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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT
Justice

PART 10

Index Number : 105348/2010
TAI'S FOOD COURT INC
vs
601 EIGHTH AVENUE LLC
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-3

Answering Affidavits — Exhibits _____ | No(s). 9, 11-14

Replying Affidavits _____ | No(s). 10

X-Motions + Aff 4-8

Upon the foregoing papers, it is ordered that this motion is

Denied. See attached Order

Dated: December 17, 2012

FILED
DEC 21 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: Dec. 18 2012

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS 10

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TAI'S FOOD COURT INC.,

Plaintiff,

-against-

601 EIGHTH AVENUE LLC,
VOLUNTEERS OF AMERICA-
GREATER NEW YORK, INC.,

Defendants.

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DECISION/ORDER
Index No.: 105348-2010
Seq. No.: 002

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

----------X

VOLUNTEERS OF AMERICA,
GREATER NEW YORK, INC.,

Third Party Plaintiff,

-against-

LI YING SUN,

Third Party Defendant.

----------X

HON. KATHRYN E. FREED:

Recitation, as required by CPLR §2219[a], of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
NOTICE OF MOTION, AFFIDAVITS AND EXHIBITS ANNEXED.....	...1-3.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	...9..... .....
REPLYING AFFIDAVITS.....	...10.....
OTHER..... X-Motion & affidavits; memos of law.	..4-8.....
EXHIBITS.....	..11-14.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff Tai's Food Court, Inc., (hereinafter "TFC"), and Third Part Defendant Li Ying Sun, (hereinafter, "Sun"), via motion, move for an Order granting summary judgment and dismissing the counterclaims asserted against them by defendant Volunteers of America-Greater New York, Inc., (hereinafter, "V.O.A."). TFC and Sun also move for an Order dismissing the third party complaint filed by V.O.A. against Sun individually. V.O.A., via cross-motion, moves for an Order granting summary judgment on its counterclaims and third party claims. V.O.A. also moves for an Order dismissing TFC's complaint against it, striking Sun's affirmative defenses, and granting it a hearing to assess attorneys' fees and expenses as against both TFC and Sun.

Factual and procedural background:

The instant matter is essentially a landlord tenant dispute. 601 Eight Avenue, LLC, (hereinafter, the "landlord"), is the landlord of the Prime Lease existing between it and VOA. VOA's sublessee is TFC. Ms. Sun is the guarantor of the sublease.

The material facts in this case are undisputed. VOA is a not for profit corporation which is a New York City based affiliate of Volunteers of America, a national charitable organization. On July 3, 2007, it entered into a Prime Lease with the landlord, to lease portions of the ground and second floors at 601 Eight Avenue, New York, New York, to operate an intake and prevention center for the homeless. The Lease was for a three year term, set to expire on May 31, 2010. Subsequent to signing the Lease, VOA lost its funding. Unable to terminate the Prime Lease, and in an effort to avoid a total loss, it advertised the premises as a sublet.

In April 2009, TFC's owner, Tai, met with Andrew Lloyd, Director of Risk Management, Purchasing & Property Control for VOA. Tai and his wife, Ms. Sun, expressed interest in subletting

the space to build a food court, but claimed that to do so, they would need to extend the Prime Lease term beyond its designated expiration date. They agreed to sublet the premises with so little time remaining on the Lease, believing that they would be able to negotiate a new lease with the landlord. Contemporaneously with the execution of the Sublease, Ms. Sun, as principal of TFC, signed a personal Guaranty, wherein she, *inter alia*, "unconditionally, absolutely and irrevocably guaranteed to VOA (1) the prompt payment when due of the Base Rent, and all other sums due in connection with or under the Sublease, and (2) any and all expenses (including without limitation, counsel fees and disbursements) incurred by VOA in enforcing any rights under the Guaranty" (see VOA's cross-motion, p. 14 ¶ 37.)

After TFC failed to negotiate an extension of the Prime Lease or obtain its own direct lease with the landlord, it ceased paying rent to VOA, from October 2009 throughout the last six months of the sublease term, while still remaining in possession of the premises, selling clothing and accessories. Consequently, on April 12, 2010, VOA commenced an L&T proceeding in New York County Civil Court. Following extensive negotiations, TFC and VOC entered into a stipulation wherein it was agreed, *inter alia*, that VOA would waive TAI's rent arrears totaling $66,200.00, and that TAI would vacate and surrender possession on June 1, 2010 at 3:00 P.M.

Mr. Lloyd asserts that on this scheduled date and time, he, as well as landlord's agent, Harold Sutton and TFC's attorney, Donald Eng, met at the subject premises. He alleges that he immediately observed the premises to be strewn with furniture, boxes of inventory, display racks and debris. While there, Mr. Eng asserts that he asked Mr. Sutton for permission to return to the store the next day to clean up the premises, but Mr. Sutton refused. Mr. Lloyd asserts that Mr. Eng asked Mr. Sutton if TFC could return in "about a week or so" to clean the premises. However, Mr. Eng, in

his "Affirmation of Donald Eng," as Exhibit "O," appends the deposition testimony of Mr. Lloyd taken on January 26, 2012. In his deposition, Mr. Sutton concedes that he overheard either Mr. Eng or Mr. Tai ask Mr. Sutton if they could be let back into the premises the next day, June 2nd, to move the items out. Mr. Lloyd also testified that he could not recall what Mr. Sutton's response to this request was.

While in the premises, Mr. Sutton's assistant and Mr. Lloyd each took photographs of the existing conditions which they observed. These photographs are appended to VOA's moving papers as Exhibits "A" and "B." They clearly depict the conditions that VOA described in its papers. The landlord subsequently removed this remaining property and had the premises cleaned. However, it gave VOA the $8,000.00 bill for the costs and expenses associated with this removal/clean up.

Positions of the parties:

VOA argues that TFC breached the Sublease by failing to pay certain rent and additional rent to it since October 2009, and breached the stipulation by failing to vacate the premises by 3:00 p.m. on June 1, 2010. It also argues that the release provision contained in the stipulation was an "executory accord," conditioned on TFC's satisfaction of its obligations to vacate and surrender possession of the premises, with time being of the essence. VOC refers to and relies on GOL §14-501(3), which provides that "[i]f an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord, or to assert his rights under the accord."

VOA also argues that TFC failed to perform its accord pursuant to the stipulation by failing to adhere to the vacate provisions of said stipulation, which was to surrender possession and leave

the premises empty. TFC's performance of these two conditions was the executory accord that TFC needed to satisfy in order to receive the benefit of the release provision set forth in paragraph 9 of the stipulation. VOA asserts that while TFC *surrendered* possession of the premises on the agreed upon date of June 1, 2010, it did not *vacate* the premises or *leave the premises vacant*. VOA, citing Black's Law Dictionary, argues that the word "vacant" means completely empty, as in no persons, property or debris. Consequently, since TFC did not leave the premises "vacant," neither TFC or Sun will be able to enforce the release provision contained in said stipulation.

TFC asserts that the Court need not concern itself with the issue of whether TFC had a meritorious claim for damages or defenses to VOA's nonpayment proceeding for rent. It argues that "the sole issue before the court is whether TFC breached the stipulation of settlement by failing to surrender 'vacant' possession." TFC argues that the meaning of the word "vacant" in the context of landlord and tenant relationships does not mean "devoid of people and property." It argues that if the intent of the stipulation was that all property be removed, the phrase "broom clean condition" would have been included in the language.

TFC also argues that "it is clear that any requirement for TFC to remove all of its personal property and to leave the premises broom clean was deleted from the stipulation. The final version of the stipulation only required TFC to promptly request access to return to clean up. It is undisputed that access was denied" (TFC's memo of law, p 6-7). TFC notes that the stipulation is silent as to what happens if permission to return was/is denied. Additionally, TFC asserts that VOA's attorney, Mr. Solomon, via letter appended as TFC's Exhibit "N," only requests that TFC reimburse VOA for the $8,000.00 clean up charge, and when TFC refused, VOA revived all of its prior claims, a remedy that the stipulation does not provide for.

Conclusions of law:

It is well established that "the proponent of 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' " (Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp., 70 A.D.3d 508, 510 [1st Dept. 2010], quoting Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Once the proponent of the motion has made a prima facie showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v. Metropolitan Museum of Art, 27 A.D.3d 227, 229 [1st Dept. 2006] citing Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation" (Morgan v. New York Telephone, 220 A.D.2d 728, 729 [2d Dept. 1995]; Zuckerman v. City of New York, at 562).

It is well settled that stipulations of settlement are judicially favored and will not easily be set aside (*see* Hallock v. State of New York, 64 N.Y.2d 224 [1984]; Matter of Frutinger, 29 N.Y.2d 143 [1971]). Stipulations of settlement are essentially contracts and will be construed in accordance with contract principles (*see* Serna v. Pergament Distributors, Inc., 182 A.D.2d 985, 986 [3d Dept. 1992], *lv. dismissed* 80 N.Y.2d 893 [1992]. Thus, "[o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation" (Hallock v. State of New York, 64 N.Y.2d at 230).

It should be noted that appended in TFC's moving papers, are three stipulations of settlement. The one designated as Exhibit "I," is the only one which bears the respective signatures of the

parties. Thus, this appears to be the final, official version, and will be the only one which the Court will acknowledge and address.

There are two pertinent paragraphs contained in the stipulation. Paragraph 6 states "[o]n or before 3:00 p.m. on the Surrender Date, Respondent shall vacate and surrender the Premises and return the same to Petitioner vacant and free of all occupants. In the event that Respondent is unable to remove any property or debris by 3:00 p.m. on the Surrender, Respondent agrees to make prompt arrangements through Petitioner and/or the overlandlord to gain access to the Premises and remove any remaining property or debris and leave the Premises in broom clean condition, except for debris caused by leaks and for property left by prior tenant."

Paragraph 9 states in pertinent part that "[p]rovided that Respondent timely vacates and surrenders possession of the Premises to Petitioner, in accordance with this stipulation on or before 3:00 p.m. on the Surrender Date, TIME BEING OF THE ESSENCE, Petitioner waives all monetary claims pursuant to the Sublease against Respondent..." It also states that Petitioner will waive the guaranty and discontinue the L&T proceeding.

Before the Court can determined the meaning of the terms "vacant" and "broom clean," it needs to address what appears to be contradictory, misleading and questionable language contained in the stipulation. While paragraph 7 clearly permits TFC an additional opportunity to make "prompt arrangements" to return to the premises after the Surrender date to clean up, paragraph 9 mandates that TFC comply with the surrender date and time, "TIME BEING OF THE ESSENCE," before it can be released from its outstanding debt. Moreover, the Court is mindful of Mr. Lloyd's deposition testimony, wherein he concedes that he overheard either Mr. Tai or his attorney, Mr. Eng, request permission from Mr. Sutton to return the following day to clean up the premises.

The Court also notes that the wording of said stipulation clearly contemplated the possibility that some items might be left behind in the premises after the surrender date and time. The stipulation stated very clearly that TFC should "make arrangements through Petitioner and/or overlord to gain access to the Premises and remove any remaining property or debris and leave the premises in broom clean condition..." This wording seems to indicate that at the surrender date and time, the premises were not required to be "broom clean." However, the stipulation remains silent as to what would happen if the landlord prevented TFC from performing its designated duties under its stipulation with VOA. Moreover, would this prevention of TFC from performing its duties be considered a material breach of the stipulation?

The Court further notes that both sides obviously had a personal interest in formulating the stipulation. TFC benefitted because VOA surrendered its right to collect all back rent due and owing as well as attorney's fees. Additionally, Sun's personal Guaranty would be waived. TFC, in agreeing to vacate by the stipulated date and time, relieved VOA from paying liquidated damages to the landlord, at the rate of 1.5 times the previous rent for every month, until TFC vacated or was evicted. VOC also prevails in that TFC agrees to relinquish any security due under the Sub-lease.

Therefore, based on the fact that the terms of the stipulation are not reasonably certain, (*see* Cobble Hill Nursing Home v. Henry & Warren Corp., 74 N.Y.2d 475 [1989]; Sterling Fifth Assoc. v. Carpentille Corp., Inc., 10 A.D.3d 282 [1st Dept. 2004]), summary judgment must be denied, as the parties' intent now becomes an issue of fact for a jury to decide.

In accordance with the aforementioned, it is hereby

ORDERED that plaintiff TFC's and third party defendant Sun's motion seeking an Order granting summary judgment and the dismissal of VOA's counterclaims is denied and it is further

ORDERED that TFC and Sun's motion for an Order dismissing VOA's third party complaint is hereby denied and it is further

ORDERED that VOA's cross-motion seeking an Order granting summary judgment on its counterclaims and third-party claims is hereby denied and it is further

ORDERED that VOA's cross motion seeking an Order striking Sun's affirmative defenses and granting it a hearing to access attorney's fees and expenses as against TFC and Sun, is also denied and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: December 17, 2012

Hon. Kathryn E. Freed
J.S.C.