SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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INDEX NO. 151555/2014

1436 LEXINGTON, LLC

Plaintiff,

MOTION DATE 01/09/2018, 01/09/2018

- v -

MOTION SEQ. NO. 001 002

EHUD BEN-ARI,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 82, 84

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 85

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

Upon the foregoing documents, it is

Plaintiff's motion for summary judgment is granted in part and defendant's motion is denied. The following facts are undisputed. On May 15, 2006, Plaintiff, and UCafe, entered into a written ten-year lease for a commercial premises located at 1436 Lexington Avenue, Store #1, New York, New York. In connection with the lease, defendant Ehud Ben-Ari signed a guarantee fully guaranteeing the performance of UCafe under lease, including the payments owed under the lease. For a number of years, UCafe did not pay the amount required in the lease.

In August 2013, plaintiff served a rent demand on UCafe in the amount of $167,267.62. Upon failure by UCafe to make payment, plaintiff commenced a non-payment proceeding in Housing Court. On October 2, 2013, the plaintiff (therein petitioner) and respondent settled that action by stipulation. UCafe consented to a judgment of possession and for $8,000 representing

use and occupancy for the months of September/October 2013. Defendant agreed to vacate no later than December 31, 2013 and agreed to pay $4,000 for each of the months of November and December 2013. The stipulation specifically provided "[T]he terms and conditions of this Agreement are without prejudice to the Petitioner's monetary claims for any and all additional monies due and owing to Petitioner; whether for rent, taxes, or any other sums allegedly due and owing to the Petitioner in accordance with the terms and conditions of the lease dated May 15, 2006 between the parties."

Plaintiff commenced this action seeking the arrears from defendant under the guarantee. Plaintiff moved for summary judgment on its claims and to dismiss the affirmative defenses. Plaintiff also sought dismissal of the counterclaim for abuse of process. In support of the motion, plaintiff submitted the lease, the guarantee, rent ledger, an earlier affidavit from defendant in this action, a commission invoice and the affidavit of Fred Stahl, the managing member of plaintiff. Defendant filed its own summary judgment motion (which the Court is permitting as opposition to plaintiff's motion) seeking dismissal of the action based upon accord and satisfaction, waiver, agreement between the parties and estoppel. In support of defendant's motion, defendant submitted his own affidavit, and an email between Stahl and defendant's father from April 2011. Defendant's arguments are premised on an alleged agreement that would have modified the monthly rent amount due to plaintiff. According to defendant, due to a downturn in the economy, as UCafe was unable to afford the rent, in 2009 his father and Mr. Stahl entered into an agreement where the monthly rent would be permanently reduced to $4,000 and payable in weekly $1,000 instalments. This alleged agreement was not reduced to writing, and was only made orally. Allegedly, plaintiff agreed to hold the rent at that rate for the balance of the lease, seven years.

The Court notes that although in this affidavit defendant claims to have personal knowledge of the modification, defendant does not claim to have been present at such meeting. Further, in an earlier affidavit, defendant stated "I had a limited role in the operations of the subject restaurant and therefore I am able only to offer limited testimony regarding of the business dealings between Plaintiff herein, and its principal, and the former lessee. Most, if not all of the dealings between the parties were done between Fred Stahl and my father who indeed ran the business on a day to day basis." Defendant has not submitted any affidavit from his father and in the attached depositions transcript of defendant's father, Mr. Ben-Ari stated that other than the lease, he was not aware of any other agreements between plaintiff and UCafe.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]). 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 (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The Appellate Division recently held that a plaintiff seeking summary judgment succeeded in making "a *prima facie* showing for rent arrears accruing. . .by submitting the original lease. . .and a detailed statement

documenting outstanding rent arrears" (*Dee Cee Assoc. LLC v 44 Beehan Corp.*, 148 AD3d 636, 641 [1st Dept 2017]).

Here, based upon the submissions by plaintiff, including the lease, the guarantee, rent ledger and the affidavit of Fred Stahl, plaintiff has established its *prima facie* burden. Defendant has failed to rebut plaintiff's *prima facie* proof and has failed to establish its burden on its own summary judgment motion. First, the lease contained a no waiver provision and required any modifications to the lease to be reduced to writing. Hence, acceptance of a reduced amount did not waive plaintiff's right to collect the full amount and any amounts paid were to be applied to earliest owed rents. Similarly, the alleged modification was supposedly an oral agreement and not reduced to writing. Second, defendant has not submitted any competent evidence of the alleged modification. Defendant has admitted that he had little to do with the day to day business operations. Although he claims to have personal knowledge of a meeting between his father and plaintiff, he does not claim to have been at said meeting and does not state his basis for the knowledge. Indeed, his father was not aware of any other agreements between plaintiff and UCafe and has not even submitted an affidavit in support/opposition of these motions. As defendant has not submitted evidence in proper form of an alleged modification and, in any event, a modification would have had to be in writing which was not done here, defendant's motion for summary judgment is denied. Similarly, defendant's affirmative defenses of waiver, agreement between the parties and estoppel are dismissed. Defendant's affirmative defense of accord and satisfaction is also dismissed. Defendant claims that it was paying $4,000 per month pursuant to a modification. Defendant does not claim that the meeting and then payments were in full satisfaction and settlement of outstanding claims. Accordingly, no accord and satisfaction took place. The remaining laundry list of affirmative defenses are also dismissed as they are

insufficient to raise a genuine issue of fact (*see Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75 [1st Dept 2015] ["[M]oreover, neither plaintiff nor the court ought to be required to sift through a boilerplate list of defenses, or 'be compelled to wade through a mass of verbiage and superfluous matter' (*Barsella v City of New York*, 82 AD2d 747, 748 [1st Dept 1981]), to divine which defenses might apply to the case."]).

Defendant's counterclaim for abuse of process is also dismissed. "Abuse of process may be defined as the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process" (*Board of Education of Farmingdale Union Free School District v. Farmingdale Classroom Teachers Association, Inc.*, 38 NY2d 397, 400 [1975]). To establish a cause of action for abuse of process, three elements need to be established: "(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; *see Gidumal v Cagney*, 144 AD3d 550, 551 [1st Dept 2016]). Further, "the gist of the action for abuse of process lies in the improper use of process after it is issued" (*Id.* at 117 (quoting *Williams v Williams*, 23 NY2d 592, 596 [1969]). "It is not enough that the actor have an ulterior motive in using the process of the court. It must further appear that he did something in the use of the process outside of the purpose for which it was intended" (*Hauser v Bartow*, 273 NY 370, 374 [1937] [the complaint failed to state a cause of action where the respondent "used the process of the court for the purpose for which the law created it," despite the respondent's motives]). Here, the plaintiff did not improperly use process after it was issued. Plaintiff simply filed a valid claim against defendant. Since defendant's actions do not qualify to sustain the claim of abuse of process, this cause of action is dismissed.

As plaintiff has established its *prima facie* burden relating to defendant's liability under the guarantee, summary judgment on liability is granted. However, plaintiff has failed to meet its burden with respect to its entitlement to judgment as a matter of law with respect to the measure of damages. This Court finds that there are discrepancies between the affidavit of Mr. Stahl and the rent ledger submitted as an exhibit that raise questions of fact with respect to the amount of rent and additional rent outstanding through and including December 2013. Further, with respect to amounts due after the April 2016 reletting, there remain issues of fact with respect to the calculations of the amounts plaintiff is entitled to under the liquidated damages clause. In the absence of any evidence of the amounts recoverable under the lease with the new tenant, this Court cannot precisely determine the net deficiency. It is therefore

ORDERED that plaintiff's motion for summary judgment is granted on liability only; and it is further

ORDERED that plaintiff's motion to dismiss the affirmative defenses is granted in its entirety; and it is further

ORDERED that plaintiff's motion to dismiss defendant's counterclaim is granted; and it is further

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that an assessment of damages against defendant is directed, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

This constitutes the decision of the Court.

12/20/2018
DATE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

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