SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

149 MADISON LLC,

Plaintiff,

-against-

PSF SHOES LTD. and STEVEN FUCHS,

Defendants.

----------x

Index No.: 156596/2015

DECISION AND ORDER

Motion Sequence 001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action by Plaintiff/Landlord 149 Madison LLC ("149 Madison") to recover unpaid rent and additional damages, including re-letting expenses and attorneys' fees, from Defendant/Tenant PSF Shoes LTD ("PSF") pursuant to a lease (the "Lease," *Exh C*), and from Defendant/PSF Vice President/Guarantor Steven Fuchs ("Fuchs") individually pursuant to a guaranty signed with the Lease (the "Guaranty," *Exh C* at p. 25). Defendants move to dismiss the fifth through ninth causes of action, which allege various forms of fraud and abuse of the corporate form. 149 Madison cross-moves for partial summary judgment on the first and second causes of action for breach of contract against PSF, the third and fourth causes of action for breach of contract against Fuchs, the tenth cause of action for attorneys' fees against PSF, and the eleventh cause of action for attorneys' fees against Fuchs.

BACKGROUND FACTS

149 Madison, as landlord, and PSF, as tenant, entered into the Lease for Room 401 (the "Premises") within 149 Madison Avenue, New York, New York (the "Building") beginning on January 1, 2011 and expiring January 31, 2018. Pursuant to the lease, PSF agreed to monthly

payments for base rent, electric bills, taxes as additional rent, and, upon late payment, late charges and interest (*Lease* ¶¶ 47, 48, 50, 53). The Lease also contained provisions requiring the payment of liquidated damages upon PSF's premature surrender of the Premises (*id.* at ¶ 18), absolving 149 Madison of any obligation to mitigate its damages by re-letting the Premises but obligating PSF to pay for any expenses should 149 Madison choose to re-let (*id.*), setting forth terms of early surrender (*id.* at ¶ 25), and allowing 149 Madison to apply PSF's $14,428.13 security deposit to any amount owed by PSF (*id.* at ¶ 49).

In conjunction with the Lease, Fuchs executed the Guaranty, thus accepting personal liability for PSF's payments and obligations under the Lease. The Guaranty contained a "good guy clause" which released Fuchs from personal liability upon the satisfaction of three conditions: vacatur and surrender of the demises Premises, notification to the Owner or Managing Agent in writing, and delivery of the keys to the Owner or Managing Agent.[1]

On November 3, 2014, Fuchs, in his capacity as PSF Vice President, sent a letter to Alan Abramson ("Abramson") of 149 Madison setting forth PSF's intention to surrender the Premises on November 30, 2014, several years before the Lease's end and "deliver the keys to the Leased Space to Landlord" (*Defs Opp/Reply, Exh A*). On or about that date, PSF vacated the Premises after paying Shyquri Ternava ("Ternava"), an employee of 149 Madison, to return the Premises to broom clean condition. Frank Fuchs, an employee of PSF, gave Ternava the keys on or about the same date. 149 Madison re-let the premises just under a year later, on or about November 1, 2015.

---

[1] These are the undisputed terms. As discussed in detail below, the parties dispute whether the Guaranty also contained the language "and as otherwise required by this lease," which would implicate an additional requirement that the Owner consent to the surrender in writing.

149 Madison subsequently filed this action. The Complaint's first and second causes of action allege that PSF is liable to 149 Madison for monies owed under the Lease—the first for rent and additional damages, and the second for liquidated damages. Similarly, the third and fourth causes of action allege that Fuchs, as Guarantor, is personally liable for the same amounts. The fifth through ninth causes of action allege various fraud claims against Fuchs, alleging in sum and substance that Fuchs abused the corporate form and is thus personally liable. The tenth and eleventh causes of action request attorneys' fees under the Lease against PSF and Fuchs, respectively.

Defendants move to dismiss the fifth through ninth causes of action, arguing that the causes of action are fraud claims which impermissibly duplicate the first through fourth causes of action for breach of contract. In the alternative, Defendants argue that the fifth and ninth causes of action should be dismissed because they fail to satisfy heightened pleading requirements for fraud claims.

In opposition, 149 Madison argues: first, that the fifth through ninth causes of action do not duplicate the breach of contract claims because the claims allege Fuchs' personal liability based on fraud related to PSF's corporate form, not fraud in the inducement or breach of the contract and, should that argument fail, that alternative theories of liability are permissible; and second, that, factoring in the forgiving standards of CPLR 3211(a)(7) review, 149 Madison has alleged sufficient detail to preclude dismissal of the fifth through ninth causes of action.

149 Madison also cross-moves for partial summary judgment on the first, second, third, fourth, tenth, and eleventh causes of action, and to dismiss the defenses as meritless, attaching and relying upon the affidavit of Abramson as well as the pleadings (*Exhs A, B*), Lease and

Guaranty (*Exh C*), lease with a new tenant (*Exh D*), and check evidencing expenses incurred in acquiring the new tenant (*Exh E*).[2] In support of the first and second causes of action, 149 Madison argues that PSF is liable, based on its early vacatur, in the amount of $93,708.05.[3] Specifically, 149 Madison argues that PSF breached the Lease by vacating the Premises unilaterally without 149 Madison's written consent and delivery of the keys to Ternava, not 149 Madison or its Managing Agent.

In support of partial summary judgment on the third and fourth causes of action against Fuchs individually, 149 Madison argues that Fuchs, as the Lease's guarantor, is liable for PSF's breach. 149 Madison contends that the Guaranty's "good guy clause" is not applicable for the same reason that PSF breached the lease: 149 Madison did not consent to surrender and the keys were not delivered to 149 Madison or its Managing Agent.

In support of partial summary judgment on the tenth and eleventh causes of action, 149 Madison argues that the Lease provides for attorneys' fees in response to PSF's default, and the Guaranty, by implication, imposes liability upon Fuchs.

In opposition to 149 Madison's cross-motion, Defendants attach the affidavits of Fuchs and Frank Fuchs and argue: first, that triable issues of fact exist with respect to PSF's surrender of the Premises by operation of law and a material change to the relevant language of the Guaranty; second, that the affirmative defenses should not be stricken because Defendants have

---

[2] 149 Madison's opposition and cross-motion are consolidated into the same affirmation and memorandum of law.

[3] This amount represents the portion of liquidated damages and/or the base and additional rent from December 1, 2014 through October 31, 2015 totaling $85,316.25, plus 5% per month in late fees, 12% annual interest calculated through May 31, 2016, and $12,282.00 in re-letting expenses, and subtracting the $14,428.13 security deposit (*149 Madison/Abramson Affirm* ¶¶ 26-31).

demonstrated triable issues of fact; and third, that Defendants are entitled to, at minimum, further discovery related to the triable issues of fact.

In reply, Defendants also argue that dismissal of the fifth through ninth causes of action is justified because 149 Madison has not pled sufficient facts, or facts which render the causes of action distinct from the Complaint's breach claims.[4]

In reply, 149 Madison responds: first that no issue of fact exists because Defendants acknowledge that Plaintiff did not agree in a signed writing to accept surrender or modify the Lease; second, that surrender did not occur because Ternava did not have the authority to accept the keys; and third, that, inasmuch as Defendants' affidavits attempt to alter the Lease's terms, the affidavits are inadmissible parol evidence.

DISCUSSION

I. Defendants' Motion to Dismiss

A. Motions to Dismiss Generally

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord

[4] Defendants' opposition and reply in further support are consolidated into the same affidavits and memorandum of law.

plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss*, 104 AD3d at 401; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack,* 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon*, 84 NY2d at 88; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] (CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort)).

B. CPLR 3211(a)(7): Failure of Fifth-Ninth Fraud Causes of Action to State a Claim Based on Duplication of Breach Causes of Action

> "A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, *i.e.*, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. * * * Unlike a

> misrepresentation of future intent to perform, *a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty"* (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291–92 [1st Dept 1999] [emphasis added]).

In other words, contrary to Defendants' argument, the focus of this inquiry is not on the damages resulting from the breach (*Defs memo of law* at p. 4), but the nature of the breach itself. Where, as here, a claim alleges the inappropriate use of the corporate form in derogation of a creditor's rights, a complaint adequately states a claim for relief (*Am. Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 478–79 [1st Dept 2016] ("the claim does not involve the failure to pay the amounts owed under the contract, but rather Ruderman's inappropriately taking money out of Bainbridge that could have been used to repay plaintiffs")).

Furthermore, inasmuch as the fraud claims seek the same damages as the breach of contract claims, CPLR 3017(a) permits parties to demand "relief in the alternative or of several different types" (*see also Volt Sys. Dev. Corp. v Raytheon Co.*, 155 AD2d 309, 309 [1st Dept 1989] (election of remedies, if any, "need not be made until all the proof has been presented")).

Accordingly, Defendants' motion to dismiss 149 Madison's fifth through ninth causes of action is denied.

C. Failure of Fifth Cause of Action (Veil Piercing) to Adequately State a Claim/Plead with Specificity (CPLR 3211 [a] [7] / CPLR 3016 [b])

CPLR 3016(b) heightens the pleading standards for fraud-based actions, mandating that the circumstances underlying actions for "misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence . . . shall be stated in detail" (*see DDJ Mgt., LLC v Rhone*

Group L.L.C., 78 AD3d 442, 443 [1st Dept 2010] ("CPLR 3016 [b] imposes a more stringent standard of pleading than the generally applicable notice of transaction rule of CPLR 3013")).

As an initial matter, 149 Madison's contention that veil-piercing claims do not implicate heightened pleading requirements is incorrect because veil-piercing claims are not limited to fraud alone (*compare 149 Madison Memo of Law* at p. 20, *citing Lederer v King*, 214 AD2d 354, 354 [1st Dept 1995] *with Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005] ("the motion court aptly determined that plaintiffs have not alleged, with the requisite 'particularized statements detailing fraud *or other corporate misconduct*,' facts that would warrant piercing the corporate veil [emphasis added])). Nevertheless, the Complaint satisfies even the heightened pleading requirements, which still require that the Court view the Complaint in the light most favorable to the plaintiff (*Stewart Tit. Ins. Co. v Liberty Tit. Agency, LLC*, 83 AD3d 532, 533 [1st Dept 2011]).

Generally, piercing the corporate veil requires a fact-specific showing that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff" (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]; *see also Shisgal v Brown*, 21 AD3d 845 [1st Dept 1995] (setting forth 8 factors))[5]. Allegations based on information and belief are generally insufficient to support a fraud cause of action, which must be pleaded with particularity, unless the source of such information is revealed (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010] *accord County of Erie v M/A-Com, Inc.*,

[5] These cases also rebut Defendants' assertion that "piercing the corporate veil is not a recognized cause of action" (*Defs Memo of Law* at p. 9).

104 AD3d 1233, 1242 [4th Dept 2013]). The reliance upon only information and belief will be sustained where, for example, specific dates and names are provided that "set forth sufficient information to apprise defendants of the alleged wrongs" (*Allenby, LLC v Credit Suisse*, AG, 134 AD3d 577, 580 [1st Dept 2015]; *see also 2406-12 Amsterdam Assoc. LLC v Alianza LLC*, 136 AD3d 512, 512–13 [1st Dept 2016] (complaint and plaintiff's affidavits in opposition to defendants' motion sufficiently alleged improper asset transfer to second defendant, a newly formed entity, which was 90% owned by the first defendant and had no employees and no function but to hold those assets away from creditors)).

Generally, "courts must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 [2011]). It is also notable that CPLR 3016 has frequently been subordinated to CPLR 3013, which stated that even the sufficiency of a pleading involving fraud or breach of trust still "primarily depends upon compliance with CPLR 3013's basic requirements (*Foley v D'Agostino*, 21 AD2d 60, 64, 248 NYS2d 121, 126 [1st Dept 1964]; Prof. Patrick M. Connors, *Practice Commentaries* [McKinney's], CPLR 3016:3 ("The circumstances of a fraud are more often than not in the 'peculiar knowledge' of the alleged defrauder because fraudulent conduct is inherently secretive conduct. This offers further reason to keep CPLR 3016 [b] closely confined"); *see also Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008] ("where concrete facts 'are peculiarly within the knowledge of the party' charged with the fraud . . . it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings")).

Providing some clarity, the Court of Appeals recently reversed the First Department and reinstated a veil-piercing cause of action, noting that "the party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011], *citing ABN AMRO Bank, N.V. v MBIA Inc.*, 81 AD3d 237, 255 [1st Dept 2011] [*Abdus-Salaam, J., dissenting in part*]; *compare E. Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 16 NY3d 775, 776 [2011] (piercing the corporate veil claim properly dismissed where plaintiff failed to allege any harm purportedly resulting from an abuse or perversion of the corporate form)). As noted by then-First Department Justice Abdus-Salaam in her dissent (cited favorably by the Court of Appeals), "[v]eil-piercing is a fact-laden claim that is not well suited for summary judgment resolution, much less for resolution on a pre-answer, pre-discovery motion" (*ABN AMRO Bank*, 81 AD3d at 255).

The Court, facing similar facts, reaches the same conclusion here. Though sources, dates, and names are not provided, the Complaint alleges specific categories of abuse of the corporate form including, among other things, the failure to keep proper records, inadequate capitalization, and Fuchs' complete control of PSF (*Complaint* ¶¶ 56-74). To the extent that Defendants argue that the allegations are insufficient because they are made upon information and belief, and bearing in mind the forgiving standards of analysis under CPLR 3211(a)(7), "at this stage of the proceedings, it cannot be said that this proposed cause of action is palpably insufficient or patently devoid of merit" (*Hudson-Spring Partnership, L.P. v P+M Design Consultants, Inc.*, 112 AD3d 419, 420 [1st Dept 2013]). Accordingly, Defendants' motion to dismiss the fifth

cause of action is denied.

C. Failure of Ninth Cause of Action (Veil Piercing) to Plead with Specificity (CPLR 3016 [b])

"Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on 'badges of fraud' to support his case, *i.e.*, circumstances so commonly associated with fraudulent transfers 'that their presence gives rise to an inference of intent'" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). Such circumstances include "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance" (*id.*). To the extent that the Complaint's ninth cause of action incorporates the Complaint's other allegations, some of which allege circumstances that may give rise to the appearance of fraudulent intent, this branch of Defendants' motion is also denied.

D. CPLR 3211(a)(1) (Documentary Evidence)

To the extent that Defendants invoke CPLR 3211(a)(1) in their notice of motion but do not substantively argue dismissal based on any documentary evidence, that portion of Defendants' motion is also denied.

II. 149 Madison's Cross-motion for Summary Judgment

A. Summary Judgment Generally

As the proponent of the motion for summary judgment, Plaintiff must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of

law (CPLR 3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]; *Ryan v Trustees of Columbia University in City of New York, Inc.*, 96 AD3d 551, 947 NYS2d 85 [1st Dept 2012]). This requires a prima facie showing of entitlement to judgment through sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572 [1986] and *Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR 3212 [b]).

Conversely, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR 3212[b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action (*Wing Wong Realty Corp. v Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1st Dept 2012] *citing Alvarez,* 68 NY2d 320; *Ostrov v Rozbruch*, 91 AD3d 147, 936 NYS2d 31 [1st Dept 2012]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof, in admissible form, demonstrating that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]).

The Defendant "must assemble and lay bare [its] affirmative proof to demonstrate that

genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]; *see Machado v Henry*, 96 AD3d 437, 945 NYS2d 552 [1st Dept 2012]; *Garber v Stevens*, 94 AD3d 426, 941 NYS2d 127 [1st Dept 2012], *citing Pippo v City of N.Y.*, 43 AD3d 303, 304, 842 NYS2d 367 [1st Dept 2007]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Siegel v City of N.Y.*, 86 AD3d 452, 928 NYS2d 1 [1st Dept 2011] *citing Zuckerman*, 49 NY2d at 562 [1980]).

B. First Cause of Action Against PSF (Rent Due Until Premises Were Re-Let)

The evidence submitted by 149 Madison satisfies its *prima facie* burden. The Lease provides that PSF was obligated to pay annual base rent of $79,222.21 ($6,601.89 per month) from January 1, 2014 through December 31, 2014; $81,599.39 ($6,799.95 per month) from January 1, 2015 through December 31, 2015; $847.29 per month for electric, and additional rent in the form of real estate taxes, and late charges and interest (*Lease* ¶¶ 47, 48, 50, 53). Neither party disputes that PSF vacated the Premises on or about November 30, 2014. 149 Madison was under no obligation to re-let the Premises, but chose to do so, entering into a lease with Redwood Capital, LLC that extends from November 1, 2015 through January 31, 2018 (*id.* at ¶ 18; *Exh D*).[6] The cost of re-letting the Premises was $12,282.00 (*Exh E*).

Importantly, Article 25 of the Lease unambiguously states that " * * * No act or thing done by Owner or Owner's agents during the term hereby demised shall be deemed an

[6] The rent for the new lease is not in the record but, inasmuch as 149 Madison seeks only damages from PSF's vacatur to November 1, 2015, when the new tenant arrived, it is not relevant.

acceptance of a surrender of the demised premises, and no agreement to accept such surrender shall be valid unless in writing signed by Owner." 149 Madison did not provide any writing, nor did it directly accept the keys (*Abramson Aff* ¶¶ 21-22).

Article 25 also provides that "*No employee* of Owner or Owner's agent shall have any power to accept the keys of said premises prior to the 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 demised premises." (Emphasis added). To the extent that neither party disputes that PSF surrendered the keys to Ternava, 149 Madison's superintendent, doing so was ineffective to the surrender of the demised premises.

To the extent that Defendants argue through multiple affidavits that 149 Madison, through its own actions and those of its agents, tacitly accepted surrender of the Premises, those actions do not change the ironclad language of the Lease. As noted by 149 Madison, General Obligations Law § 15-301 provides that "a written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." "The writing requirement may apply even if the written agreement does not affirmatively proscribe oral amendments, as long as the written agreement has the effect or requiring written amendment" (61 NY Jur 2d Frauds, Statute of § 148).

Accordingly, to the extent that Article 21 of the Lease affirmatively states that the Lease represents the entire agreement and cannot be modified except in a writing signed by both parties, the surrounding circumstances detailed in Defendants' affidavits are irrelevant. For the

same reason, the letter sent by Fuchs to 149 Madison's counsel is also irrelevant (*Defs Reply, Exh A*). Most significantly, Defendants' submissions do not contain what the Lease clearly requires: 149 Madison's written agreement to accept the surrender. Thus, PSF fails to satisfy its shifted burden and/or introduce any issue of fact, and PSF is liable to 149 Madison for damages under the Lease.

C. Second Cause of Action Against PSF (Liquidated Damages)

When PSF abandoned the Premises prior to expiration of the lease, the landlord had three options: (1) it could do nothing and collect the full rent due under the lease, (2) accept PSF's surrender, reenter the premises and re-let them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and re-letting the premises for the tenant's benefit (*Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130, 133–34 [1995]). When a landlord re-lets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and re-letting and then to pay the tenant's rent obligation (*id.* at 134).

149 Madison chose the second option. Article 18 of the Lease provides that, if the Premises are re-let, PSF

> "shall also pay to [149 Madison] as liquidated damages for the failure of [PSF] to observe and perform [PSF'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 lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the terms of the lease."

149 Madison has demonstrated entitlement to summary judgment on the second cause of action, with an important caveat: pursuant to the Lease, PSF (and, as discussed below, Fuchs as

Guarantor) is entitled to a credit calculated from proceeds derived from 149 Madison's re-letting of the Premises. 149 Madison appears to acknowledge this; that is, its motion and notice of motion do not request the same amount as its Complaint, requesting instead the same $93,708.05 as under the first cause of action. To the extent that Defendants do not substantively oppose 149 Madison's argument regarding this provision, the Court grants partial summary judgment against PSF on the second cause of action.

D. Summary Judgment Against Fuchs as Guarantor (Third and Fourth Causes of Action)

The Guaranty's requirements differ from the Lease, but the result is ultimately the same as Fuchs failed to satisfy all of the conditions required by the Guaranty's "good guy clause."

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, and the guarantor's failure to perform under the guaranty (*City of N.Y. v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

The Guaranty unambiguously provides that

> "for value received, and in consideration for, and as an inducement to [149 Madison] making the within lease with [PSF], *[Fuchs] guarantees to [149 Madison] . . .the full performance and observance of all the covenants, conditions and agreements, therein provided to be performed and observed by [PSF], including the 'Rules and Regulations' as therein provided, . . .and the obligations of the guarantor* hereunder shall in no way be terminated, affected or impaired by reason of the assertion by [149 Madison] against [PSF] of any of the rights or remedies reserved to [149 Madison] pursuant to the provisions of the within lease" (emphases added).

Having satisfied its burden to demonstrate a debt and guaranty, the only remaining issue is the Guaranty's "good guy clause," which Fuchs claims to have satisfied, thereby absolving him

of personal liability. That clause, reproduced here exactly as it was provided to the Court (*Exh C* at p. 25), states:

> Anything herein and contained to the contrary notwithstanding upon Tenant's (a) having vacated and surrendered the demised premises to Owner free of all subleases or licenses and in a broom clean condition ~~as otherwise provided by the lease~~ and (b) having notified Owner or Managing Agent in writing and (c) delivered the keys to the demised premises to the Owner or its Managing Agent, Guarantor shall not be liable under this guarantee to pay rent, additional rent or other charges or payments accruing under the lease after the date of said surrender.

According to Fuchs, the striking of "and as otherwise provided by the lease" superceded the Lease's more onerous requirement that 149 Madison consent in writing to the surrender. 149 Madison disputes Fuchs' version of events, arguing that it never agreed to strike that portion of the Guaranty and pointing to the fact that the struck portion was not initialed as found elsewhere in the Lease (*see, e.g. Lease* ¶ 24).[7]

Whatever the precise sequence of events, the significance of the stricken (or unstricken) language is a red herring. The parties do not dispute the relevant facts: that PSF vacated the Premises in broom clean condition, notified 149 Madison in writing of the surrender, and – most importantly for analysis here – provided the keys to Ternava, 149 Madison's superintendent.

Generally speaking, giving keys to a janitor or superintendent in and of itself will not effect a surrender and acceptance (Dolan, Robert F., 2 NY Landlord & Tenant Incl. Summary Proc. § 26:30 (4th ed. 2016), *citing Obendorfer v Mecham*, 110 NYS 340, 342 [App Term 1908] *and Dodge v Pritchard*, 34 Misc 542, 544 [App Term 1901] ("this case resolves itself, at most, into one where the receipt of the keys [by the janitor] was coupled with the express condition that

[7] The Court notes that the version with the struck language was attached by 149 Madison to its cross-motion for summary judgment.

in the event of the failure of the defendant to pay the stipulated amount the original rights of the plaintiff were not to be affected")). This rule is distinct from circumstances where, for example, an agent's knowledge alone may be imputed by statute to the agent's principal (*see, e.g. 149th St., LLC v Rodriguez*, 50 Misc 3d 139(A) [App Term 2d Dept 2016], *citing NYC Admin Code* § 27-2009.1 [b] (the knowledge of the landlord's agents, including building employees, will be imputed to the landlord where the employees are shown to be aware of the presence of a pet)).

The cases cited by Defendants to argue otherwise are, for various reasons, factually distinguishable (*see e.g., Tootle Theater Co. v Shubert Theat. Co.*, 175 AD 530, 532 [1st Dept 1916] (keys were given directly to, and accepted by, owner); *Bay Plaza Estates, Inc. v New York Univ.*, 257 AD2d 472, 473 [1st Dept 1999] (owner demanded that the keys be returned, changed the locks, and placed a "for rent" sign in front of the building); *Solomon v Ness*, 118 AD3d 773, 774 [2d Dept 2014] ("plaintiffs [lessors] accepted a return of the keys to the house, immediately put the house on the market for sale, and did not demand payment of rent until [about two months after tenant's vacatur]"); *Real Estate Alternatives Portfolio 4MR, LLC v. D.B. Computer Investments, Inc*, 2013 WL 3172420 (Sup Ct NY County) (individual judgment against guarantor awarded to landlord where, in violation of the lease terms, keys to the premises were never returned and garbage was scattered throughout the premises and alterations were not removed by corporate tenant)).

Nor did Ternava have apparent authority to bind 149 Madison through his actions. Apparent authority is created by the "words or conduct of the *principal*, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*Hallock v State*, 64 NY2d 224, 231 [1984] [emphasis added]). Significantly, "the

agent cannot *by his own acts* imbue himself with apparent authority (*id.* [emphasis added]). "Rather, the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal—not the agent" (*id.*).

The actions allegedly taken by 149 Madison to re-let the Premises and a statement by 149 Madison that Ternava would meet with Fuchs near the time of the surrender (*Fuchs Aff* ¶ 5), did not delegate, explicitly or otherwise, authority to Ternava to accept keys on 149 Madison's behalf. Defendants cite only their own actions and assumptions: paying Ternava in cash to ensure that the Premises were left in broom clean condition and giving Ternava the keys. Most significantly, Fuchs' own affidavit undermines his argument by admitting that "No one from [149 Madison] ever told me or distinguished to me that I had to deal with people at [149 Madison] other than Mr. Ternava (or [the previous superintendent]) with respect to the Leased Space, *except with respect to being told to contact the office of [149 Madison] if I had questions with respect to rental obligations under the [L]ease*" (*Fuchs Aff* ¶ 4 [emphasis added]). Giving terms their plain meaning, "rental obligations" unambiguously refers to the obligation to pay rent, including, logically, the conditions required to dissolve that obligation. Defendants' additional submission, the letter to Abramson informing the latter of PSF's surrender, similarly undermines Defendants' argument by acknowledging that "Tennant [sic] shall deliver the keys to the Lease Space to Landlord" (*Defs Reply, Exh A*). Thus, there was no surrender by operation of law.

And, even crediting Fuchs' version of events, Fuchs did not introduce an issue of fact as to his satisfaction of the good guy clause's requirement that the surrender of keys be made to the "Owner or Managing Agent" because Ternava, an employee of 149 Madison, qualifies as neither.

Accordingly, Fuchs is personally liable for PSF's financial obligations under the Guaranty.[8]

E. Summary Judgment against PSF and Fuchs for attorneys' fees and re-letting expenses (tenth and eleventh causes of action)

Article 18 of the Lease provides that in computing damages, "there shall be added . . . such as 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.

Article 19 of the Lease provides, in relevant part, that

> If [PSF] shall default . . . then . . . [149 Madison] . . . in connection with any default by [PSF] in the covenant to pay rent hereunder beyond the applicable notice and cure period, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any action 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.

Accordingly, pursuant to Articles 18 and 19, and to the extent that Defendants interpose no substantive arguments in opposition, both attorneys' fees (which must be determined) and re-letting expenses shall be awarded to 149 Madison.

Similarly, because the Guaranty obligates Fuchs to assume all of PSF's financial

---

[8] It is noted that to the extent that the Lease's provisions do not conflict with the Guaranty's terms of surrender, the Lease explicitly excludes employees from acceptance of the keys:

> "No employee of Owner or Owner's agent shall have any power to accept the keys of said premises prior to the 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 demised premises" (*Lease* ¶ 25, *see also Exh C [Rider to Standard Form of Loft Lease*] at ¶ R.2. ("For all purposes, the addresses of the parties shall be as follows: Landlord, c/o Abramson Bros Realty, 501 Fifth Avenue, New York, NY)).

obligations under the Lease, Fuchs is personally liable for reasonable attorneys' fees.

F. Defenses

Based on the Court's grant of partial summary judgment on the first through fourth causes of action and denial of Defendants' motion to dismiss the fifth through ninth causes of action, the defenses, inasmuch as they are directly contradicted by the discussion above, are dismissed as moot.

CONCLUSION[9]

For the foregoing reasons, it is hereby

ORDERED that the motion of Defendants PSF Shoes LTD ("PSF") and Steven Fuchs ("Fuchs") to dismiss the fifth through ninth causes of action of Plaintiff 149 Madison ("149 Madison") is **DENIED**; and it is further

ORDERED that the branch of 149 Madison's cross-motion seeking partial summary judgment on the first cause of action against PSF and a monetary award of base rent, electricity charges, late charges, interest charges, and real estate tax is **GRANTED**; and it is further

ORDERED that the branch of 149 Madison's cross-motion seeking partial summary judgment against PSF on the second cause of action and liquidated damages is **GRANTED**; and it is further

ORDERED that the branch of 149 Madison's cross-motion seeking partial summary judgment on the third cause of action against Fuchs is **GRANTED**; and it is further

---

[9] Though the fifth through ninth causes of action survived Defendants' motion to dismiss and therefore preclude full disposition of this case, they are arguably mooted by the Court's grant of partial summary judgment on related claims and/or claims pled in the alternative. In other words, to justify additional recovery, 149 Madison would be required to show additional and/or distinct damages.

ORDERED that the branch of 149 Madison's cross-motion seeking partial summary judgment on the fourth cause of action against Fuchs is **GRANTED**; and it is further

ORDERED that the branch of 149 Madison's cross-motion seeking partial summary judgment against PSF on the tenth cause of action for attorneys' fees is **GRANTED**; and it is further

ORDERED that the branch of 149 Madison's cross-motion seeking partial summary judgment against Fuchs on the eleventh cause of action for attorneys' fees is **GRANTED**; and it is further

ORDERED that pursuant to this order, the first, second, third, fourth, tenth, and eleventh causes of action shall be referred to a special referee for a determination consistent with this opinion; and it is further

ORDERED that the parties shall appear for the previously-scheduled compliance conference on September 27, 2016, at 2:30 p.m., at which time the Court will address discovery as it pertains to the surviving fifth through ninth causes of action, and that no adjournments of said conference shall be granted absent a showing of good cause.

ORDERED that 149 Madison shall serve a copy of this Order with notice of entry upon the County Clerk, Special Referee Clerk, and all parties within 20 days; and it is further

This constitutes the decision and order of the Court.

Dated: September 15, 2016

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.