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

----------x

WEST 45 APF LLC,

Plaintiff,

-against-

TAKE TIME TO TRAVEL, INC. and ANIL PATEL,

Defendants.

----------x

DECISION/ ORDER
Index No.: 116926/09
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C

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

Papers	**Numbered**
Pltf n/m 3025(b), 3212(b) w/MIR affirm, RT affid, exhs	1
Def opp 3212(b) w/ AP affid	2
Pltf supp 3212(b) w/ RT affid	3

Gische, J.S.C.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by Plaintiff West 45 APF LLC ("plaintiff" or "West"), to recover damages accrued under a commercial lease agreement that the Defendant Take Time To Travel, Inc. ("TTTT") entered into and that defendant Anil Patel ("Patel") personally guaranteed. Hereinafter, TTTT and Patel are collectively referred to as "defendants." Plaintiff now moves now moves: [1] to amend the complaint to include all sums due and owing under Defendant TTTT's lease with plaintiff through the date of entry of judgment (CPLR § 3025 [b]); [2] to strike defendant's affirmative defenses and granting plaintiff's motion for summary judgment, directing entry of a money judgment, against TTTT in the amount of $117,333.10 and against Patel in the amount of $44,896.52 (CPLR § 3212); [3] setting this matter down for a hearing on any additional counsel fees incurred in this

transaction on or after November 1, 2010. Defendants TTTT and Patel oppose the motion. Issue has been joined and the note of issue has not yet been filed. Summary judgment relief is, therefore, available. CPLR § 3212; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept. 2001].

FACTS CONSIDERED AND ARGUMENTS PRESENTED

It is undisputed that a lease ("Lease") was executed on December 10, 2004 by Plaintiff's predecessor, as landlord, and Defendant TTTT, as tenant. Article 25 of the Lease contains the following language:

> "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 said premises, and no agreement to accept such surrender shall be valid unless in writing signed by Owner. No employee of Owner or Owner's agent shall have any power to accept the keys of said premises prior to 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 premises." (Taylor Affid., Exhibit "A")

It is also not in dispute that a Guaranty ("Guaranty"), containing a "good-guy" clause, was executed on December 10, 2004, contemporaneously with the Lease, by Defendant Patel. Article C. ¶ 1. of the Guaranty contains the following language:

> "Principal guarantees to Landlord the payments and performance of Tenant's obligations under and in accordance with the Lease, including, without limitation, the payment of fixed and additional rent (the "Obligations"). This is a guarantee of payment and not only of collection. Guarantor's liability pursuant to this guarantee shall be limited to the sum of Obligations which accrue up to the date that is the last to occur of: (a) Tenant vacating the Demised Premises; (b) Tenant removing its property from the Demised Premises; (c) Tenant delivering the keys to the Landlord and surrendering the Demised Premises; (d) the expiration of three (3) full calendar months after the date that Tenant has given Landlord written notice that it will surrender possession of the Demised

> Premises. Landlord may, at its option, proceed against Principal and Tenant, jointly and severally, or Landlord may proceed against Principal under this Agreement without commencing any suit or proceeding of any kind against Tenant , or without having obtained any judgment against Tenant. (Taylor Affid., Exhibit "H").

Article C. ¶ 2. of the Guaranty contains the following language:

> "The obligations of Principal under this Agreement are unconditional, are not subject to any set-off or defense based upon any claim Principal may have against Landlord, and will remain in full force and effect without regard to any circumstance or condition, including, without limitation: (a) any modification or extension of the Lease (except that the liability of Principal hereunder will apply to the Lease as so modified or extended); (b) any exercise or non-exercise by Landlord of any right or remedy in respect of the Lease, or any waiver, consent or other action, or omission, in respect of the waiver, consent or other action, or omission, in respect of the Lease or any interest in the Demised Premises; (d) any bankruptcy, insolvency, receivership, reorganization, dissolution, liquidation or other like proceeding involving or affecting Landlord or Tenant or their obligations, properties or creditors, or any action taken with respect to such obligations or creditors, or any action taken with respect to such obligations or Tenant, or by any court, in any such proceeding; (e) any defense to or limitation on the liability or obligations of Tenant under the Lease, or any invalidity or unenforceability, in whole or in part, of any obligation of Tenant under the Lease or of any term part, of any obligation of Tenant under the Lease or of any term the capital stock of Tenant or the control thereof." (Taylor Affid., Exhibit "H").

Article C. ¶ 11. of the Guaranty contains the following language:

> "This agreement may not be modified or terminated orally or in any manner other than by an agreement in writing signed by Principal and Landlord, or their respective successors and assigns." (Taylor Affid., Exhibit "H").

The parties do not dispute that Defendant TTTT breached the Lease by unilaterally vacating its leased premises (the "Premises") on November 30, 2009, and by ceasing to pay certain charges due under the Lease thereafter as of January 1, 2009. It is not

disputed that Plaintiff did not issue a signed writing accepting or otherwise authorizing Defendants to unilaterally vacate the Premises as a legal surrender, nor were there any writings waiving Plaintiff's legal or equitable rights. Plaintiff argues, and Defendants do not dispute, that TTTT merely moved out of the Premises of its own accord and ceased paying rent in violation of the Lease.

Given these circumstances, Plaintiff claims that (1) defendant TTTT is liable for arrears of rent and additional rent pursuant to the Lease; (2) defendant Patel is liable for arrears of rent and additional rent pursuant to the Lease; and (3) that Patel is liable for the arrears for three month period after Defendant TTTT vacated the leased premises, pursuant to the Guaranty.

Plaintiff claims that TTTT is liable for a total arrears of fixed rent, for the period November 2009 through November 2010, for the sum of $88,725.56.

Plaintiff also claims that TTTT liable for the following additional rent:

Pursuant to Articles 41C and 46 of the Lease, TTTT's electricity rent inclusion factor was set at $596.25 per month, subject to periodic adjustments. For the months of November 2009 through November 2010, the rate was set at $1,136.76 per month, totaling at the sum of $14,777.88. Pursuant to Article 62 of the Lease, TTTT is liable for late payment charges on rent and additional rent for a total of $2,453.69. Pursuant to the Lease, defendants are liable for plaintiffs' reasonable expenses, including counsel fees totaling $8,011.07 and fees that will continue to accrue in connection with this action. TTTT is liable for its share of improvements made to the building as a result of local laws, ordinances and regulations; specifically that for the year 2009, Defendant TTTT's proportionate share of these expenses was $2,400.00. Pursuant to Article 29 of the Lease,

TTTT was required to pay a monthly fee of $25 for its water usage at the Premises, and that the arrears for water usage for the thirteen (13) month period between November 2009 through November 2010, inclusive, is $325.00. TTTT's elevator and access service charge at the premises liability totaled in the amount of $640.00.

Based on the foregoing, Plaintiff claims that TTTT's total liability for the outstanding rent and additional rent is $117,333.10. Furthermore, Plaintiff claims that Patel is personally liable for the charges incurred, by TTTT, during the three months subsequent to the vacatur of the Premises, totaling $44,896.52.

In his opposition, Patel acknowledges that he is the chief executive and owner of TTTT, and that he signed a guaranty containing a "good-guy" clause in which he personally guaranteed TTTT's rental payments, due under the Lease, for a three month period after the vacatur of the premises. Patel's opposition is, however, based upon two grounds: (1) that plaintiff has not addressed whether the premises were re-let after TTTT abandoned the Premises, thereby mitigating the damages claimed, and (2) that the Landlord has miscalculated Patel's personal liability.

Article 53.B.(b) of the Lease contains the following language:

> "Landlord, at Landlord's option, may relet the whole or any part or parts of the Demised Premises, from time to time, either in the name of the Landlord or otherwise, to such tenant or tenants, for such term or terms ending before, on or after the Expiration Date, at such rental or rentals and upon such other conditions which may include concessions and free rent periods, as Landlord, in its sole discretion, may determine. Landlord shall have no obligation to relet the Demised Premises or any part thereof and shall in no event be liable for refusal or failure to relet the Demised Premises or any part thereof; or, in the event of any such reletting, for refusal or failure to collect any rent due upon such reletting, and no such refusal or failure shall operate to relieve Tenant of any liability under this Lease

> or otherwise to affect any such liability..." (Taylor Affid., Exhibit "A").

Article 53.B.(c) of the Lease contains the following language:

> "...If the Demised Premises, or any part thereof, shall be relet together with other space in the Building, the rents collected or reserved under any such reletting and the expenses of any such reletting shall be equitably apportioned. Tenant shall in no event be entitled to any rents collected or payable under any reletting, whether or not such rents shall exceed the Fixed Rent reserved in this Lease." (Taylor Affid., Exhibit "A").

As a preliminary matter, Patel claims that, pursuant to the terms of the guaranty, he is liable for three months rent from the date TTTT vacated the premises. Since TTTT vacated on November 30, 2009, the three month guarantee period is from December 1, 2009 through February 28, 2010 ("Guaranty Period"). Therefore, Patel offers the following calculation of his liability:

Patel claims that the base rent during the Guaranty Period was $6,686.18 per month, and three months at that rate is $20,058.54. Patel accepts that the electricity charges during the Guaranty Period were $1,136.76 per month, and three months at that rate is $3,410.28. Patel claims that even accepting that the charges for alterations and improvement totaled $2,400 and that charges for water totaled $325, it is not clear when these charges accrued. However, if these charges were annual, Patel claims that the rent attributable to the three-month Guaranty Period should be one-fourth of the amounts, or $600 and $81.25, respectively. Patel agrees that his guarantee covers a $640 elevator service fee in November 2009 that TTTT incurred. Patel claims that the sum total of these amounts ($20,058.54, $3,410.28, $600.00, $81.25 and $640.00) is $24,790.07 not $44,896.52, and that his responsibility is limited to his calculation of the rent and add ons

attributable to the Guaranty Period.

Patel also argues that the late charges accrued during the Guaranty Period pursuant to Article 62 of the Lease, at the rate of ten dollars ($10) per day, totals $900 for the ninety days of the Guaranty Period. At a rate of 1.5% interest per month (Article 62 of the Lease), that would total $1,115.55 for the Guaranty Period.

Patel argues that although counsel claims more than $8,000 in legal fees, according to the invoices attached to the moving papers, the Landlord only spent $1,853.05 during the Guaranty Period relating to the prosecution of this action.

Patel claims that even accepting the alleged amounts, he is only personally liable for $24,790.07 in principal debt, $2,015.55 in interest and late fees and $1,853.05 in legal fees. This totals $28,658.67. Therefore, any judgment against him personally should be limited to $28,658.67.

Patel does not, in opposition to the motion, dispute the validity of Plaintiff's claim against Defendant TTTT. Nor does he dispute the calculation of the $117,333.10 claimed owed by TTTT.

In reply, Plaintiff denies that mitigation of damages by the re-letting of the premises has any relevance to its claims and it defends its calculation of the damages.

DISCUSSION

Standard for a Summary Judgment

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if this

burden is met, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2d Dept. 2003).

Breach of Lease

A commercial lease is a form of contract. Havana Cent. NY2 LLC v Lunney's Pub, Inc., 49 A.D.3d 70 (1st Dept. 2007). To establish a prima facie case of breach of contract, plaintiff must plead facts that show: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage, Furia v. Furia, 116 A.D.2d 694 (2d Dept. 1986); See Ascoli v. Lynch, 2 A.D.3d 553 (2d Dept. 2003) (citing PJI). In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based, Sud v. Sud, 211 A.D.2d 423 (1st Dept. 1995); Atkinson v. Mobil Oil Corp., 205 A.D.2d 719 (2d

Dept. 1984).

Once a tenant abandons the premises prior to the expiration of the lease, the landlord is within its rights under New York law to do nothing and collect the full rent due under the lease (Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc., 87 N.Y.2d 130, 134 [1995]; see, 11 Park Place Assoc. v. Barnes, 202 A.D.2d 292, 293 [1st Dept.1994]). If, however, a landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned, first to repay the landlord's expenses in reentering and reletting and then to pay the tenant's rent obligation (Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc., 87 N.Y.2d 130, 134 [1995]). In this regard, the common law is consistent with Article 53 of the Lease, *supra*.

Here, the parties do not dispute that TTTT breached the terms of the Lease by unilaterally vacating the premises, before the end of the Lease. Patel claims, however, that in April 2011, he observed that TTTT's former premises were occupied by a new tenant. Plaintiff's attorney has stated that the ocupancy commenced January 2011. Patel argues that this statement is mere hearsay and not sufficient proof that TTTT's leased premises were empty from December 2009 until December 2010, the period for which plaintiff seeks rent. Although, Plaintiff claims that the premises were not relet until January 2011, it does not provide any admissible evidence to establish the date the premises were relet. There are no documents provided and an attorney's factual statement, not based on actual knowledge, will not support a motion for summary judgment. Batista v. Santiago, 25 A.D.3d 326 (1st Dept. 2006). Thus, the court cannot determine when the Premises were re-let and consequently, whether any rental payments made by a new tenant were applied to TTTT's indebtedness, thereby decreasing their damages. (See, Lease ¶ 53B[b], ¶ 53B[c], *supra*).

Consequently, plaintiff is only entitled to partial summary judgment against TTTT on the issue of liability. The amount of damages is disputed and cannot be determined on this motion.

Personal Guaranty

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. The principal debtor is not a party to the guarantee and the guarantor is not a party to the principal obligation (Midland Steel Warehouse Corp. v. Godinger Silver Art, 276 A.D.2d 341, 343 [1st Dept 2000], quoting Shire Realty Corp. v. Schorr, 55 A.D.2d 356, 359-360 [2d Dept 1977]). Thus, the guarantor will be required to make payment only when the primary obligor has first defaulted (Weissman v. Sinorm Deli, 88 N.Y.2d 437, 446 [1996]).

As a guarantor of the Lease of TTTT, Patel is required to make payment only if TTTT, as the primary obligor, has defaulted (Weissman v. Sinorm Deli, *supra*). Having established, *supra*, that TTTT is in default of its obligations under the Lease, and Patel, having admitted liability under the guaranty, plaintiff is entitled to partial summary judgment on the issue of liability. There are disputed issues of fact regarding the attribution of certain add on expenses to the guaranty period. Consequently, plaintiff is only entitled to partial summary judgment against Patel on the issue of liability. The amount of damages is disputed and cannot be determined on this motion.

Attorney's Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (1986). Although the lease provides for the

payment of legal fees upon default, the reasonable amount of legal fees attributable to this action is disputed. (See, Lease ¶ 19). This also remains an issue for trial.

CPLR § 3025: Leave to Amend the Complaint

Plaintiff requests leave to amend the complaint to conform the evidence presented to include all sums due and owing under Defendant TTTT's Lease with Plaintiff through the date of entry of a money judgment. Although defendants have not submitted any opposition to this branch of the relief, it is denied without prejudice to renew. Since the court is not authorizing the entry of a money judgment for the reasons previously stated, there is no reason for such amendment at this time.

CPLR § 3212(b): Affirmative Defenses

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (See CPLR § 3211[b]; Vita v. New York Waste Services, LLC, 34 A.D.3d 559 [2d Dept. 2006]; Emigrant Mortg. Co., Inc. v. Fitzpatrick, 29 Misc.3d 746, 752 [Sup.Ct. Suffolk 2010]). In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (See Fireman's Fund Ins. Co. v. Farrell, 57 A.D.3d 721, 723 [2d Dept. 2008]; Emigrant Mortg. Co., Inc. v. Fitzpatrick, 29 Misc.3d 746, 752 [Sup.Ct. Suffolk 2010]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*See*, id.).

First Affirmative Defense, Lack of Personal Jurisdiction

Defendant's first affirmative defense is that the Court lacks personal jurisdiction over the Defendants. This affirmative defense, pursuant to CPLR § 3211(a)(8) requires the

Defendant to move for judgment within sixty days of filing an answer, otherwise this defense is considered waived. See Wiebusch v. Bethany Memorial Reform Church, 9 A. D. 3d 315 (1st Dept. 2004), World Hill Ltd. v. Sternberg, 25 Misc.3d 1224(A) (Sup.Ct. N.Y. 2009). In the instant case, the Answer was served on August 23, 2010. More than sixty days have passed and Defendants have not moved to dismiss the Complaint. Additionally, the Affidavits of Service annexed to Taylor Affid. at Exhibit 'I," which are sufficient on their face, are *prima facie* proof of proper service. See American Home Assurance Co. v. Chudary, 255 A.D.2d 346 (2d Dept. 1998). Therefore, the first affirmative defense is moot and the Court dismisses the first affirmative defense.

Second Affirmative Defense, Waiver, Estopple and Laches.

The branch of plaintiff's motion which seeks dismissal of the second affirmative defenses of waiver, estoppel and laches is granted, and those defenses are dismissed. Aside from being inapplicable to the facts, as alleged herein, they are conclusorily pled. See Fireman's Fund Ins. Co. v Farrell, 57 AD3d 721, 723 (2d Dept. 2008) (court properly granted CPLR 3211 [b] motion to dismiss affirmative defenses which were conclusorily pled and devoid of facts).

Here, Plaintiff did not waive its rights or perform an act which might estop it from asserting its claims. Article 25 of the Lease provides that no provision of the Lease shall be deemed waived, unless the waiver is in writing, signed by the owner. Article 11 of the Guaranty provides that the Guaranty may not be modified in any manner, other than by a written agreement, signed by the Guarantor and Landlord. These provisions of the Lease have not been satisfied. Moreover, defendants, through Patel's Affidavit in Opposition, have admitted liability. Such an admission obviates the applicability of these standard

affirmative defenses.

Furthermore, it is well established law that the defense of laches is an equitable defense and therefore, inapplicable to actions where, as here, plaintiff seeks a legal remedy (i.e. enforcement of a contract). Even if this were not an action seeking legal remedy, TTTT vacated the Premises on November 30, 2009, and this case was commenced on December 2, 2009. This four day period can hardly be termed a delay the would give rise to a defense of laches. Therefore, the court dismisses the second affirmative defense in its entirety.

Third Affirmative Defense: Complaint Does Not Properly Compute The Amount Due To The Landlord

The amounts Plaintiff claims are due to it, pursuant to the terms of the Lease and Guaranty, and the amount the Defendants claims liability for differ. This is the crux of the remaining action, *supra*. Therefore, the third affirmative defense remains and plaintiffs' motion for its dismissal is denied.

CONCLUSION

For the foregoing reasons, it is hereby:

ORDERED that plaintiff, WEST 45 APF LLC's, motion for summary judgment against defendants, TAKE TIME TO TRAVEL, INC. and ANIL PATEL, is granted in part only as to a determination of defendants' liability for the breach of the Lease and Guaranty; and it is further

ORDERED that summary judgment is denied on the issue of damages, which must await trial; and it is further

ORDERED that plaintiff, WEST 45 APF LLC's, motion to conform the pleading to the evidence is denied without prejudice to renew; and it is further

ORDERED that plaintiff, WEST 45 APF LLC's, motion to dismiss defendants, TAKE TIME TO TRAVEL, INC. and ANIL PATEL's, affirmative defenses is granted as to the first and second affirmative defenses, but is denied as to the third affirmative defense; and it is further

ORDERED that the matter is set down for a **Preliminary Conference** for **November 10, 2011 at 9:30 a.m. in Part 10, 60 Centre Street**; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

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

Dated: New York, New York
October 5, 2011

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.