[* 1]

8/24

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

LOUIS B. YORK J.S.C.

PRESENT:

PART 2

Index Number : 114262/2009

SENEX GREENWICH RLTY ASSOC.,

VS

120 GREENWICH ST. CAFE, CORP.

Sequence Number : 002

DEFAULT JUDGMENT

INDEX NO. 114262/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/18/11

LOUIS B. YORK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----------x

SENEX GREENWICH REALTY ASSOCIATES, LLC,

Plaintiff,

Index No.: 114262/09

-against-

DECISION

120 GREENWICH STREET CAFÉ, CORP. and ANGELO TZORTZATOS

Defendants.

----------x

LOUIS B. YORK, J.S.C.:

Plaintiff moves, pursuant to CPLR 3215, for a default judgment: (1) on its first cause of action for rent and additional rent as against 120 Greenwich Street Café, Corp. (120 Greenwich) in the sum of $420,034.10 for Unit A, and setting a hearing to determine the costs of repairing Unit A; (2) on its third cause of action for rent and additional rent as against 120 Greenwich in the sum of $121,039.04 for Unit B, and setting a hearing to determine the costs of repairing Unit B; (3) pursuant to CPLR 3212, for summary judgment as against Angelo Tzortzatos (Tzortzatos) in the sum of $541,073.14, as determined in the first and third causes of action, and setting a hearing to determine the costs of repairing Units A and B; (4) for a default judgment as against Tzortzatos on the second and fourth causes of action, and for summary judgment on the portion of the fifth

cause of action, for legal fees; (5), pursuant to CPLR 3211 (c), striking the affirmative defenses of Tzortzatos; and (6), pursuant to CPLR 3211 (a) (7) and 3212, granting it summary judgment dismissing the counterclaims asserted in Tzortzatos's answer.

BACKGROUND

Plaintiff is the owner of commercial premises that it leased to 120 Greenwich pursuant to two 15-year leases, one for Unit A and one for Unit B. Motion, Exs. 2 and 3. The leases commenced on September 15, 2007 and October 1, 2007, respectively.

According to the complaint, 120 Greenwich breached the lease for Unit A on March 13, 2008, by failing to pay the rent due, and eventually abandoned the premises on or about September 28, 2009 (first cause of action). Similarly, the complaint alleges that 120 Greenwich breached the lease for Unit B on the same dates (third cause of action). In addition to the rent and additional rent, plaintiff seeks legal fees for its expenses incurred with respect to the alleged breaches of these two leases (second and fourth causes of action). In the fifth cause of action, plaintiff seeks judgment against Tzortzatos for the same damages, based on Tzortzatos's personal guaranties executed with respect to these two leases. Motion, Exs. 4 and 5.

On or about September 28, 2009, 120 Greenwich attempted to surrender possession of Unit A by returning the keys to

plaintiff's attorneys, but the attorneys rejected the attempted surrender. Motion, Ex. 13. Plaintiff then billed 120 Greenwich for both Units A and B, both units having been simultaneously vacated, and neither unit has been subsequently re-rented. Motion, Ex. 14.

According to the provisions of the leases,

> "[t]his Lease and the terms and the estate hereby granted are subject to the limitation of ... (iv) whenever Tenant shall abandon the Demised Premises of a substantial portion of the Demised Premises which shall remain vacant for a period of thirty (30) consecutive days ... Landlord may give to Tenant a notice of intention to end the term of this Lease at the expiration of three days from the date of the service of such notice of intention, and upon the expiration of said three (3) days, this Lease and the term and the state hereby granted, whether or not the term shall theretofore have commenced, shall terminate with the same effect as if that date were the expiration date, but Tenant shall remain liable for any damages sustained as a result thereof."

Motion, Exs. 2 and 3.

Plaintiff sent 120 Greenwich the requisite notices on September 30, 2009. Motion, Exs. 15 and 20.

According to the guaranties signed by Tzortzatos with respect to these leases, his personal liability is stated as:

> "Notwithstanding anything herein to the contrary, provided Tenant (i) has delivered possession of the Demised Premises to Landlord in the condition required at the expiration of the Lease, vacant and free of all tenants, persons in possession and all liens or unpaid equipment leases; and (ii) pays to Landlord all unpaid Rent, Additional Rent or any other charges which shall have accrued under the terms of this Lease, at any time up to and including such delivery of possession (in good funds which shall be lawful money of the United States of America) ... all obligations of the Guarantor accruing under this Guaranty

> after the date set forth in Tenant's Notice shall thereupon expire and terminate. Nothing contained in this Article or elsewhere herein shall serve to release Tenant from any liability under the Lease."

Motion, Exs. 4 and 5.

Plaintiff contends that 120 Greenwich failed to deliver possession of the two units in the condition required by the leases, and that there remains rent and additional rent due thereon. Therefore, plaintiff maintains that because the conditions specified in the lease remain unsatisfied, Tzortzatos remains liable to it pursuant to the terms of the guaranties. In support of its contention that the units were not returned in the appropriate condition and were damaged, plaintiff has included photographs of the two units as part of its motion. Motion, Ex. 24.[1]

In his opposition to the instant motion, Tzortzatos admits that 120 Greenwich entered into the aforementioned leases and that he executed the aforesaid guaranties, commonly referred to as "good guy" guaranties. However, Tzortzatos asserts that 120 Greenwich's attempt to surrender the premises on September 28, 2009, effectively extinguished his obligations under the good guy guaranties. Further, Tzortzatos contends that, pursuant to the guaranties, he is only liable for unpaid amounts due and owing to plaintiff from 120 Greenwich up to the time that 120 Greenwich

---

[1]The court does not find it necessary, for the purposes of resolving the instant motion, to detail all of the items specified by plaintiff regarding the condition of the units.

attempted to surrender the keys.

In addition to the foregoing, Tzortzatos challenges plaintiff's calculations as to the amounts owed to it from 120 Greenwich. Tzortzatos also asserts that there is a question as to whether 120 Greenwich provided a security deposit for Unit B, which, according to Tzortzatos, raises a question as to whether plaintiff commingled funds, resulting in a conversion. Tzortzatos maintains that the instant motion is premature, since discovery has yet to take place.

Lastly, Tzortzatos claims that plaintiff's request for default judgments should be denied, since the request was made more than one year after the default.

In his answer, Tzortzatos asserts two affirmative defenses: (1) breach of the covenant of quiet enjoyment; and (2) unlawful discrimination, pursuant to New York State Executive Law § 296. Additionally, Tzortzatos asserts two counterclaims: (1) damages resulting from the unlawful discrimination; and (2) damages resulting from the breach of the covenant of quiet enjoyment.

The court notes that, in his opposition, Tzortzatos only states that "[i]t would be a gross injustice to deny me the opportunity to present my defenses and have my counterclaims heard based solely on the habitually unreliable accounting of the plaintiff." Tzortzatos' Aff. This is the only opposition posited with respect to the branch of plaintiff's motion seeking

to dismiss the affirmative defenses and counterclaims.

On November 6, 2009, 120 Greenwich was served with a summons and complaint, pursuant to New York Business Corporation Law § 306 (b), by delivery to the Secretary of State, with an additional copy of the summons and complaint being mailed to 120 Greenwich at 120 Greenwich Street, New York, New York, 120 Greenwich's last known address, and to 120 Greenwich's attorney who represented it in the action entitled *120 Greenwich Street Café Corp. v Senex Greenwich Realty Associates, LLC,* index number 600657/09 in this court, and who currently represents Tzortzatos in the present action. Motion, Exs. 6 & 7. To date, 120 Greenwich has failed to answer or to appear in this action. Plaintiff has attached an itemized spreadsheet of the amount of rent and additional rent that it claims is owed to it by 120 Greenwich. Motion, Exs. 8 & 17.

In reply to Tzortzatos's opposition, plaintiff challenges many of Tzortzatos's computations with respect to the amounts owed, and maintains that, pursuant to the guaranties, Tzortzatos remains liable under the guaranties because the units were not returned in the condition that they were in when initially rented, an allegation that plaintiff says Tzortzatos failed to oppose, and that monies were still owing to plaintiff pursuant to the leases.

Lastly, plaintiff avers that the portion of the motion

seeking a default judgment against 120 Greenwich is timely, because Tzortzatos' attorney requested an extension of time to answer, which was granted through December 2009. Reply, Ex. 3. Plaintiff states that, at that time, it believed that the attorney was representing both defendants, since that attorney represented 120 Greenwich in the other proceeding noted above, and it was only when Tzortzatos served his answer that plaintiff realized that 120 Greenwich was unrepresented. Plaintiff claims that it never intended to abandon its action against 120 Greenwich.

DISCUSSION

That portion of the motion seeking a default judgment against 120 Greenwich is granted with respect to liability only.

CPLR 3215 (a), "Default judgment," states, in pertinent part:

> "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him."

Pursuant to CPLR 3215 (c), the plaintiff must move for entry of judgment within one year of the default. In the instant matter, the motion to enter the default judgment was made a few months after the one-year period had expired.

In opposition to this portion of plaintiff's motion, Tzortzatos only cites to *Herzbrun v Levine* (23 AD2d 744 [1st Dept

1965]), which denied entry of a default judgment after the one-year period had elapsed because that plaintiff failed to offer a reasonable excuse for her delay. However, in the case at bar, the court believes, in the exercise of its judicial discretion, that the reasons proffered by plaintiff for the slight delay, discussed above, are sufficient to warrant the entry of a default judgment as against 120 Greenwich, with respect to liability only. *Thanh Truong v All Pro Air Delivery, Inc.*, 278 AD2d 45 (1st Dept 2000).

That portion of the motion seeking summary judgment as against Tzortzatos is granted with respect to liability only.

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Pursuant to the terms of the good guy guaranty quoted above, in order for Tzortzatos to be relieved of his obligations, a two-pronged test must be met: first, 120 Greenwich must have delivered possession of the Demised Premises to plaintiff in the condition required at the expiration of the lease: vacant and free of all tenants, persons in possession and all liens or unpaid equipment leases; and second, 120 Greenwich must have paid to plaintiff all unpaid rent, additional rent or any other charges which shall have accrued under the terms of the lease.

In his opposition, Tzortzatos does not deny that some monies may be owing to plaintiff and, hence, at least one of the conditions that would excuse the guarantee has not been satisfied. Therefore, Tzortzatos remains liable to plaintiff for any sums of rent, additional rent, or other charges that 120 Greenwich owed to plaintiff.

That portion of the motion seeking a default judgment as against 120 Greenwich for attorney's fees, causes of action two and four, and seeking summary judgment as against Tzortzatos for attorney's fees, part of the fifth cause of action, is granted, with the amount of such fees to be determined at a later hearing.

Pursuant to paragraph 19 of the leases, plaintiff is entitled to attorney's fees for instituting or defending any action based on a default by 120 Greenwich. "The lease entitles [plaintiff] to recover attorney's fees incurred in connection

with tenant's default." *Huron Associates, LLC v 210 East 86th Street Corp.*, 18 AD3d 231, 232 (1st Dept 2005); *Rubin v Dondysh*, 153 Misc 2d 657 (App Term, 2d Dept 1991). This right to attorneys' fees is premised upon the leases' provisions dealing with 120 Greenwich's default, and is not based on which party may be victorious in the action. *Huron Associates, LLC v 210 East 86th Street Corp., supra.*

However, that portion of the motion seeking specific dollar damages is denied. The amount of rent, additional rent, and other charges, if any, allegedly owing to plaintiff presents a factual dispute that cannot be resolved on the papers alone. Therefore, the issue of the amount of damages, if any, owing to plaintiff shall be sent to a Special Referee to hear and report that issue.

That portion of the motion seeking to dismiss Tzortzatos' affirmative defenses and counterclaims, pursuant to CPLR 3211 (a) (7), is granted.

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> * * *
>
> (7) the pleading fails to state a cause of action ... ."

As stated in *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1st Dept 2000]),

"the court's task is to determine only whether

> the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994])."

"Although on a motion to dismiss [the] allegations are presumed to be true and accorded every favorable inference, conclusory allegations — claims consisting of bare legal conclusions with no factual specificity — are insufficient to survive a motion to dismiss." *Godfrey v Spano*, 13 NY3d 358, 373 (2009).

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999).

In the instant matter, Tzortzatos has failed to provide any evidence sufficient to withstand plaintiff's motion.

> "'Whether the breach of a covenant [of quiet enjoyment] is alleged as a defense to an action for rent due, or is used as a basis for an action for damages, the determining factor, with few exceptions, is whether the tenant has vacated the premises.' The tenant must also have performed all covenants which are a condition precedent to its right to insist upon the covenant [internal citations omitted]."

Dance Magic, Inc. v Pike Realty, Inc., 85 AD3d 1083 (2d Dept 2011).

In the case at bar, 120 Greenwich vacated the premises, not because of any infringement on its covenant of quiet enjoyment,

but, as the affidavit of Tzortzatos, who was the owner of 120 Greenwich, avers:

> "I nearly lost everything I have worked for trying to make 120 Greenwich successful. In September of 2009, 120 Greenwich simply could not afford to remain open any longer and I, as President of 120 Greenwich, made the difficult decision of closing the business down. The meant not only losing the business, but surrendering the space that the defendant spent approximately a half million dollars to improve."

Tzortzatos admits that the decision to vacate the premises was a financial one, not one based on a violation of the covenant of quiet enjoyment, and he goes on to admit that he did fall behind on rent. *Id.*

Therefore, based on the foregoing, the affirmative defense and counterclaim based on a breach of the covenant of quiet enjoyment has no basis in fact and must be dismissed.

Similarly, there is no basis alleged for maintaining the affirmative defense and counterclaim based on an alleged violation of Executive Law § 296. The only subdivision of that statute, which deals with unlawful discriminatory practices, that could be applicable to the instant matter is subsection 5 (b), concerning the rent of commercial space. However, since plaintiff did rent commercial space to 120 Greenwich, a corporation, and no protected status has been alleged, the affirmative defense and counterclaim based on a violation of Executive Law § 296 cannot be maintained.

The court also notes that Tzortzatos has provided no

argument as to why his affirmative defenses and counterclaims should not be dismissed, except for the statement noted above, that it would be unfair to dismiss them based on plaintiff's calculations of amounts due to it, an argument that in no way relates to the merits of the defenses and counterclaims.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiff's motion seeking entry of a default judgment as against defendant 120 Greenwich Street Café, Corp. is granted on the issue of liability only on the first, second, third and fourth causes of action; and it is further

ORDERED that the portion of plaintiff's motion seeking summary judgment as against defendant Angelo Tzortzatos on the fifth cause of action is granted on the issue of liability only; and it is further

ORDERED that the portion of plaintiff's motion seeking to dismiss the affirmative defenses and counterclaims asserted by defendant Angelo Tzortzatos is granted and said affirmative defenses and counterclaims are dismissed; and it is further

ORDERED that the issue of the amount of damages, if any, for rent, additional rent, costs of repair and attorney's fees owing to plaintiff is referred to a Special Referee to hear and decide, and enter ajudgment thereon;

and it is further

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[2] 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.

Dated: 8/18/11

ENTER:

Louis B. York., J.S.C.

LOUIS B. YORK

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

[2] Copies are available in Rm, 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References' section of the "Courthouse Procedures" link.