Rules of Civil Procedure, plaintiff argues that there is no legal or factual basis for sanctions under the statute.

CPLR § 3211(a)(4) provides that a party may move to dismiss an action on the basis that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States."

Having reviewed the Verified Complaint in the instant action with the Petition Holdover in the Nassau County District Court action (*see* Defendant's Affidavit in Support Exhibit 3), this Court finds that said cases involve different causes of action, as well as different parties. Defendant in this case is not a party to the District Court summary proceeding. The District Court matter is a holdover proceeding in which plaintiff seeks to recover a judgment of possession of certain premises leased to Cherubin. In the instant action, plaintiff is suing to enforce a personal guaranty. The relief sought in the District Court matter is a possessory judgment in the statutory summary proceeding while the relief sought in the instant matter is a money judgment.

In determining a motion to dismiss pursuant to CPLR 3211(a)(7) for plaintiff's alleged failure to state a cause of action, the Court will afford the Verified Complaint a liberal construction, accept the facts contained therein as true, accord plaintiff every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001).

When viewing plaintiff's Verified Complaint in light of the criteria set forth above, the Court finds that plaintiff has indeed has stated causes of action in both its first and second causes of action.

CPLR § 3211(a)(10) provides that the Court should not proceed in the absence of a person who should be a party. Defendant offers no factual or legal basis for her argument that Lenore Malvasio is an indispensable and necessary party to the instant action.

With respect to defendant's request for sanctions under Rule 11 of the Federal Rules of Civil Procedure, the Court finds that there is no legal or factual basis for sanctions under the

statute.

Accordingly, defendant's *pro se* motion, pursuant to CPLR § 3211(a)(7), § 3211(a)(10) and § 3211(a)(4) for an order dismissing the Verified Complaint and for an order of sanctions against plaintiff is hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on January 30, 2012, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 14, 2011