SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 153779/2017

TITAN WEST ASSOCIATES,

MOTION SEQ. NO. 001

Plaintiff,

- v -

OFER BITON, BENNETT ORFALY, and 1028 RESTAURANT, INC. D/B/A PITA GRILL,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion and cross-motion are **decided as follows.**

In this action for breach of a lease agreement, plaintiff Titan West Associates ("Titan West") moves, pursuant to CPLR 3212, for summary judgment on its first cause of action for outstanding base and additional rent against defendants Ofer Biton ("Biton"), Bennett Orfaly ("Orfaly"), and 1028 Restaurant, Inc. d/b/a Pita Grill ("1028 Restaurant"). Titan West further moves for partial summary judgment on its second cause of action for attorneys' fees and for dismissal of defendants' defenses and counterclaim. Defendants oppose the motion and cross-move, pursuant to CPLR 3025(b), for leave to amend their answer to add a second counterclaim. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion and cross-motion are **decided as follows.**

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Titan West, a limited partnership, is the landlord of a store located at 1028 Amsterdam Avenue ("the premises") in Manhattan. (Doc. 10 at 2.) Titan West's general partner is Onward Realty, Inc. ("Onward Realty"), whose personnel is directly involved in managing the premises. (Doc. 9 at 1.) On July 30, 2012, Titan West entered into a 12-year lease agreement with defendant 1028 Restaurant for the store. (Doc. 13 at 2.) That same day, defendant Biton, the president of 1028 Restaurant (Doc. 30 at 1), signed a guaranty on the lease (Doc. 14). In pertinent part, the guaranty provides:

> [Biton] . . . guarantees the prompt payment when due of all payments of rent, additional rent and all other charges, expenses and costs of every kind and nature, which will or may become due under the Lease, . . . and the complete performance, satisfaction and observation of the terms, covenants, agreements, obligations and conditions of the Lease required to be performed, satisfied or observed by [1028 Restaurant].

(*Id.* at 2.)

Biton intended to operate a Middle Eastern restaurant called "Pita Grill" at the premises. (Docs. 9 at 2; 13; 30 at 2.) To do so, Biton sought to renovate the premises (Doc. 30 at 2) which, pursuant to the lease, required prior written consent from Titan West (Doc. 13 at 2, 28–30). However, disputes over renovation plans between 1028 Restaurant, Titan West, and St. John Court Owners Corp. ("the co-op"), the cooperative corporation of the building (Docs. 30 at 2; 44 at 8), delayed the restaurant's opening until April of 2014 (Doc. 30 at 2). In affidavits in opposition to the motion, employees of 1028 Restaurant represent that, even after opening, the restaurant had trouble sustaining its business due to inadequate ventilation and extreme heat. (Docs. 26–29.)

Disagreements over the renovations resulted in the co-op commencing an action in March of 2013 against Titan West and 1028 Restaurant styled *St. John Ct. Owners Corp. v Titan W.*

Assocs. & 1028 Rest., Inc., Supreme Court, New York County Index Number 152739/2013[1] ("the prior action"). By order dated April 16, 2013, this Court (Kenney, J.) outlined how the renovation work was to be performed and allowed the continuation of a stay that was in effect until the Department of Buildings approved the plans. (Doc. 31.)

1028 Restaurant continued making renovations, which eventually led to the issuance of several violations by the New York City Fire Department. (Doc. 17 at 15–20.) Criminal summonses were issued in May and June of 2016 when these defects were not cured. (*Id.* at 43–46.) On September 19, 2016, by which time 1028 Restaurant had still not corrected the violations, Titan West issued a 15-day "notice to cure." (Docs. 9 at 4; 17 at 8–12.) When the restaurant did not take any corrective measures, Titan West issued a "termination notice," which became effective on October 24, 2016. (Docs. 9 at 4; 17 at 26–27.)

On October 31, 2016, Titan West commenced a summary eviction proceeding against 1028 Restaurant styled *Titan W. Assocs. v 1028 Rest., Inc. d/b/a Pita Grill*, Civil Court, New York County Index Number LT-80379/16 ("the summary eviction proceeding"), alleging that the term of the lease expired on October 24 pursuant to the termination notice and that 1028 Restaurant had become a wrongful holdover tenant. (Doc. 17 at 4–7.) The summary eviction proceeding concluded in late February of 2017, after the parties signed a stipulation dated February 10, 2017, pursuant to which 1028 Restaurant was to vacate the premises. (Docs. 9 at 5; 18.) 1028 Restaurant vacated the premises on February 22, 2017.[2] (Doc. 30 at 12.)

Over the course of the parties' hostile relationship, 1028 Restaurant withheld rent payments to Titan West. Titan West alleges that, by September of 2013, the restaurant owed it over $97,000.

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[1] The documents for this action are available online at NYSCEF under the associated index number.
[2] This Court notes that the stipulation submitted is essentially illegible. (Doc. 18.) 1028 Restaurant, however, admits that there was an agreement between it and Titan West to vacate the premises (Doc. 30 at 12) and, in fact, specifies February 22, 2017, as the date on which the premises was vacated (*id.*).

(Doc. 10 at 3.) In an effort to address the rental arrears, the restaurant and Titan West executed a lease modification agreement, which reduced 1028 Restaurant's $97,000 debt to $67,000 so long as 1028 Restaurant made its future rental payments on time and paid off its $67,000 debt in future installment payments. (Docs. 10 at 4; 15 at 2–3.) The modification agreement also stipulated that, should 1028 Restaurant default on its new payment plan, Titan West could withdraw the rent concessions and the outstanding debt would become due and owing. (Docs. 10 at 4; 15 at 3–4.)

In consideration for the lease modifications, Biton and defendant Orfaly[3] signed a guaranty for the performance and satisfaction of 1028 Restaurant's obligations to meet the installment payments under the lease modification agreement, as well as the continuing obligations for future rent under the original lease. (Doc. 16 at 2.) However, 1028 Restaurant failed to pay rent under the lease as well as the arrears under the lease modification agreement. (Doc. 10 at 5.)

Titan West commenced the instant action by filing a summons and complaint against the captioned defendants on April 8, 2017. (Doc. 11.) In its complaint, Titan West asserted: (1) a claim for the outstanding base and additional rent, which, as of April of 2017, amounted to $222,505.74, as well as any accruing interest after April of 2017 (*id.* at 8–10), and (2) a claim for attorneys' fees (*id.* at 10).

In their answer, defendants raised 7 affirmative defenses: (1) that Titan West did not obtain personal jurisdiction over the defendants due to improper service of the summons and complaint (Doc. 12 at 3); (2) that the action should be dismissed pursuant to CPLR 3211(a)(7) because the complaint fails to state a cause of action (*id.*); (3) that the action should be dismissed pursuant to CPLR 3013 because the complaint is vague and conclusory (*id.* at 3–4); (4) that Titan West is precluded from pursuing the remedies it seeks (*id.* at 4); (5) that the costs should be limited through

[3] Other than being a signatory to the guaranty of the lease modification agreement, the papers do not explain defendant Orfaly's relationship to the business or the other captioned parties.

the date of vacatur because defendants properly notified Titan West of their vacatur, and that surrender of the premises was accepted by Titan West (*id.*); (6) that Titan West failed to mitigate damages (*id.*); and (7) that Titan West breached the warranty of habitability and therefore the complaint should be dismissed (*id.* at 4–5). Defendants further asserted a counterclaim for attorneys' fees in the amount of $10,000. (*Id.* at 5.)

Titan West now moves, pursuant to CPLR 3212, for summary judgment on its first cause of action for outstanding base and additional rent from defendants in the sum of $271,344.74. (Doc. 9 at 1.) Titan West further moves for partial summary judgment on its second cause of action for attorneys' fees and for dismissal of defendants' defenses and counterclaim. (*Id.*) In opposition, defendants cross-move, pursuant to CPLR 3025(b), for leave to amend their answer to add a second counterclaim for damages in the amount of $700,000.00 due to loss of business from plaintiff's alleged improper actions. (Doc. 39 at 5.)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then

summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

a. Whether Titan West is Entitled to Summary Judgment on Its First Cause of Action for Outstanding Base and Additional Rent.

Although Titan West's first cause of action in its complaint seeks $222,505.74 for outstanding base and additional rent owed as of April of 2017 (Doc. 11 at 8–10), its summary judgment motion requests a total of $271,344.74 for unpaid rent through October of 2017[4] (Doc. 10 at 6–7).

"[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." (*Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446–47 [1st Dept 2012].) "To be enforceable, a special promise to answer for the debt or default of another must be in writing and subscribed to by the party against whom enforcement is sought." (*Paribas Properties, Inc. v Benson*, 146 AD2d 522, 525 [1st Dept 1989].)

Here, the lease was executed between Titan West and 1028 Restaurant. (Doc. 13 at 2.) While the guaranty for the lease was executed only by defendant Biton (Doc. 14 at 2, 5), the guaranty for the lease modification agreement was executed in writing by both defendants Biton and Orfaly (Doc. 16 at 2, 5). The guaranty to the lease modification agreement references the lease. (*Id.* at 2.) In pertinent part, it states:

> The Guarantor [i.e., Orfaly and Biton] . . . guarantees the prompt payment when due of all payments of rent, additional rent and all other charges, expenses and costs of every kind and nature, which will or may become due under the Lease, . . . and the complete performance, satisfaction and observation of the terms, covenants, agreements, obligations and conditions of the Lease required to be

[4] The increase in amount stems from the period from May of 2017 to October of 2017. (Doc. 10 at 6.)

> performed, satisfied or observed by the Tenant [i.e., 1028 Restaurant].

(*Id.*) This language clearly obligates both Biton and Orfaly to ensure satisfaction of 1028 Restaurant's responsibilities under the lease, and no condition limiting their liability appears in the guaranty to the lease modification agreement. In fact, the guaranty explicitly disclaims any such limitation: "This is as a direct, immediate, absolute, continuing, unconditional and unlimited Guaranty . . . ." (*Id.*) Thus, Titan West has satisfied its prima facie case for summary judgment on its first cause of action against all the defendants for unpaid base and additional rent, since it has established that 1028 Restaurant has outstanding rent and additional rent, and that Biton and Orfaly guaranteed 1028 Restaurant's obligations under the lease.

Defendants have not successfully raised an issue of fact in opposition to the motion. "It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial." (*City of New York v Caristo Constr. Corp.*, 94 AD2d 688, 690 [1st Dept 1983].)

Defendants first argue that "Plaintiff's motion is not verified by a person or party with personal knowledge who is an identified agent of the Plaintiff . . . ." (Doc. 25 at 2.) This contention, however, ignores the fact that 1028 Restaurant submitted an affidavit by the vice president of Onward Realty, which is the general partner of Titan West. (Docs. 9 at 1; 45 at 1.) Specifically, the affiant states that he is "directly involved in all aspects of the management of [1028 Restaurant], including . . . the review and maintenance of rent payment records . . . ." (Docs. 9 at 1; 45 at 1.) (*See Castro v New York Univ.*, 5 AD3d 135, 136 [1st Dept 2004] (affidavits must be attested by someone with personal knowledge of the facts in order to have probative value).)

Defendants further challenge the summary judgment motion on the ground that plaintiff has admitted to a $19,000.00 error in the amount of arrears owed. (Doc. 25 at 3.) But even though Onward Realty's vice president admits to such an error (Doc. 9 at 6), this alone is insufficient to deny summary judgment, as defendants' opposition papers do not actually offer any evidence proving their payment of the disputed rent charges. In their papers, defendants simply argue that they "deny owing the sums claims by [Titan West]." (Doc. 25 at 4.) However, no proof of any payment—such as checks or bank statements—regarding the rents in controversy has been submitted by defendants. In other words, defendants have not raised an issue of fact as to their liability: that 1028 Restaurant owes outstanding rent payments and that Biton and Orfaly are liable as guarantors. Moreover, defendants allege that they were prevented by Titan West from conducting business, but the evidence submitted shows that any trouble with business operations stemmed from 1028 Restaurant's own alterations of the premises.

This Court determines that the amount to be awarded as against defendant 1028 Restaurant is the total sum of $271,344.74 due and owing through October of 2017, as stated throughout Titan West's motion papers and as calculated in its ledger. (Docs. 9 at 8; 10 at 6; 19.) However, with regard to defendants Biton and Orfaly, this Court finds that they are liable only for the outstanding rent through May 10, 2017. Titan West's rent ledger represents that the outstanding rent as of May of 2017 amounted to $233,644.74. (Doc. 19 at 7.) Biton's and Orfaly's guaranty provides that their liability shall expire when they give "[Titan West] not less than ninety (90) days' prior written notice that Tenant intends to vacate the Demised Premises, which notice shall specify the date by which Tenant intends to vacate." (Doc. 16 at 3.) Defendants gave notice to Titan West when they signed the stipulation to vacate dated February 10, 2017. Biton's and Orfaly's liability therefore expired 90 days after February 10, 2017. The ledger reflects that defendants owed $233,644.74

rent through the month of May 2017, however that amount must be reduced by the $19,000.00 error to which plaintiff admits, (See Aff. of James Goldstick, Doc. No. 9, ¶24, ftnt 2) therefore the amount owed is $214,644.74.

b. Whether Titan West is Entitled to Summary Judgment on Its Second Cause of Action for Attorneys' Fees.

Paragraph 19 of the lease makes 1028 Restaurant liable for reasonable attorneys' fees. (Doc. 13 at 4.) Orfaly and Biton's guaranty renders them liable for such fees. (Doc. 16 at 2.) Because defendants have not addressed this issue in their opposition papers, no factual issue has been raised to dispute Titan West's prima facie case for summary judgment.

In addition, since this Court finds that Titan West is entitled to summary judgment on both causes of action in its complaint, the branch of Titan West's motion seeking dismissal of defendants' defenses and counterclaim is rendered moot. And, to the extent defendants cross-move to amend their answer to include a second counterclaim against Titan West for $700,000.00 for impeding and obstructing business operations, this Court denies the cross-motion, as there is nothing in the record to support such a claim. (*See Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003] ("Where, as here, the proposed amendments are totally devoid of merit and are legally insufficient, leave to amend should be denied.") (internal citation omitted).)

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the branch of plaintiff Titan West Associates' motion for summary judgment on its first cause of action against defendant 1028 Restaurant, Inc. d/b/a Pita Grill for unpaid rent is granted, and that the Clerk shall enter judgment in favor of plaintiff in the amount of $271,344.74; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on its first cause of action against defendants Ofer Biton and Bennett Orfaly is granted and that the Clerk shall enter judgment in favor of plaintiff in the amount of $214,644.74; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on its second cause of action for reasonable attorneys' fees is granted as against each defendant; and it is further

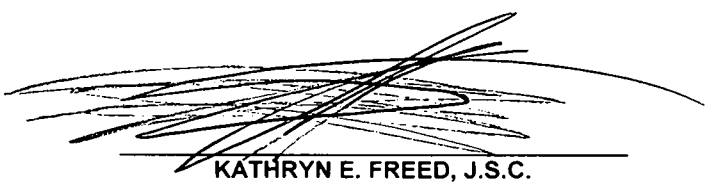
ORDERED that within 30 days of the entry of this order on the NYSCEF system, plaintiff shall serve a copy of this order on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date for a hearing to calculate the amount of reasonable attorneys' fees to be awarded, and the Clerk shall notify all parties of the hearing date; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment dismissing the defenses and counterclaim asserted by defendants is moot pursuant to this decision and order; and it is further

ORDERED that defendants' cross-motion to amend their answer to include a second counterclaim is denied; and it is further

ORDERED that plaintiff's counsel is to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within 30 days after the entry of this order onto NYSCEF; and it is further

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



1/30/2019
DATE

KATHRYN E. FREED, 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