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

PRESENT: HON. PAUL WOOTEN Justice PART 7

174 SECOND EQUITIES CORP.,

Plaintiff,

-against-

INDEX NO. 101611/10

MOTION SEQ. NO. 001

MOSES LAX, ISRAEL HOROWITZ AND CITISPACES I, LLC,

Defendants.

The following papers were read on this motion by plaintiff for summary judgment as well as a default judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ■ Yes ☐ No

This is a breach of contract action brought by 174 Second Equities Corporation (plaintiff) to recover unpaid rent and related fees allegedly owed by Moses Lax (Lax), Israel Horowitz (Horowitz) (collectively, "defendants") and Citispaces I, LLC, (Citispaces) pursuant to a commercial lease. Plaintiff is the owner and landlord of the premises located at 299 East 11 Street , New York, New York (premises). Citispaces was the tenant of the premises, and Lax and Horowitz were guarantors of the Citispaces lease agreement (Citispaces lease). Citispaces failed to pay its monthly rent and was evicted from the premises. Plaintiff now seeks to recover the outstanding rent due under the terms of the Citispaces lease and guaranty agreements. Before the Court is the plaintiff's motion for summary judgment, pursuant to CPLR 3212, seeking judgment against the defendants Lax and Horowitz in the amount of $253,741.05 for unpaid rent, additional rent, attorney's fees and costs. Plaintiff is also seeking a default judgment against Citispaces in the amount of $253,741.05 pursuant to CPLR 3215. Also before the Court is a cross-motion by Lax and Horowitz, pursuant to CPLR 3124, seeking

an Order compelling plaintiff to provide all outstanding discovery.

BACKGROUND

On February 14, 2008, plaintiff and Citispaces executed a commercial lease agreement, in which plaintiff agreed to rent the corner store and partial basement of the premises to Citispaces for a lease term of ten years beginning on March 1, 2008 and ending on February 28, 2018, at the increasing rate of $14,420.00 per month. Upon execution of the lease, Citispaces paid plaintiff the sum of $42,000.00 as a security deposit. Lax and Horowitz, in separate written guaranty agreements, each dated February 18, 2008, guaranteed full performance of the terms of the Citispaces lease, including payment of the tenants rent obligation (Lavian Affidavit, ¶ ¶ 7, 8). The limited guaranty of the lease ("the guaranty") states:

> "Anything herein to the contrary notwithstanding this Guaranty shall not exceed to any obligations incurred by Tenant under the Lease which accrue five (5) years after commencement date of the Lease term provided that (i) Tenant notifies the Landlord in writing (after said five years) of the date the Tenant intends to vacate the premises six (6) months in advance of said date, (ii) that all rent and additional rent and the other charges due under the lease as of the date that the premises are surrendered shall have been paid, (iii) the return of the premises as vacant, broom clean, undamaged and in such condition as shall be required by the Lease, and (iv) delivery to the Landlord by Tenant of the keys of the Premises. The date upon which the Tenant shall have satisfied each of these conditions shall be the "Surrender date". This Guaranty does not modify the terms of the Lease and nothing herein contained shall relieve Tenant from any liability thereunder in accordance with the terms of the Lease" (Notice of Motion, exhibit D).

The limited guaranty further provided that:

> "Landlord shall not be required to resort to any security held under the Lease and Guarantor's liability hereunder is primary. It is agreed that any security deposited under Article 31 of the lease or elsewhere shall not be computed as a deduction from any amount payable by tenant or Guarantor under the terms of the this Guaranty or the Lease" (*id.*).

Shortly after executing the lease, Citispaces breached the lease agreement by failing to pay its monthly rent as well as its additional rent (Lavian Affidavit, ¶ 9). Consequently, plaintiff commenced summary non-payment eviction proceedings against Citispaces in New York Civil

Court, and a default judgment was entered against Citispaces due to its failure to appear or file an answer (*id.* at ¶ 10). On June 22, 2009, Citispaces was evicted from the premises with a due and owing balance of $94,097.05, representing rent and additional rent that is still owed to plaintiff (*id.* at ¶ 12). Immediately following Citispaces eviction in June 2009, plaintiff entered into a separate lease agreement (Day Lease) for the premises with new tenant Kam Seng Day (Day) (*id.* at ¶ 22). However, due to market conditions plaintiff was unable to obtain the same monthly rent which was due pursuant to the Citispaces lease (*id.*).

Plaintiff commenced the present action to recover the amount in rent and additional rent owed under the Citispaces lease and the guaranty agreements. The first cause of action seeks damages against Lax and Horowitz for breach of the Citispaces lease and the guaranty in the amount of $94,097.05, based on Citispaces' failure to pay its monthly rent. The second cause of action seeks damages against Lax and Horowitz for breach of the Citispaces lease and the guaranty in the amount of $159,644.00, on account of the rent due for the period subsequent to Citispaces eviction. The third cause of action seeks a default judgment against Citispaces for breach of the Citispaces lease for a total amount of $253,741.05, for rent owed pre-eviction and post-eviction. The fourth cause of action is for the recovery of legal fees incurred by the plaintiff in this action, pursuant to provisions in the Citispaces lease and the guaranty. Defendants, in their answer, assert the affirmative defenses of failure to state a claim, breach of implied covenant in good faith and fair dealings, waiver and estoppel, statute of limitations and laches, failure to mitigate damages, and failure to subject claims to setoff and recoupment.

In support of its motion for summary judgment, plaintiff submits the affidavit of George Lavian (Lavian Affidavit), the Secretary of plaintiff, the Citispaces lease, the limited guaranty of lease, a Civil Court Order for judgment of possession, the Day Lease, and rent ledgers. Plaintiff avers that it is entitled to judgment as a matter of law on its cause of action for breach of contract, including legal fees and costs, on the basis that defendants have failed to raise any

issues of fact and defendants' affirmative defenses lack merit. Plaintiff contends that there is no legitimate dispute of fact regarding the break down of the unpaid rental fees during the pre-surrender period. Plaintiff claims that defendants' acknowledge that Citispaces failed to pay its rent and that monies are owed to Plaintiff (Affirmation in Reply, ¶ 8). As a result, the only specific charges defendants dispute are the late charges, that plaintiff claims are due and owing pursuant to the Citispaces lease, which states that payments made more than ten days after the due date are subject to a five percent late charge (*id* at ¶ 9). Plaintiff also asserts that despite defendants claim that based on their understanding of the lease they would be released from liability upon surrender of the premises, the guaranty stipulates that the obligations of the guarantors would continue for at least five years, even if Citispaces surrendered possession of the premises prior to the expiration of the five year period (Affirmation in Rely, ¶¶ 15-16). Plaintiff further claims that the "Good Guy" component of the guarantee did not become effective until after five years and if Citispaces satisfied certain conditions (*id* at ¶16). Plaintiff also contends in regards to the security deposit, there is no obligation to apply the security deposit in a manner that benefits the guarantors of the Citispaces lease (see Memorandum of Law in Support).

In opposition to the plaintiff's motion for summary judgment, defendants submit the affidavit of Horowitz (Horowitz Affidavit) and the limited guaranty of lease. Horowitz in his affidavit concedes that plaintiff is entitled to some monies for the period that Citispaces occupied the premises and rent was not paid (Horowitz Affidavit, ¶ 29). However, defendants disagree with plaintiff's allegation that Citispaces owed $94,565.05 in unpaid rent before it vacated the premises (*id* at ¶ 30). Defendants' claim they should be afforded a reasonable opportunity to conduct discovery to assess the validity of plaintiff's calculation of rental fees and late fees. Defendants further allege that their obligation to Citispaces was based on a "Good-Guy" guarantee clause, under which the guarantor is only obligated to guaranty rental payment

accruing during the period in which the tenant is actually occupying the space, but once the tenant no longer occupies the space, regardless of the time remaining under the lease, the guarantor is relieved of all further liability (Horowitz Affidavit, ¶ 9). Defendants maintain that, based on this understanding, once Citispaces surrendered the premises in June of 2009 Lax and Horowitz could no longer be held liable for rent post-surrender of the premises. Defendants also claim that under New York law, it is improper for plaintiff to keep the security deposit and not apply it to the amount allegedly owed by the defendants for the pre-surrender period (see Memorandum of Law in Opposition).

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 for Summary Judgment Against Defendants Lax and Horowitz

The plaintiff has set forth sufficient evidence to *prima facie* establish that there was a binding lease and guaranty agreement; that Citispaces breached the lease by vacating the premises prior to the end date of the lease agreement without paying the outstanding rent and fees owed pre-eviction, that defendant has not paid the amount owed in rent post-eviction[1]; that late fees, attorney's fees and costs are owed to the plaintiff under the terms of the lease; and that Lax and Horowitz have not paid the amounts due pursuant to the guaranty agreements. Thus the burden shifts to the 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 J.A.B. Madison Holdings LLC v Levy & Boonshoft, P.C.*, 22 Misc3d 1138 [A], 2009 NY Slip Op 50501[U], *3 [Sup Ct, NY County 2009]).

Lax and Horowitz have asserted eight affirmative defenses in response to plaintiff's complaint. Most notably the defendants claim the plaintiff failed to mitigate damages, failed to compute damages properly, and claims from the plaintiff are subject to being offset by the security deposit to prevent an unjust windfall. Defendants argue further that summary judgment should be denied because it is premature due to lack of discovery. Further, defendants have made a cross-motion pursuant to CPLR 3124 to compel discovery from plaintiff. In support of their cross-motion defendants maintain that discovery is needed to determine how the plaintiff computed the amounts allegedly owed, and the circumstances under which the plaintiff

[1] Said amount has been mitigated as a result of the execution of the Day lease.

negotiated the Day Lease.

It is established that under New York law, that a landlord has no duty to mitigate damages by re-renting leased premises upon a tenant's default (*see Holy Props. v Cole Prods.*, 87 NY2d 130, 133 [1995] [holding that once "the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to re-let, or attempt to re-let abandoned premises in order to minimize damages"]); *85 John St. Partnership v Kaye Ins. Assoc., L.P.*, 261 AD2d 104,105 [1st Dept 1999] [landlord owed no duty to re-let premises in order to mitigate damages, either in law or under the lease]; *Gordon v Eshaghoff*, 60 AD3d 807, 808 [2d Dept 2009] ["the Supreme Court properly determined that the plaintiff, a residential landlord, was under no duty to mitigate her damages caused by the defendants' breach of the parties' lease"]). Therefore, as a matter of law, plaintiff had no legal obligation to mitigate damages after the defendants breached the lease agreement and were evicted by the New York County Civil Court. Nor was there a duty imposed on plaintiff to mitigate damages by the terms of the Citispaces lease itself. Here, plaintiff did in fact mitigate damages by entering into the Day Lease which commenced on July 1, 2009 and runs through June 30, 2019.

Plaintiff has provided detailed information regarding the $94,097.05 owed by the defendants, up to and including the eviction date on June 22, 2009 (*see* Notice of Motion, exhibit J). Further, plaintiff has provided detailed information to substantiate its request for post eviction damages in the amount of $159,644.00 pursuant to the full term of the Citispaces lease. Plaintiff has provided the Day Lease outlining the rent to be paid under that agreement (*see id.*, exhibit K). Plaintiff also submitted a spreadsheet outlining the difference in monthly rent between the Citispaces lease and Day Lease (*id.*, exhibit L), which results in post eviction damages in the amount of $159,644.00.

Defendants assert that the guaranty agreement signed by Lax and Horowitz does not

cover the period subsequent to Citispaces' surrender of the premises. Defendants claim that they adhered to the provision of the guaranty, that the premises was in broom clean condition after they vacated on June 15, 2009, the keys were accepted by the plaintiff, and that they did not need to give six months advance notice of when they were vacating because they were doing so prior to the five year anniversary of the lease. Defendants further claim that they should be released from liability because surrendering the space as they did within sixteen months of the commencement of the lease is sufficient to terminate all liability under the guaranty.

The Court finds the defendants interpretation of the contract here to be unavailing. The guaranty clearly stipulates that "this Guaranty shall not extend any obligations incurred by Tenant under the Lease which accrue five (5) years after commencement date of the lease term provided that ..." (Notice of Motion, exhibit D). This provision guarantees the obligations of the defendants for at least the first five years of the lease. The provision is in place to allow defendants to terminate liability after five years if they were in compliance with all the provisions in paragraph eight of the guaranty agreement. Since five years did not accrue from the commencement date of the lease and defendants were not in compliance with all of the requirements under paragraph eight of the guaranty, defendants' liability extends and continues for the entire length of the lease agreement. Accordingly, assertions by the defendants about substantial performance in their surrender of the premises prior to five years after the agreement are without merit.

Defendants also claim their obligations under the guaranty agreements were terminated once plaintiff entered into the Day Lease. Defendants cite to the case *Holy Props. v Cole Prods.* (87 NY2d at 134) which states that once premises are re-let the original tenant is released from further liability for rent. However, defendants fail to note that this case also states that a landlord "could accept the tenant's surrender, reenter the premises and re-let them

for its own account thereby releasing the tenant from further liability for rent" (*id.*). Here, there was no effective surrender pursuant to the terms of the lease. Paragraph 24 of the Citispaces lease provides that:

> No act or thing done by Owner or Owner's agents during the term hereby demised shall be deemed an acceptance of a surrender of the demised premises, and no agreement to accept such surrender shall be valid unless in writing and signed by Owner. No employee of Owner or Owner's agent shall have any power to accept the keys of said premises prior to the termination of the lease, and the delivery of keys to any such agent or employee shall not operate as a termination of the lease or a surrender of the demised premises (Notice of Motion, exhibit D).

While it is disputed whether or not the keys were given back to plaintiff, there is no written evidence before the Court establishing that the premises had been effectively surrendered by defendants pursuant to the terms of the lease. Defendants further assert, based on the *Holy Props.* case, a guarantor is only responsible for the terms of a specific agreement and not a modified agreement. However, plaintiff is not attempting to hold defendants to a modified lease agreement or attempting to hold them to the terms of the Day Lease, which is a new and separate agreement. Plaintiff is only attempting to enforce the terms of the Citispaces lease by seeking from defendants the difference between the Citispaces lease and the Day Lease. The amount of money due and owing would be substantially larger if plaintiff had not re-let the premises pursuant to the Day Lease.

Holy Props. further states that "although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please" (87 NY2d at 134, citing *International Publs. v Matchabelli*, 260 NY 451, 454 [1933]; *Mann v Munch Brewery*, 225 NY 189, 194 [1919]; *Hall v Gould*, 13 NY 127, 133-134 [1855]). "If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable" (*id.*). Here, paragraph seventeen of the lease agreement states that the tenant, upon default, "waives the service of notice of intention to re-enter or institute legal proceedings to that end" (Notice of

Motion, exhibit D). Paragraph eighteen of the lease agreement addresses the plaintiff's right to re-let and collect the difference in rent, if any, between the original lease and subsequent leases. Paragraph eighteen states:

> "Owner may re-let the demised premises or any part or parts thereof, either in the name of the Owner or otherwise, for a term or terms, which may at Owner's option be less than or exceed the period which would otherwise have constituted the balance of the term of this lease, and may grant concessions or free rent or charge a higher rental than that in this lease, and/or (c) Tenant or the legal representative of Tenant shall also pay Owner as liquidated damages, for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease" (*id.*).

Defendants also fail to note that the Court in *Holy Props.* states that after premises are abandoned a landlord "could notify tenant that it was entering and re-letting the premises for the tenants benefit of the tenant. If the landlord re-lets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and re-letting and then to pay the tenant's rent obligation" (87 NY2d at 134, citing *Underhill v Collins*, 132 NY 269 [1892], *Centurian Dev. v Kenford Co.*, 60 AD2d 96 [4th Dept 1977]). Here, defendants waived notice pursuant to paragraph seventeen of the lease agreement, and as a result plaintiff acted in accordance with the relevant case law, by re-letting the premises and seeking to hold defendants liable for the difference in the rental fees between the Citispaces lease and the Day Lease.

Additionally, defendants argue that the security deposit in the amount of $42,000.00 paid at the time of the execution of the Citispaces lease should be credited to any monies owed to plaintiff during the pre-surrender period. However, it has been held that the landlord has a right to retain a security deposit from a defaulting tenant (*see Wiener v Tae Han*, 291 AD2d 297, 297 [1st Dept 2002]). "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]; *Chemical Bank v Geronimo Auto Parts Corp.*, 225 AD2d 461 [1st Dept 1996]. The guaranty addresses the security deposit issue in paragraph four which states:

> "Landlord shall not be required to resort to any security held under the Lease and Guarantor's liability hereunder is primary. It is agreed that any security deposited under Article 31 of the Lease or elsewhere shall not be computed as a deduction from any amount payable by Tenant or Guarantor under the terms of this Guaranty or Lease" (Notice of Motion, exhibits E and F).

Here, plaintiff has established the prima facie elements necessary to enforce the guaranty, and pursuant to the guaranty defendants are not entitled to a credit from the security deposit for a reduction of the "pre-surrender" amount owed. Thus, pursuant to the terms of the guaranty defendants are not entitled to a credit from the security deposit for a reduction in the "pre-surrender" amount owed by the defendants. The Court also finds defendants are not entitled to an offset on the "post surrender" rent. Paragraph four of the guaranty agreement is clear and unambiguous, it states the security deposit will not be applied to reduce the liability of the guarantors. It is well established that a guaranty is an independent agreement and its terms stand alone in imposing direct obligations for payment on the guarantor (*see City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Since there is a clear and independent guaranty agreement stating that defendants are not entitled to a reduction in rent based on the security deposit, the Court finds that the security deposit does not need to be applied to "post surrender" liability. Accordingly, plaintiff's motion for summary judgment on its complaint is granted.

The Court is not persuaded by the defendants' cross-motion to deny summary judgment in order to compel plaintiff to provide requested discovery, pursuant to CPLR 3124. 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]). Here, defendants have not met this standard. Furthermore, the majority of the information requested by defendants has been produced by plaintiff in support of its motion or is contained within the lease agreement. Defendants requested information regarding the calculation of late fees, however, information on late fees can be found in paragraph fifty-five of the lease agreement (Notice of Motion, exhibit D) and the calculation of late fees can found in plaintiff's exhibit J. Defendant also requests information regarding the negotiations between plaintiff and Day, and the circumstances in which Citispaces surrendered the lease. The negotiations between plaintiff and Day are inapplicable here, as plaintiff had no duty to mitigate its damages, and any surrender of the premises by defendant must have been in writing pursuant the Citispaces lease, and evidence of same was not produced by either party. Accordingly, defendants' cross-motion seeking to compel discovery is denied, and plaintiff's motion for summary judgment against the defendants is granted. In light of the foregoing, defendant's five affirmative defenses are dismissed.

The fourth cause of action in plaintiff's complaint seeks a hearing to determine reasonable attorney's fees. Paragraph seventy-five of the lease agreement states: "If owner, as a result of default by tenant of any provisions of this lease, including the covenants to pay rent and/or additional rent, makes any necessary expenditure or incurs any necessary

obligations for the payment of money, including but not limited to attorney's fees...shall be deemed to be additional rent hereunder and shall be paid by tenant to owner..." (*id.*, exhibit D). The Court finds that plaintiff is entitled to reasonable attorney's fees against Lax and Horowitz. Accordingly, plaintiff's fourth cause of action is granted and this issue is referred to a Special Referee to hear and determine.

Plaintiff's Motion For Default Judgment Against Citispaces I, LLC

Plaintiff's third cause of action seeks a default judgment against Citispaces in the amount of $253,741.05 pursuant to CPLR 3215. This portion of plaintiff's motion is denied without prejudice, with leave to renew, for plaintiff's failure to attach an affidavit of service of the summons and complaint upon Citispaces I, LLC.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that the portion of plaintiff's motion for summary judgment, pursuant to CPLR 3212, as against defendants Moses Lax and Israel Horowitz is granted and defendants' affirmative defenses are dismissed; and it is further,

ORDERED that the issue of the amount of damages to which plaintiff is entitled, and the issue of the amount of reasonable attorney's fees to be awarded to plaintiff, is hereby referred to a Special Referee to hear and determine; and it is further,

ORDERED that the portion of plaintiff's motion for a default judgment, pursuant to CPLR 3215, as against Citispaces is denied without prejudice; and it is further,

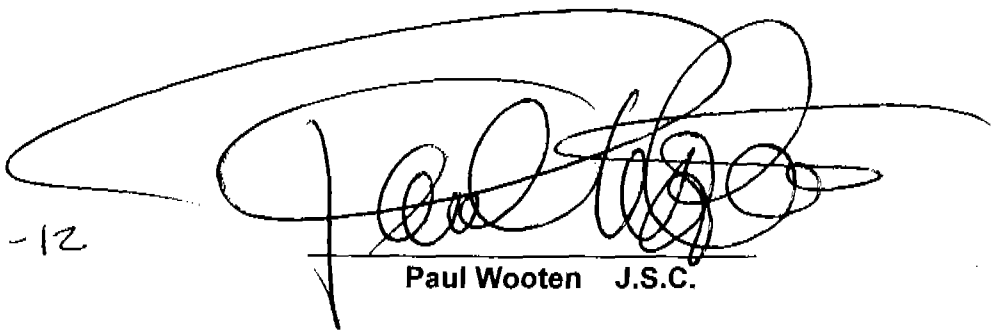
ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry on the Special Referee Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a Special Referee; and it is further,

ORDERED that the cross-motion by defendants Moses Lax and Israel Horowitz to compel discovery is denied; and it is further,

ORDERED that the remaining parties are directed to appear for a preliminary conference in Part 7, 60 Centre Street, Room 341 on October 24, 2012 at 11:00 A.M.; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order, with Notice of Entry, upon plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



Dated: 7-13-12

Paul Wooten J.S.C.

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

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