ORIGINAL
WHEN BLUE

SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

Index No. 07038/2014
Orig. Date: 7/15/2014
Adj. Date: 8/5/2014
Motion Dec. **001: MotD**

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LINDENHURST REALTY CO LLC,

Plaintiff(s),

-against-

ORDER GRANTING PARTIAL SUMMARY JUDGMENT AND SCHEDULING CONFERENCE

MODERN AIR STRIKE INC.,
DONALD BRYANT and JASON PECKHOLDT,

Defendant(s).

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Upon consideration of the Notice of Motion for summary judgment on behalf of the plaintiff Lindenhurst Realty Co. LLC ["the plaintiff"], the supporting affidavit and affirmation, and exhibits A through I, the affirmation in opposition on behalf of the defendants Modern Air Strike Inc., Donald Bryant and Jason Peckholdt [collectively "the defendants"], and supporting exhibits A through D, and the plaintiff's reply affirmation, it is now

ORDERED that the plaintiff's summary judgment motion is granted in part and denied in part in accordance herewith; and it is further

ORDERED that all attorneys of record are directed to appear for a conference with the Court on **FEBRUARY 3, 2015** at **9:30AM**.

In this action for breach of a commercial lease, there is little if any dispute as to the underlying facts. On June 21, 2012, the plaintiff and the defendant Modern Air Strike Inc. ["MAS"], entered into a commercial lease for premises located at 80 East Gates Avenue, Lindenhurst. The period of the lease was from July 1, 2012, until July 31, 2017. MAS breached the lease at some unstated time and the plaintiff then commenced a nonpayment proceeding in District Court. The plaintiff and MAS entered into a settlement agreement on December 17, 2013, providing, inter alia, MAS's acknowledgment of rental arrears in the sum of $68,350.00, and MAS's obligation to pay the amount of arrears at certain stated intervals. The stipulation of settlement provided that upon MAS's default in making any of the payments, the plaintiff would be entitled to a judgment in the entire amount of arrears and an immediate issuance of a warrant of eviction.

On or about January 22, 2014, MAS breached the stipulation of settlement. Notably, a judgment of possession with a monetary judgment in the amount of $45,355.00 was entered against MAS on January 31, 2014. Before the sheriff executed on a warrant of eviction, MAS surrendered possession and vacated the leased premises on March 14, 2014. At the time MAS vacated the leased premises, there was a past due balance in the amount of $88,114.41 which included the prior judgment plus all the rent, additional rent and late charges that accrued up until March 14th when MAS surrendered possession (see Complaint, ¶ 11). The first cause of action seeks judgment against MAS for the total amount of $88,114.41.

The third cause of action in the complaint alleges that the individual defendants, Bryant and Peckholdt, personally guaranteed all of MAS's obligations under the lease and that the plaintiff is also entitled to judgment against Bryant and Peckholdt in the amount of $88,114.41. [1] To impose liability on the individual defendants, the plaintiff relies upon the guaranty language set forth at the end of the lease above the signatures of the individual defendants.

> "IN CONSIDERATION OF LETTING THE DEMISED PREMISES TO THE TENANT HEREIN, THE UNDERSIGNED HEREBY PERSONALLY AND UNCONDITIONALLY GUARANTEES ALL OF TENANT'S OBLIGATIONS UNDER THIS LEASE, SUBJECT TO THE TERMS SET FORTH IN PARAGRAPH 37 ABOVE; AND AGREES THAT ANY LEGAL PROCEEDINGS BETWEEN THE PARTIES SHALL BE GOVERNED BY THE TERMS SET FORTH IN PARAGRAPH 33 OF THIS LEASE."

Paragraph 37 of the Lease entitled "GOOD GUY CLAUSE" provides as follows:

> "Tenant's principle's [sic] Donald Bryant and Jason Pekholdt [sic] agree to personally guarantee all of the Tenant's obligations under this Lease, including but not limited to all of the Tenant's obligations to pay rent and additional rent. However, so long as Tenant peacefully surrenders the Demised Premises, free of all occupants and in the condition required under this Lease, and *provided that Tenant is not then in default under the terms of this Lease*, the guaranty of Donald Bryant and Jason Pekholdt [sic] for the Tenant under this Lease shall be limited to all rents, additional rents and other charges due under the Lease up to and including the date that the Premises is so peacefully surrended [sic]. Notwitstanding [sic] the foregoing, Donald Bryant and Jason Pekholdt [sic] hereby agrees [sic] to personally guarantee all of the Tenant's obligations under the first year of this Lease, even if the Tenant peacefully surrenders the Demised Premises as set forth above during the first year." [*emphasis*

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[1] The moving affirmation concedes that all of the defendants are entitled to a set-off in the amount of the security deposit in the amount of $25,000, for a net owed of $62,914.41 on the first and third causes of action.

supplied].

On May 7, 2014, the plaintiff entered into a "Parking Lease Agreement" with a third party with respect to the subject premises for a period of ninety days and month to month thereafter with a monthly rent of $12,000.00 ["the parking lease agreement"]. Paragraph 9 of the lease, which is triggered in the event of the tenant's default, provides in relevant part:

> "Landlord may rent the demised premises or any portion thereof without releasing Tenant from any liability. In the event that the term of the lease shall terminate by summary proceedings or otherwise, and if Landlord shall not re-let the Demised Premises for the Landlord's own account, then, whether or not the Demised Premises be re-let, the Tenant shall remain liable for, and the Tenant hereby agrees to pay to the Landlord, until the time the Lease would have expired but for such termination or expiration, the equivalent of the amount of all rents and additional rents due under the entire term of the Lease, less the avails of re-letting, if any, and the same shall be due and payable by the Tenant to the Landlord upon demand and Tenant shall pay to the Landlord the full amount due under this Lease."

The second cause of action of the complaint alleges that MAS is responsible for the full balance due under the lease ending on July 31, 2017, in the amount of $593,174.19, less $36,000 that the plaintiff received under the parking lease agreement for the initial period of ninety days for a sum total of $557,174.19.[2]

In opposing summary judgment the defendants maintain that the last sentence of the "Good Guy Clause" beginning with "Notwithstanding the foregoing" supports the conclusion that Bryant and Peckholdt's liability as guarantors expired one year after the inception of the lease and they can not be liable as guarantors for the rent MAS accrued prior to its vacating the leased premises. They urge that the conditional, one year, time-limited nature of the Good Guy Clause is reinforced by the guarantee language appearing above the signature lines for the individual defendants on the lease:

> "THE UNDERSIGNED HEREBY PERSONALLY AND UNCONDITIONALLY GUARANTEES ALL OF TENANT'S OBLIGATIONS UNDER THIS LEASE, *SUBJECT TO THE TERMS SET FORTH IN PARAGRAPH 37 ABOVE*." [*emphasis supplied*].

The individual defendants, who have not cross moved by way of a formal notice of cross motion,

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[2] The plaintiff contends that although the individual defendants are liable to the plaintiff for the $557,174.19 under their personal guarantee, it admits that the complaint does not set forth a claim against the individual defendants for that amount.

nevertheless ask the Court to deny summary judgment to the plaintiff and grant summary judgment in favor of Bryant and Peckholdt. The individual defendants maintain that their liability for unpaid rent under the lease is limited to the rent due up until the time the defendant surrendered the premises, referring to Section 9 of the lease entitled "Default".

The facts as set forth above present three main legal issues, 1) the nature and extent of the guarantee, 2) whether MAS is liable for the full rent up to what would have been the end date of the lease (July 31, 2017) notwithstanding that the plaintiff secured a month to month tenant two months after the defendant surrendered the premises, and 3) the extent of the respective defendants' liability for reasonable legal fees, specifically the landlord's attorneys' fees, in the event of a default by the tenant.

The initial guarantee language above the guarantors' signatures is broad and all encompassing: "IN CONSIDERATION OF LETTING THE DEMISED PREMISES TO THE TENANT HEREIN, THE UNDERSIGNED HEREBY PERSONALLY AND UNCONDITIONALLY GUARANTEES ALL OF TENANT'S OBLIGATIONS UNDER THIS LEASE...". Immediately following this broad language is the qualification that the guarantee is "SUBJECT TO THE TERMS SET FORTH IN PARAGRAPH 37".

Paragraph 37, the "Good Guy Clause", again begins with broad and unqualified language: "Tenant's principle's [sic] Donald Bryant and Jason Pekholdt [sic] agree to personally guarantee all of the Tenant's obligations under this Lease, including but not limited to all of the Tenant's obligations to pay rent and additional rent..." The Good Guy clause then has the qualification that so long as Tenant peacefully surrenders the Demised Premises, free of all occupants and in the condition required under this Lease, and *provided that Tenant is not then in default under the terms of this Lease*, the guaranty of Bryant and Pe[c]kholdt for the Tenant under the Lease shall be limited to all rents, additional rents and other charges due under the Lease up to and including the date that the Premises is so peacefully surrende[re]d. However, this limiting language of an otherwise broad and unqualified guarantee only applied if at the time of surrender of the subject premises on March 14, 2014, MAS was not in default under the terms of the lease. When the premises was surrendered in March, MAS was already in default and therefore, the guarantors are not entitled to the benefit of that particular limit on the otherwise broad and all-encompassing guarantee.

Paragraph 37 contains a second caveat that trumps both the all-encompassing guarantee at the beginning of the "Good Guy Clause" and the guarantee language at the very end of the lease.

> "Notwitstanding [sic] the foregoing, Donald Bryant and Jason Pekholdt [sic] hereby agrees [sic] to personally guarantee all of the Tenant's obligations under the first year of this Lease, even if the Tenant peacefully surrenders the Demised Premises as set forth above during the first year." [*emphasis supplied*].

In the Court's view, this caveat clearly indicates that the individual defendants' guarantee is limited to liability for unpaid rent and charges for the first year of the lease only. To the extent that the third cause of action seeks unpaid charges beyond the first year, the individual defendants' liability as guarantors is limited to damages for any unpaid rent and reasonable legal fees between the lease's inception on July 1, 2012, and June 30, 2013.

Unfortunately, the record is unclear as to when MAS first defaulted in the payment of rent. As of December 17, 2013, MAS was already in arrears in the amount of $68,350.00. The rent for the first year was $12,600.00 per month. The monthly rent for the second year which commenced on July 1, 2013 was $13,600.00. The record suggests, although not definitively, that MAS did not default until just after the first year of the tenancy- thereby relieving the guarantors of any guarantor liability for MAS's default. However, to the extent that the individual defendants may have some liability as guarantors based on rental payments that were due and left unpaid for the first year of MAS's tenancy, the plaintiff has failed to establish its entitlement to judgment as a matter of law; summary judgment against Bryant and Peckholdt on the third cause of action is denied.

The Court declines Bryant and Peckholdt's invitation to grant them summary judgment on the same claims in the absence of a notice of cross motion (*see Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56, 970 N.Y.S.2d 260 [2d Dept. 2013]). Even had the individual defendants properly cross moved, as the date of default has not been definitively established as having occurred after the first year of MAS's tenancy, the individual defendants failed to establish their entitlement to judgment as a matter of law.

The second issue is whether MAS, the tenant, is liable for the unpaid rent until the conclusion of the lease on July 31, 2017, notwithstanding that the plaintiff was successful in obtaining a substitute tenant for a fixed 90 day period commencing on May 7, 2014, and month to month thereafter. The plaintiff has conceded that MAS is entitled to a $36,000 off-set, based upon payment for rental of the subject premises for the 90 day period commencing on May 7, 2014, at a rate of $12,000 per month.

Paragraph 9 of the subject lease entitled, "DEFAULT" provides that in the event that the Tenant defaults in making any of the base rental payments the Landlord may, inter alia, re-let the premises for the Landlord's own account (thereby releasing the tenant from any further liability under the lease), or may, at the Landlord's option, re-let the Demised Premises or any part thereof as the Tenant's agent and receive the rents therefrom, applying the same first to the Landlord's expenses and then to the fulfillment of the covenants of the Tenant. The Lease provides:

"Landlord may rent the Demised Premises or any portion thereof without releasing

> Tenant from any liability. In the event that the term of this Lease shall terminate by summary proceedings or otherwise, and if the Landlord shall not re-let the Demised Premises for the Landlord's own account, then, whether or not the Demised Premises be re-let, the Tenant shall remain liable for, and the Tenant hereby agrees to pay to the Landlord, until the time the Lease would have expired but for such termination or expiration, the equivalent of the amount of all the rents and additional rents due under the entire term of this Lease, less the avails of re-letting, if any, and the same shall be due and payable by the Tenant to the Landlord upon demand and Tenant shall pay to the Landlord the full amount due under this Lease."

To the extent MAS suggests that a commercial landowner should be subject to a duty to mitigate, the Court of Appeals has recently reaffirmed that there is no such duty in the context of a business transaction in *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc.*, --- N.E.3d ----, 2014 WL 7177502 [Dec. 18, 2014], *citing Holy Properties Ltd., L.P. v. Kenneth Cole* 87 N.Y.2d 130, 637 N.Y.S.2d 964, 661 N.E.2d 694[1995]).

Based on this principle, the Court concludes that with respect to the second cause of action the plaintiff is entitled to an additional judgment against MAS for the full amount of any unpaid rent, off-set by, inter alia, the already existing and enforceable judgment from the district court action (Index No. 13-1474), the security deposit, and any amount that the plaintiff concedes has been paid thus far pursuant to the parking lease agreement (*Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 661 N.E.2d 694, 637 N.Y.S.2d 964 [1995]; *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc.*, --- N.E.3d ----, 2014 WL 7177502 [2014]). Notably, MAS failed to raise an issue of fact with proof in admissible form that MAS and the Landlord had a mutual understanding that the Landlord would excuse MAS from its obligation to pay rent and additional rent until the end of its lease term, irrespective of whether the landlord was successful in re-letting the premises.

As the exact amount of MAS's liability to the plaintiff is unclear from the papers before the Court, the matter is scheduled for a conference before the Court on **FEBRUARY 3, 2015, at 9:30 AM** in the Supreme Court, One Court Street Annex, Riverhead, to discuss any discovery requests on the issue of damages and to schedule a damages hearing, if appropriate.

Finally, with respect to the third issue, and the fourth cause of action, the subject lease provides at ¶ 33 that "should the Landlord prevail in any litigation or other proceedings between the parties, the Tenant shall pay the Landlord's reasonable legal fees." In New York, an attorney's fee is " 'merely an incident of litigation and is not recoverable absent a specific contractual provision or statutory authority' " (*214 Wall St. Assoc., LLC v. Medical Arts–Huntington Realty*, 99 A.D.3d 988, 990, 953 N.Y.S.2d 124, *quoting Levine v. Infidelity, Inc.*, 2 A.D.3d 691, 692, 770 N.Y.S.2d 83; *see Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5, 511 N.Y.S.2d 216, 503 N.E.2d 681; *see also Mount Vernon City School Dist. v.*

Nova Cas. Co., 78 A.D.3d 1028, 912 N.Y.S.2d 98 [2d Dept. 2010]).

Since "a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" (*Hooper Assoc., Ltd. v. AGS Computers*, 74 N.Y.2d 487, 492, 549 N.Y.S.2d 365, 548 N.E.2d 903). Although a promise to pay "legal costs" has been held to be insufficient to impose a duty to pay another party's attorney's fees (*United States Fidelity and Guar. Co. v. Braspetro Oil Services Co.*, 369 F.3d 34, 75–77; *Mount Vernon City School Dist. v. Nova Cas. Co.,* 78 A.D.3d at 1030; *Comprehensive Care Management Corp. v. Utica Mut. Ins. Co.,* 33 Misc.3d 1236(A), 941 N.Y.S.2d 537 [Table)] [N.Y.Sup. 2011] [Emerson, J.]), a promise to pay "legal fees" in the context of an entire agreement, has been held to be sufficiently clear and unmistakable to impose that burden (*Spodek v. Neiss,* 86 A.D.3d 561, 926 N.Y.S.2d 904 [2d Dept. 2011] [citations omitted]).

Thus, MAS is liable for the plaintiff's reasonable legal fees, including attorney's fees. As the Court has determined that the guarantors' liability is limited to unpaid rent that accrued in the first year of the lease, if any, it stands to reason that they are only liable for reasonable legal fees, including attorneys' fees, incurred between the inception of the lease term and one year thereafter. The issue of the reasonableness of the fees will likewise be addressed at the conference scheduled for **FEBRUARY 3, 2015**.

To summarize, so much of the plaintiff's motion that seeks a judgment against MAS for unpaid rent to the end of the lease term is granted, subject to the off-sets discussed herein. So much of the plaintiff's motion that seeks a judgment against the guarantors for unpaid rent and legal fees is denied, the plaintiff having failed to establish whether any of the amount(s) sought accrued in the first year of the lease term. So much of the plaintiff's motion that seeks legal fees, including attorney's fees, against MAS is granted, the amount to be determined after the conference scheduled for **FEBRUARY 3, 2015**. Bryant and Peckholdt's request for summary judgment dismissing the complaint against them is denied.

This constitutes the Order of the Court.

Dated: DEC 23 2014

ANDREW G. TARANTINO, JR., A.J.S.C.

____ FINAL DISPOSITION **_XX _NON-FINAL DISPOSITION**