88 Third Realty, LLC v Bekiyants
2018 NY Slip Op 33340(U)
December 21, 2018
Supreme Court, New York County
Docket Number: 154922/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH **PART** IAS MOTION 29EFM

Justice

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88 THIRD REALTY, LLC,

Plaintiff,

- v -

BORIS BEKIYANTS, DR. RAJEN MANIAR and MLFE YOGURT INC. D/B/A FUNKIBERRY,

Defendants.

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INDEX NO. 154922/2017

MOTION DATE 09/26/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30

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

Motion by Plaintiff 88 Third Realty, LLC, for summary judgment, pursuant to CPLR 3212, is granted in part and denied in part for the reasons stated herein:

BACKGROUND

I. The Pleadings, The Lease, and the Guaranties

Plaintiff 88 Third Realty, LLC ("Landlord") is the landlord and owner of the corner store and partial basement thereunder (hereinafter 'Premises') in the building located at, and known as, 139 East 12th Street a/k/a 88 Third Avenue, New York, New York 10003." (Affirm in Supp., Ex. A [Complaint] ¶ 2.) On or about November 14, 2013, Landlord entered into a written lease agreement with Defendant MLFE Yogurt Inc. D/B/A Funkiberry ("Tenant"), as tenant, for the rental of the Premises. (Id. ¶ 6; Ex. C [Lease].) The lease was for a period of ten (10) years commencing on December 1, 2013 and expiring on November 30, 2023. (Id.)

Article 17 of the lease provides that, if Tenant defaults in the payment of rent or "additional rent," Landlord is entitled "to dispossess Tenant by summary proceeding or otherwise."

Article 18 of the lease, entitled "Remedies of Owner and Waiver of Redemption," states in part:

> "In case of any such default, re-entry, expiration and/or dispossess by summary proceedings, or otherwise, (a) the rent, and additional rent, shall become due thereupon and be paid up to the time of such re-entry, dispossess and/or expiration, (b) 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. The failure of Owner to re-let the demised premises or any part or parts thereof shall not release or affect Tenant's liability for damages. In computing such liquidated damages there shall be added to the said deficiency such expenses as Owner may incur in connection with re-letting, such as legal expenses, reasonable attorney's fees, brokerage, advertising and for keeping the demised premises in good order, or for preparing the same for re-letting. Any such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in the lease."

(Affirm in Supp., Ex. C [Lease] art. 18 [emphasis added].)

In addition, Article 19, entitled "Fees and Expenses," states:

> "If Tenant shall default in the observance or performance of any term or covenant on the Tenant's part to be observed or performed under, or by virtue of, any of the terms or provisions in any article of this lease ... and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding, and prevails in any such action

> or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of any or statement to Tenant therefrom, and if Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages."

(Id. art. 19)

The lease also contains a merger clause, in Article 20, that reads as follows:

> "All understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between Owner and Tenant and 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. art. 20.)

Annexed to the lease is a rider that contains a provision wherein the rent increases each year under the ten-year term of the lease. (Lease art. 40.)[1] The lease also contemplates various other expenses and charges being due "as additional rent" to Landlord by Tenant. (See e.g. id. arts. 19, 28, 40, 41.4.)

Landlord alleges that as inducements for it to lease the premises to Tenant, Defendant Boris Bekiyants and Defendant Rajen Maniar each executed a written Guaranty of Lease dated November 20, 2013 (hereinafter "Bekiyants Guaranty").

On the instant motion, Landlord attaches signed guaranties from Defendant Boris Bekiyants and Defendant Rajen Maniar (collectively, "Guarantors") which state:

> "[T]he named Guarantor and his successors and assigns[], hereby absolutely, unconditionally and irrevocably guarantees to Landlord (which term shall be deemed to include the named Landlord and its successors and assigns) the

[1] The first article of the annexed rider is numbered 40 to be continuous with the lease. As such, the rider is referenced as the "Lease" in the citations herein.

full and prompt payment of all fixed rent and additional rent and all other charges and sums (including, without limitation Landlord's reasonable attorney's fees and disbursements and reasonable disbursements incurred by Landlord) payable by Tenant, its successors and assigns, and the performance by Tenant of all other obligations arising under the Lease. This Guaranty shall include any liability of Tenant which shall accrue under the Lease for any period preceding as well as any period following the term in said Lease specified."

(Affirm. in Supp., Ex. D [Bekiyants Guaranty]; Ex. E [Maniar Guaranty].)

The Guaranty also contains a provision, in Article 8, that contemplates the potential release of the guarantors from their obligations. It states as follows:

"Notwithstanding anything contained herein, if (a) Tenant is in good standing and is not in default beyond applicable notice and cure periods under any of the terms of the Lease both when the Surrender Notice (referred to below) is given and on the Final Day (defined below), and (b) Tenant gives written notice ("Surrender Notice") by certified mail, return receipt requested or by reputable carrier with signature requested, to the Landlord at Landlord's address in the same manner as set forth in the Lease that Tenant will vacate the Premises on the last calendar day (the "Final Day") of the 6th calendar month after the month in which the Surrender Notice is actually received by the Landlord, and (c) Tenant performs all of the conditions set forth in subparagraphs (i) through (viii) below (the "Release Conditions"), on or before the Final Day, TIME AND TENANT'S PERFORMANCE BEING OF THE ESSENCE, **then (and only in such circumstances)** Guarantor shall be released from liability under the this Guaranty accruing after the Final Day. The Release Conditions are as follows, i.e., Tenant shall have:

(i) Vacated and surrendered the Premises to the Landlord, in broom clean condition, free from any occupancies and in the condition called for on the expiration of the Lease term;
(ii) Delivered the keys and all alarm codes to the Premises to the Landlord;
(iii) Delivered to Landlord a duly executed and notarized surrender of lease (a form of which is annexed hereto as Exhibit A);

(iv) Paid to Landlord all Rent and Additional Rent, including court costs and reasonable legal fees incurred by the Owner through the Final Day;
(v) Delivered reasonable proof to the Landlord that there are no Mechanic's Lien(s) filed or recorded against the Premises; and,
(vi) Complied with provisions of Paragraph 82 of the Rider to the Lease.

If Tenant has not strictly complied with all of the requirements as set forth in this Article 8, on or before the Final Day, then Guarantor agrees and acknowledges that the provisions of this Article 8 shall be null and void and of no force and effect and all of the other provisions of this Guaranty shall remain in full force and effect."

(Bekiyants Guaranty art. 8; Maniar Guaranty art. 8.)

Landlord alleges that shortly after the commencement of the lease, Tenant began to default by failing to timely make payment of rent and additional rent. (Complaint ¶ 18.) Landlord alleges that on or about January 2015, it commenced a summary eviction proceeding against Tenant in the New York City Civil Court in the proceeding entitled "88 Third Realty, LLC v. MLFE Yogurt Inc., d/b/a Funkiberry", Index No.053481/15 (hereinafter "Summary Eviction Proceeding") based upon its failure to pay rent. (Id. ¶ 19.)

Landlord alleges that Tenant initially appeared in the Summary Eviction Proceeding, but eventually defaulted in this proceeding. On April 30, 2015, a judgment of possession and money judgment of $52,151.86 was awarded to Landlord as against Tenant. (Affirm in Reply, Ex. B [Civil Court Judgment].)

Landlord alleges that Tenant vacated the Premises in April 2015. (Complaint ¶ 21.) Landlord alleges that at the time of Tenant's vacatur, Tenant owed Landlord $117,428.36, representing rent and additional rent for the months of November 2014 through April 2015. Landlord alleges that these arrears remain unpaid to date.

Landlord alleges that Tenant failed to satisfy the Release Conditions, pursuant to Article 8 of the Guaranties, and as such Guarantors remain liable for the aforesaid unpaid pre-vacatur rent and additional rent as well as tenant's continuing liability for rent and additional rent under the lease. (Complaint ¶¶ 24-39.)

Landlord alleges that, on March 4, 2016, it entered into a lease with a new tenant non-party Third Gotham Pizza, Inc. ("Gotham Pizza") for a period of 10 years, commencing on March 1, 2016 and expiring on February 28, 2026 ("Gotham Lease").[2] (Complaint ¶¶ 40-41.) Landlord alleges that the monthly rent under the Gotham Lease is significantly lower than the rent under the lease with Tenant. Accordingly, Landlord seeks to hold Guarantors liable for the difference in rent from the beginning of the Gotham Lease to the present. (Complaint ¶¶ 42-54.) In addition, that Landlord seeks the rent and additional rent for the 10-month period between Tenant's vacatur and the commencement of the Gotham Lease.

All of the rent due from the date of Tenant's first default up to the present (when the complaint was signed on May 9, 2017) is alleged to be $455,175.01, and is sought as Landlord's **first cause of action**.

As its **second cause of action**, Landlord seeks to hold Defendants (Tenant and Guarantors) liable for the rent due from the present (when the complaint was filed in 2017) to the expiration of the lease with Tenant in November 2023 (less Gotham Pizza's rent), which Landlord alleges amounts to $280,000.

As a **third cause of action**, Landlord seeks legal fees incurred by Landlord in connection with the commencement and prosecution of this action in an amount to be determined by this Court, plus applicable interest.

In Defendants' answer, Defendants allege the following affirmative defenses:

1. There were no contractual obligations between the parties.
2. Lack of jurisdiction
3. Estoppel
4. "Plaintiff is barred from recovery as there is documentary proof contradicting such claims, including a surrender that complied substantially with the terms of the guaranty and the terms of the lease."
5. Failure to state a cause of action
6. "The claims herein are barred by res judicata. Plaintiff chose the Civil' Court to pursue possession and monetary claims 'and such was adjudicated by such court fully."

[2] In addition, Landlord alleges that Gotham Pizza was given a four-month rent concession for the period from March 2016 through June 2016. (Complaint ¶ 42.)

7. "The claims of Plaintiff that arise after July 2017 are unripe and therefore cannot be claimed as losses as such have not yet accrued."
8. Contributory fault: "Any liability of the defendants is limited to the percentage of responsibility in proportion to the fault of Plaintiff, its agents or employees, and other persons, corporations and entities, whether named as parties to this action or not, who caused or contributed to any damages alleged by Plaintiff, in relation to the proportionate fault of such other parties."
9. "Defendant specifically denies any allegation it erroneously failed to deny in the Complaint above."
10. "Defendant reserves the right to assert additional affirmative defenses and counterclaims that may become known to it prior to trial."
11. "Plaintiff is barred from recovery and the causes of action in this action must be dismissed because of ratification or agreement."
12. "Plaintiff is barred from recovery due to the doctrine of waiver, in that it failed to properly satisfy the terms of any agreement between the parties that may exist."
13. "Plaintiffs claims are barred due to the unclean hands of the plaintiff, who materially breached its obligations to the defendants."

In addition, Defendants assert "a counterclaim" in which they point out that the instant action is being brought two years after Landlord "accepted the surrender of defendant and appl[ied] the substantial security deposit to the arrears, without further claim or notice to defendants." (Affirm. in Supp. Ex. B [Answer ¶ 18].) Defendants allege that they were "justified in relying upon the acceptance of the surrender" and that the Guarantors "are only liable until the time that possession was surrendered, which was done in April 2015." (Id. ¶ 19.) As such, Defendants allege that the Court should award them "costs, fees and other relief this Court deems just and proper" because the "sole purpose of this action is harassing and annoying the Defendant with meritless and vexatious claims." (Id. ¶¶ 20-21.)

II. The Instant Motion for Summary Judgment

Roughly four months after Defendants filed their answer, Landlord moved for summary judgment seeking to dismiss Defendants affirmative defenses and single counterclaim and to be awarded summary judgment on its three causes of action. In its opening papers, Landlord submits an affidavit from its member George Lavian, which largely reiterates the same facts and theories of liability in the complaint.

The arguments raised by Defendants in opposition and by Landlord in reply are discussed in the Discussion section.

DISCUSSION

"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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006], quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].) "Once this showing has been made, 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].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

(1) Landlord Is Entitled to Summary Judgment on Liability for the Guaranty.

"In order to prevail on a breach of contract claim, a plaintiff must establish each of the following four elements: (1) existence of a valid contract; (2) plaintiff's performance of the contract; (3) defendant's material breach of the contract; and (4) damages." (*Sun Gold Corp. v Stillman*, 28 Misc 3d 1213(A) [Sup Ct, New York County 2010] [Sherwood, J.], *affd*, 95 AD3d 668 [1st Dept 2012].)

As a general rule in contract law, a party injured by a breach of contract has "the duty of making reasonable exertions to minimize the injury." (*Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130, 133 [1995].) However, "[l]eases are not subject to this general rule . . . , for, unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property." (Id.) As such, "[o]nce 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 relet, or attempt to relet abandoned premises in order to minimize damages." (Id.)

Fundamentally, a guaranty is "[a] promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance." (GUARANTY, Black's Law Dictionary [10th ed. 2014]; *see also Brewster Tr. Mix Corp. v McLean*, 169 AD2d 1036, 1037 [3d Dept 1991] ["A guarantee is an agreement to pay a debt owed by another which creates a secondary liability and thus is collateral to the contractual obligation."].) "A contract of guaranty is subject to the fulfillment of any condition precedent to the liability imposed on the guarantor." (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 10 [1st Dept 2006], affd, 8 NY3d 59 [2006].) As such, the guarantor's liability "accrues only after default on the part of the principal obligor" and thus "to establish that the guaranty ever took effect, plaintiff must demonstrate that there was a default on the part of the principal obligor." (Id.)

On a guaranty, "[a] landlord demonstrates its prima facie entitlement to summary judgment on the issue of liability by establishing that the guarantor signed an absolute and unconditional guaranty of a commercial lease, that the tenant was in arrears in payment of base rent and additional rent, the amount of the underlying debt, and that defendant failed to perform under the guaranty." (*MSMC Residential Realty, LLC v Himani*, 60 Misc 3d 1223(A) [Sup Ct, NY County 2018] [Reed, J.]; *see also 4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st Dept 2014] ["'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 [unsatisfied by the obligor], and the guarantor's failure to perform under the guaranty.'"], quoting *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998].)

Landlord has set forth sufficient prima facie evidence to establish a breach of contract by the Tenant: (1) that there was a binding lease between Landlord and Defendant MLFE Yogurt Inc. (hereinafter, "Tenant"); (2) that Landlord performed under the lease by tendering possession of the premises to Tenant; (3) that Tenant breached the lease by failing to timely pay rent and by vacating the premises without paying the rent and fees owed prior to vacating, and by not paying post-vacatur rent and fees owed pursuant to the lease; and (4) that Landlord has been damaged by Tenants failure to pay rent and fees owed prior to and post vacatur.

In addition, Landlord has established prima facie liability on the part on the part of Guarantors in that: (1) landlord has provided the Court with signed guaranties by Guarantors assuming liability for Tenant's performance under the

lease; and (2) it is uncontested that Guarantors have not paid the rent and fees owed by the tenant.

Thus, the burden shifts to Defendants "to assert a defense to the enforcement of the terms of the Lease which is sufficient to raise a triable issue of fact." (*J.A.B. Madison Holdings LLC v Levy & Boonshoft*, P.C., 22 Misc 3d 1138(A) [Sup Ct, NY County 2009] [Madden, J.].)

In opposition, Defendants argue that:

> "It seems there never was an eviction because the landlord accepted surrender and was placed into possession without need for eviction. There is no money judgment. This was a negotiated surrender and plaintiff's counsel tries to skirt this by saying there was not a technical surrender in writing that is acceptable — while not denying the negotiated surrender by his client. At the very least, this is bad faith and unclean hands, which plaintiff cannot benefit from."

(Affirm in Opp. ¶ 22.) Defendant Bekiyants states that the non-payment of rent was litigated in Civil Court, "but we then realized it was not a fight we could win and we could not afford the legal fees." (Bekiyants Aff. ¶ 6.) Defendant Bekiyants further states:

> "We talked to the landlord, and told him that rather than fighting the case, we would surrender the lease and give him possession. He agreed. We gave them possession around April 27, 2015 after we got all of our things out and left the space in good, broom clean condition. The surrender was in writing, with the keys, and accepted by the landlord. Exhibit '1' Surrender letter. There were no mechanic's liens on the property.
>
> We then told our lawyer not to defend the case anymore. We are not aware of what happened with that case, but we do not believe there was ever a judgment for money, as we were never presented with any judgment.
>
> It was our understanding from the landlord that if we returned the space to him, they would terminate the lease when they took back possession. We returned the keys and vacated and relied on their representation that we could surrender."

(Id. ¶ 7-9.) Defendant Bekiyants further states that the premises were "in great condition and fully renovated", and that the "[t]his space should have immediately been leased." (Id. ¶ 10.)[3] The surrender letter, dated April 27, 2015, is attached as the sole exhibit to Defendants opposition papers. (Ex. 1 to Affirm in Opp.)

In reply, Plaintiff claims that it never received Defendants' surrender letter and that, in any event, "such a letter or surrender would not relieve Defendants of liability under the MLFE Lease and Guarantees." (Affirm. in Reply ¶ 47.) Specifically, Plaintiff argues that Tenant failed to:

> "a) surrender the Premises in vacant and broom clean condition, b) deliver to Plaintiff a duly executed and notarized Surrender of Lease Form, c) (most importantly) make payment of all rent and additional rent due to Plaintiff through the date of vacatur and d) deliver to Plaintiff reasonable proof that no mechanic's liens were recorded against the Premises."

(Id. ¶ 48 [emphasis added].) Plaintiff attaches the judgment of eviction and award of $52,151.86 of money damages by Judge Tische, dated April 30, 2015 as Exhibit 1 to its reply papers—it attaches its petition in the Civil court action as exhibit 2.

Preliminarily, it bears noting that Defendant Bekiyants does not assert that the surrender letter was sent to Plaintiff by certified mail (or reputable courier) and the letter that Defendant Bekiyants claims to have sent (attached as Ex. 1) is not notarized. In addition, Defendant Bekiyants does not assert that he provided "reasonable proof" that there were no mechanic's liens recorded against the premises, but rather states that "[t]here were no mechanic's liens on the property."

Nonetheless, even if the Court were to excuse Defendants' failure to comply with the above conditions, Defendant Bekiyants does not even assert that Tenant had paid to Plaintiff "all Rent and Additional Rent, including court costs and reasonable legal fees incurred by the Owner through the Final Day." As such, Defendant Bekiyants does not raise a material issue of fact in opposition to Plaintiff's showing that Tenant failed to meet all of the "Release Conditions."

Defendants' only response to this argument is that they thought that they had an oral agreement with Landlord that its returning possession would suffice.

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[3] It bears noting that Landlord disputes Defendants' assertion that they left the premises in broom clean condition. Rather, Landlord claims that "there was garbage and debris strewn through the Premises and exposed wiring throughout the Premises. It was a mess." (Lavian Aff. in Reply ¶ 7.)

However, the Guaranties expressly state that they "cannot be changed or terminated orally." (Bekikants Guaranty ¶ 10; Marian Guaranty ¶ 10.) As such, these allegations of oral modification are insufficient to defeat the instant motion. (*99 Realty Co. v Eikenberry*, 242 AD2d 215, 216 [1st Dept 1997] ["The lease in question expressly barred any oral modification or release of the tenant."].)

Accordingly, Landlord is entitled to summary judgment on the issue of liability for the first cause of action, and Defendants' affirmative defenses and counterclaim is dismissed.

(2) Landlord Is Not Entitled to a Lump Sum Payment for Future Rent.

As a general matter, "no action can be brought for future rent in the absence of an acceleration clause." (*Beaumont Offset Corp. v Zito*, 256 AD2d 372, 373 [2d Dept 1998]; *see also Islip U-Slip LLC v Gander Mtn. Co.*, 2 F Supp 3d 296, 303 [NDNY 2014] ["New York law states that absent an acceleration clause in a lease, the breach of a lease does not entitle a landlord to make a claim for all future rents under the lease."].)

Here, the lease states that in the event of a default, Landlord may re-let the premises and that Tenant shall pay as "liquidated damages" "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." (Lease § 18.) The lease further states that: "**Any such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in the lease.**" (Id. [emphasis added].)

Based on the language of the lease's first page—that rent is due "in equal monthly installments in advance on the first day of each month during said term"—the "rent day" would appear to be the first day of the month. (Id.)

As such, a plain reading of the operative lease indicates that Landlord is not entitled to future rents, but rather must wait until these rents accrue on the rent day—the first day of the month.

Indeed, the instant lease was crafted from a "Standard Form of Store Lease" provided by the Real Estate Board of New York, Inc., and another court sitting in this county has interpreted identical language and found that the landlord was

"limited to recovering the rent that has fallen due from the tenant on a month-by-month basis, and/or as it subsequently accrues." (*226 Fifth Ave. LLC v SBF Intern., Inc.*, 2012 N.Y. Slip Op. 33491[U] [Sup Ct, New York County 2012] [Coin, J.] [dismissing cause of action for future damages with leave to re-plead "to the extent of requesting presently accrued damages"].)

Accordingly, Landlord's second cause of action is dismissed without prejudice to assert new claims for rent due under the lease once those claims accrue in a new action.[4]

(3) Defendants Are Not Entitled to a Credit for the $80,000 Security Deposit at This Time.

Defendants argue, in their opposition papers, that they are entitled to a set-off for their $80,000 deposit. With respect to the deposit, the instant lease states:

> "[I]n the event Tenant defaults in respect of any of the terms, provisions and conditions of this lease, including, but not limited to, the payment of rent and additional rent, Owner may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any rent and additional rent, or any other sum as to which Tenant is in default, or for any sum which Owner may expend or may be required to expend by reason of Tenant's default in respect of any terms, covenants and conditions in this lease, including but not limited in, any damages or deficiency in the reletting of the demised premises, whether such damages or deficiency accrued before or after summary proceedings or other re-entry by Owner. In the case of every such use, application or retention, Tenant shall, within five (5) days after demand, pay to Owner the sum so used, applied or retained which shall be added to the security deposit so that the same shall be replenished to its former amount. In the event that Tenant shall fully and faithfully comply with all of the terms, provisions, covenants and conditions of this lease, the security shall be returned to Tenant after the date fixed as the end of the lease and after delivery of entire possession of the demised premises to Owner. . . . Security deposit shall not bear any interest."

(Lease art. 31.)

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[4] Landlord, of course, may assert new claims for rent due under the lease once those claims accrue in a new action.

Landlord replies that Defendants are entitled to no such set-off based on the following language in one of the Guaranties:

> "All of Landlord's rights and remedies under the Lease or under this Guaranty are intended to be distinct, separate and cumulative and no such right or remedy therein or herein mentioned is intended to be in exclusion of or a waiver of any of the others. 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 the Lease.**"

(Bekiyants Guaranty art. 4.)

During oral argument, when Landlord's counsel was questioned whether they were entitled to retain the deposit as a windfall, Landlord's counsel stated that it was not arguing this, but rather—in the event that the Court would not award it damages for future rent—Landlord was entitled to retain the deposit until the expiration of the lease on November 30, 2023. (Oral Arg. Tr. at 17:09-23:19.)

A security deposit "provides a fund from which the landlord can draw for unpaid rent or damages and which puts the landlord into the status of a secured creditor." (*Markowitz v Landau*, 171 AD2d 564, 565 [1st Dept 1991].) Generally, a landlord is entitled to retain a deposit in escrow until the expiration of the lease absent the lease stating otherwise. (*Wingett v Bartoloni*, 8 Misc 3d 134(A) [App Term 2d Dept, 9th & 10th Jud Dists 2005] ["It is well established that an action for the return of security is premature where the term has not yet expired."]; *see also Fifth Ave. Ctr., LLC v Dryland Properties, LLC*, 149 AD3d 445, 445 [1st Dept 2017].) However, in *Wooster 76 LLC v Ghatanfard*, in which the lease contained a similar language (in a similarly numbered paragraph 31) – which stated that the plaintiff-landlord may "use, apply or retain the whole or any part of the security [deposit] to the extent required for the payment of any rent and additional rent" – the First Department held "that nothing prevented plaintiff from applying the security deposit to the arrears, but the interest on the arrears should not have been calculated prior to the application of a credit for the security deposit." (68 AD3d 480, 481 [1st Dept 2009].)

As such, when a landlord holds a security deposit at the time a court issues a judgment for unpaid rent, the security deposit is subtracted from the judgment if

the landlord has "applied" the security deposit to the arrears. If instead the landlord continues to hold the security deposit in a designated account as security in the event that it is unable to collect future rent that is expected to accrue, the security deposit is not subtracted from the judgment.

Based on the papers and statements from Landlord's counsel at oral argument, Landlord has elected not to "apply" the security deposit to Tenant's arrears, notwithstanding counsel's argument that "the landlord is entitled then to take … the security deposit at some point" and "doesn't have to hold it indefinitely." (Oral Arg. Tr. at 19:23-23:19.)

Accordingly, the $80,000 security deposit will not be subtracted from the judgment for first cause of action in the amount of 455,175.01. However, this Court directs that in the event that Landlord does apply any portion of the deposit to the any arrears that have accrued since May 9, 2017—the end date for the first cause of action—Landlord must notify Defendants by certified mail at their last known addresses.

(4) Landlord Is Entitled to a Judgment of $455,175.01 on the First Cause of Judgment as against Guarantors and $403,023.15 as against Tenant.

On the instant motion, Landlord has provided bookkeeping statements, a verified complaint and two affidavits from its principal documenting the amounts owed under the lease relating to the first cause of action, totaling $455,175.01. In response to Defendants claim for damages on the first cause of action, Defendants speculate that Landlord may have received "key money" from Gotham Pizza and that they need discovery on this issue, including a deposition of non-party Gotham Pizza. (See Oral Argument at 45:08-46:18.) This mere speculation fails to raise an issue as to Landlord's calculation of damages under the lease.

However, as landlord has already received a judgment of $52,151.86 as against Tenant, that amount is subtracted the summary judgment award this Court makes against Tenant.

Accordingly, Landlord is awarded summary judgment on the first cause of action in the amount of $455,175.01 against Guarantors and 403,023.15 against

Tenant, with statutory interest from the date of the filing of the complaint May 30, 2017.[5]

(5) Landlord Is Granted Summary Judgment on the Issue of Liability on Its Third Cause of Action for Reasonable Attorney Fees Pursuant to the Lease.

The lease states that:

> "If Tenant shall default in the observance or performance of any term or covenant on the Tenant's part to be observed or performed under, or by virtue of, any of the terms or provisions in any article of this lease ... and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, **including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding,** ***and prevails in any such action or proceeding***, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of any or statement to Tenant therefrom, and if Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages."

(Affirm in Supp., Ex. C [Lease] art. 19 [emphasis added].) The Guaranties state that:

> "[T]he named Guarantor and his successors and assigns[], hereby absolutely, unconditionally and irrevocably guarantees to Landlord (which term shall be deemed to include the named Landlord and its successors and assigns) the full and prompt payment of all fixed rent and additional rent and all other charges and sums (**including, without limitation Landlord's reasonable attorney's fees and disbursements and reasonable disbursements incurred by Landlord**) payable by Tenant, its successors and assigns, and the performance by Tenant of all other obligations arising under the Lease. This Guaranty shall include any liability of Tenant which shall accrue under

[5] The Court notes that Landlord merely asks that this amount be "plus interest" and does not argue for a specific rate or date of accrual pursuant to the Lease.

> the Lease for any period preceding as well as any period following the term in said Lease specified."

(Affirm. in Supp., Ex. D [Bekiyants Guaranty].)

Because the lease makes Tenant's liability for "reasonable attorney fees" contingent on Landlord being the prevailing party in this action, the Court must determine who is the prevailing party here.

"To determine whether a party has 'prevailed' for the purpose of awarding attorneys' fees, the court must consider the "true scope" of the dispute litigated and what was achieved within that scope." (*Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279, 279 [1st Dept 2007].) "To be considered a 'prevailing party,' one must simply prevail on the central claims advanced, and receive substantial relief in consequence thereof." (Id.)

Here, Landlord has prevailed on one of the two causes of action for rent alleged to be due under the lease. In addition, Landlord has received a judgment of $455,175.01 of the $735,975.01 sought in the complaint's ad damnum clause—roughly a 62% recovery. Finally, the dismissal of Landlord's claims for future rent are without prejudice to Landlord bringing a cause of action for unpaid rent under lease once those claims accrue (i.e. the rent becomes due under the lease).

Accordingly, this Court finds that Landlord is the prevailing party under the lease and awards Landlord summary judgment on its third cause of action, and the issue of reasonable attorney fees is referred to the Special Referee's Part to Hear and Determine.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Plaintiff 88 Third Realty, LLC, for summary judgment, pursuant to CPLR 3212, is granted in part and denied in part to the extent that Plaintiff is granted summary judgment on the first cause of action in the amount $455,175.01 as against Defendants Boris Bekiyants and Dr. Rajen Maniar and $403,023.15 as against Defendant MLFE Yogurt Inc., d/b/a Funkiberry, with interest at the rate of 9% per annum from the date of May 30, 2017 until the date of entry of the judgment and thereafter at the statutory rate, and Plaintiff is granted summary judgment on the third cause of action on the issue of liability only, and the motion is otherwise denied; and it is further

ORDERED that the second cause of action for rent subsequent to May 2017 up until November 2023 is dismissed without prejudice to Plaintiff bringing a cause of action for rent covered by this period after it becomes due under the lease; and it is further

ORDERED that Defendants' affirmative defenses and counter-claims are dismissed; and it is further

ORDERED and DECLARED that Plaintiff is entitled to reasonable attorney fees incurred in the making of this motion from Defendants pursuant to Article 19 of the Lease as the prevailing party; and it is further

ORDERED that the portion of Plaintiffs' action seeking recovery of reasonable attorney fees is severed and continued, and the issue of the amount of Plaintiff's reasonable attorney's fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that counsel for Plaintiff shall, within thirty (30) days from the filing of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the Clerk shall enter judgment accordingly, with costs and disbursements to Plaintiffs as taxed by the Clerk; and it is further

ORDERED that Plaintiff shall upload a copy of the transcript of oral argument on this motion to NYSCEF within thirty (30) days; and it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry upon Defendants and upon the Clerk of the Court within thirty (30) days of the filing of this order.

The foregoing constitutes the decision, declaration, and order of this Court.

12/21/2018
DATE

HON. ROBERT D. KALISH, J.S.C.

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