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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

1407 BROADWAY REAL ESTATE LLC,
Plaintiff,

-against-

JAMES TSUI AND J.W. TRECI, INC.,
Defendant.

INDEX NO. 106297/10

MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion by plaintiff for summary judgment and defendants' cross-motion to strike.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

1407 Broadway Real Estate LLC (plaintiff) brings this action for breach of a guaranty against James Tsui (Mr. Tsui) and breach of contract against J.W. Treci, Inc. (Treci) (collectively defendants) to recover unpaid rent and related fees alleged under a commercial lease and guaranty agreement. Before the Court is plaintiff's motion for summary judgment, pursuant to CPLR 3212, seeking liability and damages: (1) on its first cause of action against Mr. Tsui in the sum of $39,983.84 plus interest, costs and disbursements; (2) on its second cause of action against Treci in the sum of $206,704.40 plus interest, costs and disbursements; and (3) on its third cause of action for reasonable attorneys' fees, costs and expenses, and request that the Court set the matter down for a hearing. Plaintiff also moves, pursuant to CPLR 3211, for the dismissal of defendants' counterclaims and affirmative defenses. Defendants have responded in opposition to plaintiff's motion and bring a cross-motion, pursuant to CPLR 3126, to strike plaintiff's complaint for willful failure to provide discovery. Both parties have filed replies. Discovery is not complete and the Note of Issue has not been filed.

BACKGROUND

Plaintiff is the owner of the building located at 1407 Broadway, New York, NY 10018 (the building). Treci is a corporation that manufactures and distributes women's clothing and Mr. Tsui is a principal and CEO of Treci. On October 11, 2007 plaintiff and Treci entered into a written commercial lease agreement for Unit 710 on the 7th floor of the building with a lease term of November 1, 2007 to February 28, 2011.[1] At the execution of the lease agreement Treci tendered a security deposit to plaintiff in the amount of $63,309.75 pursuant to the agreement. Mr. Tsui executed a "Good-Guy" Guaranty (Guaranty), personally guaranteeing plaintiff full performance and observance of all obligations to be performed by Treci while in actual possession of the premises. Treci remained in possession of the premises until October 2009 and made its last rent payment on August 1, 2009. As a result, plaintiff is seeking unpaid rent and fees from September 1, 2009 through July 14, 2010. Plaintiff asserts that the amount of rent outstanding through and including the date Treci vacated is $39,983.84. The security deposit is still being held by plaintiff.

In support of its motion plaintiff submits, *inter alia*, the affidavit of Bob Foreman (Mr. Foreman), the Leasing Director of Gettinger Management LLC; the affidavit of Peter Metas (Mr. Metas), superintendent of the subject premises; the subject lease agreement dated October 11, 2007; the Guaranty signed by Mr. Tsui on October 11, 2007; and an itemized list of unpaid rent and fees. In support of their cross-motion defendants submit an affidavit of Mr. Tsui and an affidavit of Joel Glantz (Mr. Glantz), Vice President of sales for Treci. Defendants also submit a transcript from a meeting that took place on October 1, 2009 between Mr. Tsui, Mr. Glantz, Mr. Foreman, and Steve Baron (Mr. Baron), a principal for the plaintiff.

[1] The annual rent from November 1, 2007 through October 31, 2008 was set at $231,750.00. The annual rent from November 1, 2008 trough October 31, 2009 was set at $238,703.00. The annual rent from November 1, 2009 through October 31, 2010 was set at $245, 864.00. The rent from November 1, 2010 through February 28, 2011 was set at $253,239.00.

Paragraph 45(e) of the lease provides that a modification of the lease cannot take place without a subsequent written agreement, and states in pertinent part:

> "This Lease may not be extended, renewed, terminated, or otherwise modified and no provision is waived, except as expressly provided for herein or by an instrument in writing signed by the party against whom enforcement of any such extension, renewal, termination, modification, waiver is sought" (*see* Notice of Motion, exhibit D).

Paragraph 45(k) of the lease agreement memorializes the lease as a complete contract and states:

> "This leases contains the entire agreement between the parties and all prior negotiations and agreements are merged in this lease. Any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought" (*id.*).

Paragraph 8(c) of the lease addresses the security deposit in the event of default by the tenant:

> "The landlord may apply or retain the whole or any party of the security so deposited to the extent required for the payment of rent or any other sum as to which tenant is in default..." (*id.*).

In connection with the lease Mr. Tsui, executed the Guaranty which provides that the guarantor:

> "absolutely, irrevocably and unconditionally guarantees to Landlord (a)(i) the payment of Base Rent and Additional Rent (as defined in the Lease) payable under the Lease, (ii) the payment of all use and occupancy charges payable to the Landlord after the expiration or earlier termination of the term of the lease, and (iii) any damages to the Premises resulting from any default... (b) the full and prompt payment of all damages and expenses that may arise in connection with or as a consequence of any of the foregoing (including but not limited to attorneys' fees and disbursements). However nothing in this Guaranty shall be deemed to limit the liability of the tenant under or pursuant to the Lease or Landlord's right to retain and/or apply the security deposit under the Lease" (*id.*, exhibit E).

Defendants claim that due to the recession in late 2008, they realized they could not afford the space in plaintiff's building and needed a smaller location. Defendants maintain that they had multiple discussions with Mr. Metas about moving to a smaller

location in the building and were repeatedly advised by Mr. Metas that they would be able to relocate. In furtherance of looking for a smaller office defendants were shown unit 908, a smaller unit within the building. Due to the fact that no new lease agreement was provided to defendants by the fall of 2009, defendants assert that an in person meeting took place between the parties on October 1, 2009. Mr. Tsui and Mr. Glantz were present at the meeting for the defendants and Mr. Foreman and Mr. Baron were present on behalf of the plaintiff. Unbeknownst to Mr. Foreman and Mr. Baron, defendants made an audio recording of this meeting. During the meeting there were discussions regarding plaintiff providing defendants with a new lease agreement for a smaller space, however no new agreement was signed by the parties at the meeting (*see* Notice of Cross-Motion, exhibit A).

In support of their cross-motion, defendants state that on or about August 27, 2010 defendants' counsel served plaintiff with a first notice of discovery and inspection as well as a notice to take depositions on October 27, 2010 (*id.*, exhibit C). On or about September 17, 2010 defendants' counsel served plaintiff's counsel with interrogatories (*id.*). On October 11, 2010, plaintiff's counsel advised defendant's counsel by letter that they would serve their discovery responses by October 29, 2010 (*id.*, exhibit E). Thereafter, in a letter dated October 12, 2010, defendants' counsel acknowledged plaintiff's request to extend the time to comply with discovery requests and advised plaintiff's counsel that if the October 29, 2010 deadline was not met that they would be asking for Court intervention (*id.*, exhibit D). On November 1, 2010 defendants' counsel sent notice to plaintiff's counsel that plaintiff's discovery responses were still outstanding, and as a result defendants would move to strike the plaintiff's complaint for willful failure to provide discovery (*id.*, exhibit F). Subsequently, on November 8, 2010 the plaintiff filed for summary judgment.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "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]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Rotunda Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Plaintiff's Motion

Plaintiff proffers that it is entitled to recover all outstanding sums owing under the terms of the lease through July 14, 2010, as a matter of law, because it has established

defendants' breach of the lease and guaranty agreement. Plaintiff seeks judgment in the amount of $206,704.40 for unpaid rent, late fees, attorney's fees, and costs against Treci. Plaintiff seeks judgment in the amount of $39,983.84 for breach of the guaranty agreement by Mr. Tsui. Moreover, plaintiff asserts that reasonable attorney's fees are owed by the defendants pursuant to paragraph 10(k) of the lease agreement which states:

> Tenant shall pay to Landlord, as Additional Rent, all costs and expenses, including, without limitation, attorneys' fees, costs and disbursements, together with interest thereon at the Applicable Rate, incurred by Landlord (i) in any action or proceeding to which Landlord may be made a party by reason of any act or omission of Tenant . . . (ii) in enforcing any of the covenants and provisions of this Lease . . . (iii) in any action or proceeding . . . brought by Landlord against Tenant on account of the provisions hereof . . . " (*see* Notice of Motion, exhibit D).

Plaintiff also seeks the dismissal of the defendants' affirmative defenses and counterclaims.[2]

In opposition, defendants aver that plaintiff's motion should be denied and plaintiff should be estopped from relying upon the merger clause in the lease agreement because of plaintiff's representations that Treci could move to a smaller unit. Defendants also assert that plaintiff's summary judgment motion should be denied so that discovery can be completed, as plaintiff may be in possession of drafts regarding a lease for a smaller unit. In support of their cross-motion, defendants maintain that plaintiff's complaint should be stricken, pursuant to CPLR 3126, because plaintiff willfully and intentionally failed to provide defendants with discovery despite repeated demands.

The Court finds that plaintiff has set forth sufficient evidence to *prima facie* establish that there was a binding lease agreement between the parties and that Treci

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[2] Defendants answered together and raise five affirmative defenses in their answer: (1) failure to state a cause of action; (2) equitable estoppel; (3) doctrine of waiver; (4) doctrine of laches; and (5) accord and satisfaction. Defendants assert two counterclaims: (1) breach of an oral agreement between the parties permitting Treci to move to a smaller unit within the building, for which defendants have incurred damages of at least $72,000; and (2) conversion of defendants' security deposit in the amount of $60,000.

breached the lease by vacating the premises prior to the end date of the lease agreement without paying the outstanding unpaid rent remaining on the lease (*see J.A.B. Madison Holdings LLC v Levy & Boonshoft, P.C.*, 22 Misc. 3d 1138[A], 2009 NY Slip Op 50501[U], *3 [Sup Ct, NY County 2009]). Accordingly, the burden shifts to defendants to assert a defense to the enforcement of the terms of the lease that is sufficient to raise a triable issue of fact (*see id.*).

Defendants argue that there is a triable issue of fact regarding whether an oral agreement was reached between the parties to permit Treci to move to a different unit within the building. Generally when a "lease contains a clause requiring modification of its terms to be in a writing signed by the landlord, oral modification is precluded" (*see Aris Indus. v 1411 Trizechahn-Swig*, 294 AD2d 107, 107 [1st Dept 2002], citing General Obligations Law § 15–301[1]; *Joseph P. Day Realty Corp v Jeffrey Lawrence Assoc.*, 270 AD2d 140, 141 [1st Dept 2000]; *99 Realty Co. v Eikenberry*, 242 AD2d 215 [1st Dept 1997]). Here, paragraph 45(e) of the lease agreement explicitly requires any modifications of the lease to be in writing. "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving up practical interpretation to the language employed and the parties' reasonable expectations" (*112 W. 34th St. Assoc. LLC v 112-1400 Trade Props. LLC*, 95 AD3d 529, 531 [1st Dept 2012], quoting *Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 861 [2007]). While defendants claim they reached an oral agreement with plaintiff to allow Treci to move to a smaller commercial unit within the building, these discussions were never memorialized in writing in the form of a lease modification. Without a written memorialization of the oral modification, "the alleged representations from the plaintiff are nothing more than negotiations, or an agreement to

agree" (*Two Wall St. Assoc. Ltd. Partnership v Anderson, Raymond, & Lowenthal*, 183 Ad2d 498, 498 [1st Dept 1992]).

Additionally, defendants claim they relied on the alleged representations by plaintiff, and as a result plaintiff should be equitably estopped from recovering the outstanding rent and other fees due under the written lease agreement.

The doctrine of equitable estoppel is in place to "prevent the infliction of unconscionable injury and loss upon one who has relied upon the promise of another" (*American Bartenders School, Inc. v 105 Madison Co.*, 59 NY2d 716, 718 [1983]). The necessary elements of equitable estoppel are: (1) conduct amounting to false representation or concealment of material facts; (2) intention or expectation that the other party will act upon such conduct; and (3) actual or constructive knowledge of the true facts (*see BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 853 [1st Dept 1985]). In order to prevail, the party seeking estoppel must show: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party; and (3) a prejudicial change in his or her position (*see id.; River Seafoods, Inc. v JP Morgan Chase Bank*, 19 AD3d 120, 122 [1st Dept 2005]).

The Court finds defendants' argument regarding the applicability of the doctrine of equitable estoppel insufficient to raise a triable issue of fact. Defendants do not show reasonable reliance on the representations by plaintiff, and have failed to demonstrate prejudicial change to their position as a result of their reliance. It is clear that both parties were involved in discussions about a modification of the lease. However, since there was no written modification of the lease it was not reasonable for defendants to rely on plaintiff's oral representations (*see Aris Indus.* 294 AD2d at 107 [Without a written memorialization of the alleged oral lease modification, despite numerous drafts exchanged between the parties, the Court found tenant's promissory estoppel claim to

be without merit as there could be no reasonable reliance on landlord's oral representations in light of the lease's clear provision requiring modifications of its terms to be in writing signed by the landlord]; *see also Joseph P. Day Realty Corp.*, 270 AD2d 140 [1st Dept 2000]).

Moreover, there cannot be an unconscionable injury to the defendants if they are forced to live under the terms of an agreement they willingly entered into (*see Aris Indus.*, 294 AD2d at 107). The defendants, sophisticated businessmen, signed the original lease agreement and Mr. Tsui willingly signed the Guaranty in October of 2007, with full knowledge that the lease ran through February 28, 2011. Notwithstanding the fact that defendants wanted to move to smaller unit in 2009, this intent does not vitiate the lease agreement which was still in effect for another sixteen months. The Court therefore concludes that plaintiff is entitled to recover the outstanding sums under the terms of the lease, and accordingly, plaintiff's motion for summary judgment against Treci is granted on the issue of liability for their second cause of action.

The Court finds that plaintiff has set forth sufficient evidence to establish that there was a binding guaranty agreement between the parties and that Mr. Tsui breached the agreement by failing to pay rent for September and October 2009, during which time Treci occupied the premises but did not pay any rent.

"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" (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998], citing *BNY Fin. Corp. v Clare*, 172 AD2d 203 [1st Dept 1991]; *see Chemical Bank v Geronimo Auto Parts Corp.*, 225 AD2d 461 [1st Dept 1996]. Here, the first paragraph of the guaranty agreement signed by Mr. Tsui establishes that the agreement was in fact absolute and unconditional (*see* Notice

of Motion, exhibit E). Plaintiff has proven that there is an underlying debt due to Treci's failure to pay rent from September and October 2009 (*id.*, exhibit F). Plaintiff has further proven that Mr. Tsui has not paid the debt owed by Treci for September and October 2009 pursuant to the guaranty agreement (*id.*). Mr. Tsui fails to raise a triable issue of fact in opposition. The Court therefore concludes that plaintiff is entitled to recover the outstanding sums under the terms of the guaranty, and accordingly, plaintiff's motion for summary judgment on its first cause of action against Mr. Tsui is granted on the issue of liability.

As to plaintiff's request for summary judgment on its third cause of action, the Court finds that pursuant to paragraph 10(k) of the lease agreement, plaintiff is entitled to its reasonable attorneys fees, costs, and disbursements incurred by plaintiff, and the amount of fees to which plaintiff is entitled is referred to a Special Referee for a hearing.

The Court now turns to the portion of plaintiff's motion seeking dismissal of defendants' counterclaims and affirmative defenses. Defendants' first counterclaim is for a breach of an oral agreement between the parties permitting Treci to move to a smaller unit within the building, for which defendants claim to have incurred damages of at least $72,000.00. However, as noted above any modifications the lease, including moving to another unit, had to be memorialized in writing. As there was no written agreement or modification permitting defendants to move to a smaller unit within the building, defendants' counterclaim for damages related to breach of an oral agreement is denied.

Defendants' second counterclaim alleges conversion of their security deposit. The security deposit is addressed in Paragraph 8(c) of the lease agreement which states: "Landlord may apply or retain the whole or any party of the security so deposited to the extent required for payment of rent or any other sum as to which tenant is in

default..." (Notice of Motion, exhibit D). As it has already been decided that defendants breached the lease and guaranty agreements, plaintiff is entitled to retain the security deposit to apply towards the outstanding rent in arrears. Accordingly, defendants' second counterclaim for a return of their security deposit is denied.

Moreover, defendants' five affirmative defenses of failure to state a claim, equitable estoppel, doctrine of waiver, doctrine of laches, and accord and satisfaction are also hereby dismissed.

Defendants' Cross-Motion

The Court is unpersuaded by the defendants' argument that pursuant to CPLR 3126 plaintiff's pleadings should be stricken for willful failure to provide discovery. In the instant matter there are no Court orders directing plaintiff to provide disclosure, and despite plaintiff's failure to respond to defendant's discovery requests, the Court does not find that plaintiff's failure to respond was willful (*see* CPLR 3126). Moreover, in order to defeat summary judgment, the party seeking further discovery must "establish how discovery will uncover further evidence or material in the exclusive possession of the [plaintiff], as is required under CPLR 3212(f)" (*Kent v East 11th Street*, 80 AD3d 106,114 [1st Dept 2010], citing *Berkeley Fed. Bank & Trust v 229 E. 53rd St. Assoc.*, 242 AD2d 489 [1st Dept 1997]; *see Auerbach v Bennett*, 47 NY2d 619, 636 [1979]; *Arpi v New York City Tr. Auth.*, 42 AD3d 478, 479 [2d Dept 2007]). There must be an actual likelihood of locating additional relevant evidence, the mere hope of finding evidence is insufficient (*see Kent*, 80 AD3d 106 at 114, citing *Neryaev v Solon*, 6 AD3d 510 [2d Dept 2004]). Defendants have not demonstrated the likelihood that discovery will lead to evidence sufficient to defeat summary judgment, since the lease agreement was never modified in writing. Accordingly, defendants' cross-motion to strike plaintiff's complaint is denied.

CONCLUSION

Upon the foregoing, it is

ORDERED that the portion of plaintiff's motion for summary judgment on its complaint is granted, and the issue of the amount of damages and reasonable attorneys' fees, costs, and disbursements awarded to plaintiff is referred to a Special Referee to hear and determine; and it is further,

ORDERED that the portion of plaintiff's motion seeking dismissal of defendants' counterclaims and affirmative defenses is granted; and it is further,

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a special referee, and it is further,

ORDERED that defendants' cross-motion to strike plaintiff's complaint is denied; and it is further,

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 6-29-12

PAUL WOOTEN ***J.S.C.***

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**