SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM
Justice

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INDEX NO. 652564/2016

JUDITH KINGMAN, ALEXANDER KINGMAN, GARRET KINGMAN

Plaintiffs,

MOTION SEQ. NO. 001 & 002

- v -

ZMOORE LTD. D/B/A COMMERCE RESTAURANT, TONY ZAZULA, HAROLD MOORE,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 131, 135

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 127, 128, 129, 130, 132, 133, 134

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

Upon the foregoing documents, it is

This court consolidates motion sequences 001 and 002 for disposition and addresses them together.

Defendants ZMoore Ltd. d/b/a Commerce Restaurant (ZMoore) and Tony Zazula move under motion sequence number 001 for partial summary judgment to dismiss the first and second cause of actions in plaintiffs' complaint and to amend their answer to add counterclaims.

Plaintiffs move under motion sequence number 002 for summary judgment against defendants on three causes of actions alleged in their complaint, to dismiss defendants' affirmative defenses and defendants' request for attorney fees.

Defendant Harold Moore has not opposed plaintiffs' motion.

Background

Plaintiffs, Judith Kingman, Alexander Kingman, and Garrett Kingman (the Kingmans), are landlords of commercial property located at 50 Commerce Street, New York. The property

was leased to defendant ZMoore under a lease agreement dated February 8, 2007. The lease was guaranteed by Harold Moore and Tony Zazula (the guarantors) on February 8, 2007 (guarantees). The lease and guarantees were executed between defendants and Pride Rock LLC. Pride Rock sold the demised premises to plaintiffs on February 16, 2007. Plaintiffs sought to modernize an elevator on the premises in 2011 (elevator project).

Defendants sought a restraining order against plaintiffs' elevator project in Supreme Court, New York County, under index number 113772/2011. Justice Arthur F. Engoron allowed plaintiffs to carry on the elevator project and awarded plaintiffs $72,000.00 in attorney fees (Case 1). (NYSCEF document numbers 114 and 116.)

Plaintiffs terminated the lease on April 15, 2013. Defendants sought a Yellowstone injunction in Supreme Court, New York County, under index no. 153282/2013, to restrain plaintiffs from terminating the lease. Justice Paul Wooten denied the Yellowstone injunction (NYSCEF document number 66.) and referred the determination of attorney fees to a special referee. (NYSCEF document number 67.) Special Referee Jeremy R. Feinberg awarded $39,859.50 in attorney fees (Case 2). (NYSCEF document number 70.) On June 3, 2015, ZMoore deposited a $40,500.00 cashier's check with the clerk of the Supreme Court, New York County, to secure payment of the judgment award.

Plaintiffs commenced a holdover proceeding in the Civil Court, Part 52, under index no. 66749/2013. On December 9, 2013, then-Judge Jennifer Schecter granted plaintiffs a warrant of eviction and conditionally stayed the execution of the warrant until January 2, 2014. The court also awarded plaintiffs $96,164.28 in use and occupancy from April 2013 through July 2013 and referred the determination of attorney fees for a special hearing.

Defendants appealed and also sought a stay of all proceedings pending appeal. On February 25, 2014, the Appellate Term granted a stay. On March 11, 2015, the Appellate Term affirmed Judge Schecter's December 9, 2013, order. (NYSCEF document number 55.) Defendants sought reargument or, in the alternative, leave to appeal the Appellate Term's March 11, 2015, order. The Appellate Term denied defendants' motion. Defendants then sought from the Appellate Division leave to appeal the Appellate Term's March 11, 2015. On May 28, 2015, the Appellate Division denied leave. On June 18, 2015, defendants moved the Civil Court to stay the eviction. On June 26, 2015, then-Judge David B. Cohen denied the motion, vacated all stays, and ordered the premises vacated by June 29, 2015. Defendants were evicted on June 29, 2015. (NYSCEF document number 97.)

Plaintiffs then sent a written demand dated March 29, 2016 (NYSCEF document number 82.), to defendants and the guarantors demanding payment by April 29, 2016, of $428,016.45 as liquidated damages under Article 63 of the lease, an end-of-term clause that supposedly entitles plaintiffs to liquidated damages if defendants continued in possession of the premises after the lease ends.

After defendants were evicted, plaintiffs moved before Judge Jose A. Padilla in Civil Court in August 2015 (index no. 066749/2013) to restore the holdover proceeding to the calendar and to schedule a legal-fee hearing. (NYSCEF document number 99.) On October 26, 2016,

then-Judge W. Franc Perry granted a judgment in plaintiffs' favor for $184,321.61 in legal fees accrued during the holdover proceeding through September 2016. (NYSCEF document number 62.)

Analysis

Plaintiffs move for summary judgment. Plaintiffs raise four grounds for summary judgment: (1) that defendant, ZMoore, failed to pay $428,061.45 under Article 63 (End of Term) of lease[1]; (2) that plaintiffs seek $724,197.56[2] under the guarantees from the guarantors, defendants Tony Zazula and Harold Moore; (3) that plaintiffs seek to recover attorney fees for the present action from all defendants and; (4) plaintiffs want defendants' affirmative defenses stricken, striking the demand for attorney fees. Plaintiffs oppose defendants' request for leave to amend their answers to add counterclaims.

Defendants move for partial summary judgment. Defendants argue that plaintiffs' first cause of action is barred by collateral estoppel, res judicata, claim splitting, and waiver. The defendants contend that Civil Court during the holdover-attorney-fees proceeding under index no. 066749/2013 had determined all sums due under the lease. Defendants also challenge the enforceability of Article 63, arguing that the liquidated-damages provision under Article 63 constituted an unenforceable penalty. Defendants argue that plaintiffs' second cause of action for recovery under the guarantees must be dismissed on the ground that the guarantors' obligation to indemnify plaintiffs extended only to ZMoore's liability under the lease and that, because plaintiffs' claim under the lease is barred by collateral estoppel, res judicata, claim splitting, and waiver, plaintiffs may not enforce the guarantees.

Alternatively, defendants challenge the enforceability of the guarantees because they were executed by and between the guarantors and Pride Rock LLC, and plaintiffs were not a party to the guarantees.

Also, defendants move for leave to amend their answer to add counterclaims for conversion of property and breach of contract on the ground that plaintiffs denied defendants access to the premises to retrieve their property after the lease ended. Defendants further seek to add a counterclaim for conversion of security deposit and unjust enrichment because plaintiffs allegedly refused to return the security deposit or apply it toward the judgment awards, breached the lease terms, and allowed plaintiffs to be unjustly enriched by obtaining the CPLR nine

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[1] Under Article 63 of the lease if a tenant continues in possession of the premises after the lease is terminated, the tenant shall pay a sum equal to two times the average rent paid during last six months of the lease as liquidated damages for each month of possession post termination. Plaintiff alleges that defendants accrued liquidated damages under Art. 63 for $428,016.45 for 18 months of post-termination possession.

[2] The sum of $724,197.56 claimed by plaintiffs under the guarantees has two components: recovery of, in first part, of liquidated damages to the tune of $428,016.45 claimed in the first cause of action; and in second part, unpaid attorney fees to the tune of $296,181.11 (i.e. sum of $72,000.00 under Case 1, $39,859.50 under Case 2, and $184,321.61 under Judge W. Franc Perry's October 26, 2016 order).

percent interest rate. Defendants also raise 24 affirmative defenses in their amended answer, dated August 24, 2016 (NYSCEF document number 20.), and additionally request attorney fees, which plaintiffs challenge.

1. First cause of action

Plaintiffs' first cause of action — for $428,061.45 as liquidated damages under Article 63 of the lease — is barred by res judicata.

In 2015, after defendants' eviction, plaintiffs requested from the Civil Court a money judgment for attorney fees incurred by them during the holdover proceeding. The jurisdiction of the Civil Court was available only if the plaintiffs were able to show that the lease classified the attorney fees to be additional rent. (NYSCEF document number 101.) The plaintiffs, to meet the subject matter jurisdiction of the Civil Court, classified their attorney fees claim as "additional rent" that the defendants owed under Articles 21[3], 40[4] and 63 of the lease. The term "additional rent" is defined in Article 40 as "all other amounts and obligations which Tenant assumes or agrees to pay under this Lease."

Article 63 of the lease entitled the plaintiffs to receive two categories of relief: (1) costs, claims, loss or liability incurred during the holdover tenancy[5]; and (2) liquidated damages.[6] During the attorney-fee hearing, plaintiffs sought only the costs portion of Article 63 as "additional rent" and did not claim liquidated damages relief, even though their claim for liquidated damages became ripe when the defendant surrendered the premises on June 29, 2015. Plaintiffs in this motion seek the liquidated damages portion of Article 63.

"The doctrine of res judicata operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same "factual grouping" or "transaction" and which should have or could have been resolved in the prior proceeding." (*Ordenana v Weber*, 269 AD2d 580, 581 [2d Dept 2000].) "What constitutes a 'transaction' or a series of transactions depends on how the facts are related in time,

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[3] Relevant portion of Article 21: "Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to Owner the demised premises, "broom-clean", in good order and condition, ordinary wear expected, and Tenant shall remove all its property."

[4] Relevant portion of Article 40: "Tenant also covenants to pay . . . as additional rent: all other amounts under obligations which Tenant assumes or agrees to pay under this Lease."

[5] Relevant portion of Article 63: "In the event that the demised premises are not surrendered at the end of the Lease term, Tenant shall indemnify and save Landlord harmless against all costs, claims, loss or liability resulting from delay by Tenant in so surrendering the demised premises."

[6] Article 63 with respect to liquidated damages read as: "Additionally, the parties recognize and agree that other damage to Landlord resulting from any failure by Tenant to timely surrender the demised premises will be substantial. . . . Tenant therefore agrees that if possession of the demised premises is not surrendered to Landlord within one day after the date of expiration or sooner termination of the term of this Lease, then Tenant will pay Landlord as liquidated damages for each month and for each portion of any month during which Lessee holds over in the premises after the expiration or termination of the term of this Lease."

space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage" (*Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 AD3d 1010, 1013 [2d Dept 2010], quoting *Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193 [1981] [internal quotation marks omitted].)

Res judicata precludes plaintiffs from renewing the issue of defendants' "additional rent" obligations under the lease which was decided by Civil Court during the 2016 attorney-fee proceeding before then-Judge W. Franc Perry. Plaintiffs' classification of attorney fees as "additional rent" under Articles 21, 40 and 63, inadvertently allowed the Civil Court to determine defendants' additional rent obligations under the lease for the duration up to September 2016. The doctrine now precludes plaintiffs from claiming different relief of liquidated damages under the lease for the same duration. Plaintiffs cannot prosecute their ripe claims piecemeal.

Plaintiffs, citing *Smith* (54 NY2d at 193-194), argue that plaintiffs' liquidated damages claim and attorney-fee claim are not sufficiently "related in time, space, origin, or motivation," nor would "they form a convenient trial unit," nor would "their treatment as a unit conform to the parties' expectations or business understanding or usage," for res judicata to apply. The court disagrees.

Res judicata applies. Plaintiffs' claims for liquidated damages and attorney fees originated from the same cause of action, i.e. defendants' holdover tenancy. According to Article 63, plaintiffs' claim for liquidated damages became ripe when ZMoore surrendered the demised premises on June 29, 2015. Plaintiffs initiated their attorney-fee proceeding post-surrender of demised premises, in August 2015. Both claims share the same motivation, i.e. seeking indemnification for ZMoore's holdover tenancy. Civil Court's jurisdiction was invoked on the basis of plaintiffs' claim for additional rent and not solely on their claim for attorney fees. Plaintiffs' liquidated damages claim forms a "convenient trial unit" where the plaintiffs are seeking redressal for "all other amounts and obligations which Tenant [defendants] assumes or agrees to pay under the lease." Given these factors, it would be reasonable to say that the two claims arise out of the same "factual grouping" or "transaction" and would have formed a "convenient trial unit." Thus, the doctrine of res judicata applies.

Plaintiffs' first cause of action is dismissed. The court need not address plaintiffs' remaining arguments on this cause of action.

Defendants' motion for partial summary judgment to dismiss plaintiffs' first cause of action is granted. Plaintiffs' motion for summary judgment on its first cause of action is denied.

2. Second cause of action

Plaintiffs' motion for summary judgment on their second cause of action for $724,197.56 in liquidated damages ($428,016.45) and unpaid attorney fees ($296,181.11) against the guarantors, jointly or severally, is granted. And defendants' partial summary-judgment motion to dismiss the second cause of action is denied.

a. Liquidated damages

"A lease and a guarantee are two separate contracts. A holdover proceeding under the terms of a lease does not extinguish a landlord's claims under a guarantee." (*APF 286 Mad LLC v Chittur & Assoc. P.C.*, 132 AD3d 610, 610 [1st Dept 2015].) The holdover proceeding was brought against ZMoore and not against the guarantors. As plaintiffs are moving against the guarantors in this action, it does not amount to claim-splitting or barred by res judicata. Plaintiffs' claim for liquidated damages against the guarantors is still valid.

Plaintiffs proved their entitlement to summary judgment to obtain liquidated damages against the guarantors: "On a motion for summary judgment to enforce a written guaranty, a creditor must prove an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." (*City of NY v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998].) Plaintiffs have satisfied all three requirements. The guarantees executed by the guarantors are absolute and unconditional. (NYSCEF document numbers 49 and 50.) Plaintiffs made a written demand to ZMoore and the guarantors on March 29, 2016 for payment of $428,016.45 in liquidated damages under Article 63 of the lease. (NYSCEF document number 121.) Neither ZMoore nor the guarantors made any payment toward plaintiffs' written demand. Plaintiffs may enforce the guarantees for liquidated damages under Article 63 against the guarantors, jointly or severally.

b. Plaintiffs also seek unpaid attorney fees

Article 40 of the lease contains a legal-fee clause that provides:

> "If Landlord commences any action or proceeding against Tenant, or if Landlord is required to defend any action or proceeding commenced by Tenant, in connection with this lease or the demised premises, Landlord shall be entitled to recover from Tenant in such action or proceeding, or a subsequently commenced action or proceeding, Landlord's reasonable attorney's fees, costs and disbursements and all applicable interest thereon at the statutory rate incurred in connection with such action or proceeding and any appeals, including but not limited to fees on fees incurred to collected said monies, if Landlord is the prevailing party." (NYSCEF document number 86.)

Further, the guarantors have executed separate guarantees, where in Part 1 of the guarantees, the guarantors have guaranteed the payments due under the lease:

> "The guarantors guarantee, the full, faithful and timely payment by Tenant of all the rent and additional rent payments due under or pursuant to the Lease. If Tenant shall default at any time in the payment of any rent or additional rent or other monetary charges due to the Landlord under or pursuant to the Lease, then the

> guarantors, shall fully and promptly, and will and truly, pay all of same to Landlord, and in addition shall *pay to Landlord any and all sums due to Landlord including, without limitation, all interest on past due obligations of Tenant, costs advanced by Landlord, and including attorney's fees and litigation costs that may arise in consequence of Tenant's default or guarantor's default hereunder.*" (NYSCEF document numbers 88 and 89 [emphasis added].)

"Guaranties and leases are separate documents; the former impose obligations on the guarantors and the latter impose obligations on the landlord and tenant. When a guarantor is sued on the guaranty, [the guarantor] cannot raise a claim or defense which is personal to the principal debtor, such as breach of the principal contract, unless it extends to a failure of consideration for the principal contract, and therefore for the guarantor's contract." (*I Bldg., Inc. v Hong Mei Cheung*, 137 AD3d 478, 478 [1st Dept 2016].) A collective reading of Article 40 of lease and Part 1 of the guarantees allows plaintiffs to claim unpaid attorney fees from the guarantors.

Unpersuasive is defendants' argument that plaintiffs cannot enforce the guarantees because the guarantees were executed between Pride Rock LLC and guarantors, and not directly with plaintiffs. A change in identity of the beneficiary under a guarantee does not affect the substance or extent of the guarantee undertaken by the guarantor. (*Nicholas A. Cutaia, Inc. v Buyer's Bazaar*, 224 AD2d 952, 953 [4th Dept 1996].) The transfer of ownership of the premises from Pride Rock LLC to plaintiffs does not affect the substance or extent of the guarantees. In addition, the guarantees contain a valid assignment provision that allows the guarantees to inure to the benefit of landlord's heirs, successors, and assigns. Thus, plaintiffs as successors to the guarantee can avail the benefit under the guarantees.

Defendants have not met their burden to prove liquidated damages under Article 63 as unenforceable penalty. Additionally, defendants' argument that plaintiffs' motion is premature because plaintiffs have not provided necessary discovery for comparison of actual damages and liquidated damages, is not viable. "The liquidated damages clause, providing for two times the existing rent in the event of a holdover, was not an unenforceable penalty." (*Tenber Assoc. v Bloomberg L.P.*, 51 AD3d 573, 574 [1st Dept 2008].) The language of Article 63 leaves no doubt about its being a liquidated damages clause that gives plaintiffs a right to a sum equal to two times the average rent paid during last six months of the lease, in liquidated damages for each month of possession by defendants, post termination of the lease. The amount contemplated in the provision is not disproportionately high to the anticipated losses and falls within the range of reasonability.

Further, in New York, "parties are free to agree to a liquidated damages clause 'provided that the clause is neither unconscionable nor contrary to public policy.'" (*172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assoc.* 24 NY3d 528, 536 [2014].) "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation." (*Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425 [1977].) The lease was executed on February 8, 2007, for a term of 10 years. Looking forward

from the date of the lease, the parties could not have reasonably estimated actual loss. The court finds no reason to estimate the actual damages from the holdover when the lease has specifically determined so and which, by analysis of case law, does not shock the court's conscience and therefore would not classify as an unenforceable penalty.

The court awards a judgment in plaintiffs' favor for $724,197.56 as against the guarantors, Harold Moore and Tony Zazula, jointly and severally.

3. Third cause of action

Plaintiffs' motion for legal fees incurred in this action is granted.

In its third cause of action, plaintiffs seek attorney fees they have incurred in this action. Article 40 of the lease provides that plaintiffs may recover reasonable attorney fees and legal costs incurred in connection with any legal action brought in relation to the lease, if the plaintiffs are the prevailing party in that action.

The court notes that defendants do not raise any argument against this cause of action in their moving papers.

Plaintiffs' motion is therefore granted as unopposed. Accordingly, the court hereby refers a Special Referee to hear and report with recommendations the issue of the reasonable attorney fees that plaintiff incurred in this action to.

4. Defendant ZMoore and Zazula's motion to amend the answer and add counterclaims

Defendants ZMoore and Zazula's motion under sequence number 001, for leave to amend the answer to include four counterclaims — for conversion of property, conversion of security deposit, breach of contract, and unjust enrichment — is denied.

Defendants seek leave to amend their answers to add counterclaims for conversion of property and breach of contract on the ground that plaintiffs denied defendants access to the premises to retrieve their property after the termination of the lease. Defendants further want to counterclaim for conversion of a security deposit and for unjust enrichment, alleging that plaintiffs' refusal to return the security deposit or apply it toward the judgment awards breached the lease terms. Plaintiffs became unjustly enriched by obtaining the CPLR nine-percent interest rate.

Plaintiffs oppose defendants' motion to amend the answer to add counterclaims Plaintiffs argue that defendants' motion should be denied because defendants' motion is not adequately pleaded, that the motion papers are not supported by any sworn statement or verification upon personal knowledge and cannot otherwise be sustained. "CPLR 3025 (b) motions to amend pleadings are to be liberally granted, absent prejudice or surprise, but such leave should not be granted upon mere request, without appropriate substantiation." (*Guzman v Mike's Pipe Yard*, 35 AD3d 266, 266 [1st Dept 2006].) *In Guzman*, the First Department denied defendant's motion to amend its answer on the ground that the moving papers consisted solely of a four-page attorney's

affirmation, without an affidavit of a person having personal knowledge, or any other evidence of a viable defense, and thus lacked probative value.

However, a line of New York court cases has eased the requirement of form over substance with respect to what constitutes acceptable evidence in CPLR 3025 (b) motions. New York courts have recognized the sufficiency and admissibility of affidavits or affirmations of an attorney, even if the attorney has no personal knowledge of the facts, if the affidavits or affirmations are based upon documentary or evidentiary proof, in admissible form, including documents and transcripts in an attorney's possession. (*See e.g. Zuckerman v New York*, 49 NY2d 557, 563 [1980]; *accord Getlan v Hofstra Univ.*, 41 AD2d 830, 831 [2d Dept 1973]; *Lindner v Eichel*, 34 Misc 2d 840, 845-46 [Sup Ct, NY County 1962].)

Defendants' moving papers consisted solely of a six-page attorney's affirmation, without an affidavit of a person having personal knowledge. (NYSCEF document number 32.) Moreover, the attorney's affirmation did not address defendants' allegations with respect to the counterclaims or include documentary evidence in support of their counterclaims. Given these deficiencies in their motion papers, defendants' motion for leave to interpose counterclaims is defectively pleaded. Thus, ZMoore and Zazula's motion for leave to amend the answer to include four counterclaims is denied.

5. Defendants' affirmative defenses and demand for attorney fees

Plaintiffs move to dismiss the defendants' affirmative defenses on the ground that defendants have not adequately stated these defenses in their answer and/or these defenses are without merit as a matter of law.

Defendants ZMoore and Zazula raise 24 affirmative defenses in their answer, dated August 24, 2016 (NYSCEF document number 20), none of which are supported by facts contained in the record and/or are without merit, and are accordingly, stricken.

The court notes that defendant Moore has not opposed plaintiffs' motion. Defendant Moore's pro se answer (NYSCEF document number 16) is virtually identical to defendants ZMoore and Zazula's answer, namely, that it contains the same 24 affirmative defenses. Plaintiffs' motion to strike defendant Moore's affirmative defenses and to strike his demand for attorney fees is granted as unopposed.

CPLR 3211 (b) provides that "[a] party may move for judgment dismissing one or more defense, on the ground that a defense is not stated or has no merit." On a motion to dismiss an affirmative defense, "the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law.'" (*Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010].) And a court "reviewing a motion to dismiss an affirmative defense . . . must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference." (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008].) But "[d]efenses which merely plead conclusions of law without supporting facts are insufficient." (*Glenesk v Guidance Realty Corp.*, 36 AD2d 852, 853 [2d Dept 1971].

Bare legal conclusions without supporting factual allegations are insufficient to raise affirmative defenses. (*Robbins v Growney*, 229 AD2d 356, 357 [1st Dept 1996].)

The first and second affirmative defenses allege failure to state a cognizable cause of action and claims being barred by documentary evidence and terms of lease and guarantees. Plaintiffs' complaint and documentary evidence, including terms of lease and guarantees, allege facts sufficient to state a cause of action. Defendants' first and second affirmative defenses are stricken.

The third affirmative defense asserting that "claims are barred by ZMoore's having paid all obligations under the lease, is stricken. The proposed defense is plead in one conclusory sentence without any supporting facts. In *Fireman's Fund Ins. Co.*, 57 AD3d at 723, the Second Department properly granted a CPLR 3211 (b) motion to dismiss affirmative defenses which were conclusory and devoid of facts. Because defendants have failed to plead their defense with supporting facts, the affirmative third defense is stricken.

The fourth, fifth, and sixth affirmative defenses are stricken. In these affirmative defenses, defendants assert that plaintiffs' claims are barred by the doctrines of res judicata, collateral estoppel, and claim splitting, created by virtue of the prior actions. These proposed defenses are conclusory. The proposed affirmative defenses do not allege which of plaintiffs' four claims are barred by prior litigation and how. Affirmative defenses plead as conclusions of law that are not supported by any facts are legally insufficient. (*Petracca*, 305 AD2d at 567; *accord Bentivegna*, 126 AD2d at 508; *Glenesk*, 36 AD2d at 853.) These affirmative defenses do not contain factual allegations, therefore, are stricken.

The seventh affirmative defense — asserting that the amounts sought under Article 63 of the lease constitute penalties — is stricken. Defendants claim that the liquidated damages are disproportionately high to the anticipated loss and the actual damages purportedly suffered by the Kingmans during the alleged holdover period are not difficult to quantify. "The liquidated damages clause, providing for two times the existing rent in the event of a holdover, was not an unenforceable penalty." (*Tenber Assoc. v Bloomberg L.P.*, 51 AD3d 573, 574 [1st Dept 2008].). Article 63 provides plaintiffs a sum equal to two times the average rent paid during the last six months of the lease, in liquidated damages for each month of possession by the defendants, post termination of the lease. The amount contemplated in the provision is not disproportionately high to the anticipated losses and falls within the range of reasonability.

The eighth, ninth, tenth, eighteenth, nineteenth, and twentieth affirmative defenses alleging non-enforceability of guarantees are stricken.

In the eighth affirmative defense, defendants incorrectly plead that the obligations under the guarantees were terminated upon the termination of the lease. "Where an individual unconditionally guarantees a tenant's performance of a lease, the guaranty survives the expiration of the lease term, and the guarantor remains personally liable thereunder, where, as here, any of the conditions of the guaranty are not satisfied." (*Harlorn LLC v Poy Ao Cheng*, 59 Misc 3d 1221 [A], *5, 2018 NY Slip Op 50642 [U], *5, 2018 WL 2091382, at * 5 [Sup Ct, NY County 2018]), quoting *Aspenly Co. LLC v Pirgousis*, 2017 WL 3449270, at *2 [Sup Ct, NY

County 2017] [internal quotation marks omitted].) Further, the guarantees stipulate that the guarantors shall continue to be liable under the guarantees until (i) the tenants vacate the premises; and (ii) settle all payments obligations under the lease. (NYSCEF document numbers 49 and 50, ¶ 1, guarantees.) Only after these stipulations are met, the obligations of the guarantors accruing under the guarantees are terminated. Because the payments obligations under the lease have not been settled, the guarantors' obligations under the guarantee continue.

The ninth affirmative defense — alleges that plaintiffs' claim under the guarantees is barred due to plaintiffs' noncompliance with the terms guarantees — is stricken. The proposed affirmative defense does not allege which provisions of the guarantees plaintiffs have not complied with or how plaintiffs breached the guarantees. This affirmative defense does not contain factual allegations. Therefore, the ninth affirmative defense is stricken.

The tenth affirmative defense alleges that plaintiffs' claim under the guarantees are barred by lack of privity. Defendants' argue that plaintiffs cannot enforce the guarantees because the guarantees were executed between Pride Rock LLC and the guarantors, and not directly with plaintiffs. A change in identity of the beneficiary under a guarantee does not affect the substance or extent of the guarantee undertaken by the guarantor. (*Nicholas A. Cutaia*, 224 AD2d at 953.) The transfer of ownership of the premises from Pride Rock LLC to plaintiffs does not affect the substance or extent of the guarantees. Defendants' tenth affirmative defense is stricken.

The eighteenth, nineteenth, and twentieth affirmative defenses allege that plaintiffs' claims against the guarantors are not covered by the scope of guarantees and that the guarantees were void for lack of consideration. The proposed defenses are conclusory and without any supporting facts. Affirmative defenses pleaded as conclusions of law unsupported by any facts are legally insufficient. (*Petracca*, 305 AD2d at 567; *Bentivegna*, 126 AD2d at 508; *Glenesk*, 36 AD2d at 853.) Because defendants have failed to plead these defenses with any supporting facts, the eighteenth, nineteenth, and twentieth affirmative defenses are stricken.

The eleventh, twelfth, and sixteenth affirmative defenses alleging that plaintiffs breached the lease and ZMoore is entitled to an abatement, set-off, rent reduction and/or damages, is stricken. These affirmative defenses do not allege which provisions of the lease plaintiffs materially breached or how plaintiffs materially breached the lease. These affirmative defenses are conclusory and do not contain factual allegations. Therefore, these affirmative defenses are stricken.

The thirteenth affirmative defense alleging that plaintiffs' claim is barred by the doctrine of election of remedies is stricken. The purpose of the doctrine of the election of remedies is to prevent double redress for a single wrong. (*See Matter of Tate v Estate of Fred Dickens*, 276 AD 94, 96-97 [3d Dept 1949].) "Election of remedies is a harsh doctrine and should only be applied where there has clearly been an irrevocable election." (*Stoetzel v Wappingers Cent. School Dist.*, 118 AD2d 636, 636 [2d Dept 1986].) "Where a party has an election between two inconsistent remedies, he is bound by that which he first chooses." (*Merry Realty Co. v Shamokin & Hollis Real Estate Co.*, 230 NY 316, 325 [1921], quoting *Whalen v Stuart*, 194 NY 495, 505 [1909].) This affirmative defense is plead as a conclusion of law not supported by any facts and thus is stricken.

The fourteenth affirmative defense seeking relief under the unclean hands doctrine is stricken. A party alleging unclean hands must establish that the party charged committed immoral or unconscionable conduct directly related to the subject matter. (*Citibank, N.A. v American Banana Co., Inc.*, 50 AD3d 593, 594 [1st Dept 2008].) Defendants have not made out a defense that plaintiffs' conduct is so immoral and depraved to warrant a defense of unclean hands. The fourteenth affirmative defense is stricken.

The fifteenth affirmative defense, alleging that plaintiffs' claims are not ripe and premature as the obligations purportedly sought are not yet fixed, is stricken. The proposed defense is not specified in the answer and is plead in a conclusory fashion. (*Fireman's Fund Ins. Co.*, 57 AD3d at 723] [granting CPLR 3211 [b] motion to dismiss affirmative defenses that were conclusory and devoid of facts].)

The seventeenth affirmative defense of accord and satisfaction is stricken as it is barred by Articles 24 and 40 of the lease:

> "[u]nder no circumstances shall Landlord's acceptance of a partial payment constitute accord and satisfaction. Nor will Landlord's acceptance of a partial payment forfeit Landlord's right to collect the balance due on the account, together with applicable late charges and interest despite any endorsement, stipulation, or other statement on any check." (*See 225 E. 64th St., LLC v Janet H. Prystowsky, M.D. P.C.*, 96 AD3d 536, 538 [1st Dept 2012] [dismissing affirmative defense of accord and satisfaction where the lease precluded partial payments in settlement of unpaid rent.)

The twenty-first affirmative defense alleging waiver, estoppel, or other equitable principles is stricken. Article 24 of the lease provides that no provision of the lease shall be deemed waived, unless the waiver is in writing, signed by the landlord. Plaintiffs did not waive their rights or perform an act that might estop them from asserting their claims.

The twenty-second affirmative defense alleges that plaintiffs' actions are barred by statute of limitations. The proposed defense is conclusory and without any supporting facts. Affirmative defenses plead as conclusions of law that are not supported by any facts are legally insufficient. (*Petracca*, 305 AD2d at 567; accord *Bentivegna*, 126 AD2d at 508; *Glenesk*, 36 AD2d at 853.) Because defendants have failed to plead their defense with supporting facts, the affirmative defense is stricken. Further, the causes of action for breach of lease accrued in 2011. This action was commenced in 2016. The statute of limitations, CPLR 213 (2) for a cause of action for breach of lease is six years. This action was commenced within the applicable period. Therefore, the affirmative defense is without merit and is stricken.

The twenty-third affirmative defense of laches is stricken. Laches is an equitable doctrine that is inapplicable in an action at law. (*Reeps v BMW of N. Am., LLC*, 94 AD3d 475, 476 [1st Dept 2012]. Plaintiffs' cause of action against the guarantors is an action at law and not in equity. Further, "[l]aches is an equitable bar based on a lengthy neglect or omission to assert a right and the resulting prejudice to the adverse party." (*Matter of Linker v Martin*, 23 AD3d

186,189 [1st Dept 2005] [citations omitted]). Plaintiffs have acted in a timely manner in commencing this action. Therefore, defendants twenty-third affirmative defense is stricken.

Defendants' demand for attorney fees is stricken.

Defendants have not based their request for attorney fees on any statute or agreement which provide for any such recovery by the defendants. There is no provision in the lease which entitles the defendants to recover attorney fees in any legal action arising out of the lease. Defendants have also not shown an entitlement under 22 NYCRR § 130-1.1 for reasonable attorney fees, resulting from frivolous conduct of the plaintiffs. Therefore, defendants' request for reasonable costs and attorney fees is denied.

Defendants' affirmative defenses are stricken.

ACCORDINGLY, it is hereby

ORDERED that defendants' motion sequence 001 for partial summary judgment and leave to amend the complaint is granted in that plaintiffs' first cause of action is dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' motion sequence 002 for summary judgment is granted in part and denied in part. On plaintiffs' first cause of action to recover $428,061.45 against defendant ZMoore, the motion is denied. On plaintiffs' second cause of action, plaintiffs' motion is granted, and plaintiff is entitled to summary judgment for $724,197.56 under the guarantees from the guarantors, defendants Tony Zazula and Harold Moore, jointly or severally. On plaintiffs' third cause of action for legal fees against all defendants, jointly and severally, is granted as unopposed. The court hereby refers the issue of the reasonable attorney fees that plaintiff incurred in this action to a Special Referee to hear and report with recommendations. That aspect of plaintiffs' motion for summary judgment to dismiss defendants' affirmative defenses and strike defendants' demand for attorney fees is granted. Plaintiffs' motion to strike defendant Moore's affirmative defenses and to strike his demand for attorney fees is granted as unopposed; and it is further

ORDERED that plaintiffs must serve a copy of this decision and order on defendants and the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

ORDERED that upon service of a copy of this order with notice of entry on the Office of the Special Referee, 60 Centre Street, Room 119, the clerk shall place the matter on the calendar for assignment to a referee to hear and report with recommendations the amount of reasonable

attorney fees incurred by plaintiff in the present.

8/16/2018
DATE

GERALD LEBOVITS, J.S.C.

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