SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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INDEX NO. 651750/2017

BP/CGCENTER II LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

MARIA SAUSA, PEGGY SAUSA

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for DISMISS.

In this action to enforce the guaranties of two so-ordered Stipulations of Settlement regarding two related commercial holdover disputes, plaintiff BP/CGCENTER II LLC moves: (1) to dismiss defendants Maria Sausa and Peggy Sausa's six affirmative defenses and two counterclaims asserted in their capacity as guarantors pursuant to CPLR 3211; (2) for summary judgment pursuant to CPLR 3212(b) on defendants' liability, jointly and severally, per the Stipulations; and (3) to schedule a hearing on the issue of damages. The decision and order is as follows:

FACTS

This action concerns enforcing two Stipulations of Settlement, agreed to by plaintiff landlord and defendants as guarantors that resolved two separate, but related, holdover proceedings in New York County Civil Court against two restaurants, Cuccina Too, and Restaurante. The restaurants occupied adjacent spaces in the Citigroup Center located at 153 East 53rd Street, New York, New York 10022 since 1998 (NYSCEF #12 – Levin Affidavit at ¶¶5-6). The restaurants are closely held corporations owned, operated, and maintained by defendants. Plaintiff claims that in January of 2015, it had informed defendants of the need to vacate the premises by January 31, 2016. However, defendants failed to vacate the premises on January 31, 2016, and plaintiff initiated holdover proceedings against both restaurants (*id.* at ¶10). The parties resolved the holdover proceedings by entering into separate but nearly identical so-ordered Stipulations of Settlement on August 18, 2016, which indicated that the vacate date would be January 31, 2017 (NYSCEF ## 19-20 – Stipulations of Settlement at ¶6). The stipulations were negotiated in

anticipation of plaintiff's major renovation of the building that was scheduled to begin on February 1, 2017 (Levin Affidavit at ¶15).

The Stipulations provided detailed instructions for compliance by the restaurant entities to ensure that the vacate process went smoothly. Paragraph 16 of the Stipulations required the tenants to vacate the premises by the vacate date and leave the property vacant, broom clean, and required delivery of the keys and a Vacatur Affidavit by defendants to plaintiff (Stipulations at ¶16). The Stipulations also prohibited any application to modify or extend the vacate date, specifically preventing both parties from seeking any stays, injunctive relief, or declaratory relief in relation to the eviction warrant (*id.* at ¶22). Additionally, the stipulation contemplated default by the vacating tenants and included a liquidated damages provision, a provision for self-help, and attorneys' fees related to any proceeding connected to the Stipulations or eviction process (*id.* at ¶18[iii-v]). The Stipulations also indicated that any "property remaining in the premises from and after the Vacate Date: (i) shall be deemed abandoned by [defendants]; and (ii) may be removed, retained and/or disposed of by [plaintiff] in its sole and absolute discretion...and at [defendants] sole cost and expense" (*id.* at ¶17). To ensure that the Stipulations were complied with, Maria Sausa and Peggy Sausa agreed to act as guarantors and they guaranteed "full and timely performance of the non-monetary obligations and monetary obligations under th[e] [Stipulations]" (*id.* at ¶9).

However, on January 24, 2017, defendants filed an Order to Show Cause to extend the vacate date, in violation of ¶22 of the Stipulations. Judge Carol Feinman of the Civil Court, New York County, signed the first order to show cause with a return date of February 2, 2017 – two days after the vacate date. Plaintiff moved ex parte in the Appellate Term, First Department on January 30, 2017, to vacate the Order to Show Cause based on ¶22 of the Stipulations. On January 31, 2017, Justice Schoenfeld granted plaintiff's application and vacated the Order to Show Cause (NYSCEF # 23 – J. Schoenfeld Order). Plaintiff retook the premises on February 1, 2017 pursuant to the self-help provision of the Stipulations. Defendants, however, again filed a second Order to Show Cause on February 1, 2017, which was left unsigned by Judge Feinman; rather, Judge Feinman instructed the parties to appear on February 2, 2017, for a conference to resolve outstanding issues. However, by the parties' admissions, the meeting was unsuccessful and, thus, defendants were not granted an extension on the vacate date or the conditions of vacatur. Plaintiff contends that it experienced consequential and liquidated damages and is owed attorneys' fees.

Defendants inform that they sought to delay the vacate date because of issues at their new premises (NYSCEF # 56 – Maria Sausa Aff at ¶4). Defendants claim that plaintiff was unreasonable and would not adjust the vacate date at all. Defendants also claim that, upon reentering the premises, they found it demolished and that all of their equipment was removed (*id.* at ¶6). Additionally, defendants

contend that plaintiff misrepresented facts to the Appellate Term (*id.* at ¶7). Defendants argue that they substantially performed on the Stipulations (*id.* at ¶14).

MOTION TO DISMISS

Plaintiff moves pursuant to CPLR 3211(a)(7) and (b) to dismiss defendants two counterclaims and first through sixth affirmative defenses. In deciding a motion to dismiss pursuant to CPLR 3211(a)(7), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). "The court must determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 88). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

CPLR 3211(b) is governed by similar principles, wherein "plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. The allegations set forth in the answer must be viewed in the light most favorable to the defendant, and 'the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed'. Further, the court should not dismiss a defense where there remain questions of fact requiring a trial" (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015] [citations omitted]).

Plaintiff's motion is denied as to defendants' first affirmative defense. Defendants' boilerplate first affirmative defense -- that plaintiff's complaint "fails to state any cognizable cause of action" -- is merely "surplusage" and "inclusion of such defense in an answer is not prejudicial" as this defense "may be asserted at any time even if not pleaded" (*Riland v Fredrick S. Todman & Co.*, 56 AD2d 350, 352 [1st Dept 1977]). However, it must be noted that such surplusage does not defeat summary judgment (*see Citibank (S.D.) N.A. v Coughlin*, 274 AD2d 658, 659 [3d Dept 2000]).

Plaintiff's motion is granted as to defendants' second and third affirmative defenses. Defendants' second affirmative defense is that plaintiff's exercise of the self-help provisions of the stipulation means that plaintiff "did not suffer any delay in the progress of the work as contemplated and did not sustain any damages" (NYSCEF # 26 – Defts' Ans with CCs at ¶22). Defendants' third affirmative defense is that they did leave the premises on the vacate date and did not impede plaintiff's right to demolish and renovate the premises (*id.* at ¶26).

It is undisputed that plaintiff unilaterally exercised its right to self-help on February 1, 2017. It is also undisputed that defendants left equipment and other

materials at the properties and did not deliver the keys or vacate documents, as per the Stipulations. As such, defendants have breached ¶¶ 17 and 18(v) of the Stipulations. Thus, per the terms of the Stipulations, plaintiff experienced consequential damages in exercising self-help and in disposing of defendants' equipment. Defendant Maria Sausa's own affidavit confirms that certain equipment was removed, and the space was demolished following plaintiff's re-taking of the premises (Maria Sausa Aff at ¶6). In addition, due to defendants' breach of the Stipulations, defendants are liable for liquidated damages pursuant to ¶¶ 8 and 18(iii) in the amount of "triple the monthly base rent under the expired lease, broken down per diem, from... the vacate date... through the date that [Former Tenants] fully vacate and surrender" the premises to plaintiffs and deliver to plaintiffs "the keys and vacate documents" (Stipulations at ¶18(iii)). Defendants are also liable for attorneys' fees, as per the stipulation (Stipulations at ¶32). As defendants did not vacate the premises as contemplated by the Stipulations, plaintiff did experience damage. Accordingly, defendants' second and third affirmative defenses are dismissed.

Plaintiff's motion is granted as to defendants' fourth affirmative defense. Defendants argue that plaintiff has a duty to mitigate damages and that plaintiff must deduct the security deposit from any damage to mitigate (Ans at ¶29). However, case law, as espoused in *Holy Properties, Ltd. v Kenneth Cole Productions, Inc.* (87 NY2d 130 [1995]), is clear that commercial leases are not subject to the requirement to mitigate damages (*see BP 399 Park Avenue, LLC v Pret 399 Park, Inc.*, 150 AD3d 507 [1st Dept 2017]). Defendants argue that since the instant matter concerns Stipulations of Settlement, the usual contractual requirement to mitigate damages comes into play instead of the rules governing lease disputes (NYSCEF # 31 – Aff in Opp at ¶31). However, the Stipulations, by their own terms, were "fully incorporated" into the underlying expired leases and, therefore, clearly related to the commercial landlord-tenant relationship (Stipulations of Settlement at ¶7). As such, the *Holy Properties* rule applies here; plaintiff has no duty to mitigate.

Plaintiff's motion is granted as to defendants' fifth affirmative defense, which argues that the Order by Justice Schoenfeld of the Appellate Term vacating a temporary restraining order was improper. The basis of this argument is that the Order enforced a stipulation that violated public policy, and that plaintiff misrepresented facts to the Civil Court that led to defendants' improper eviction (Ans at ¶¶31-38). In effect, defendants are asking this court to overturn an Appellate Term Order. This court does not have the authority to overturn an Order by the Appellate Term (*see Mears v Chrysler Fin. Corp.*, 243 AD2d 270, 272 [1st Dept 1997]). Defendants' fifth affirmative defense is dismissed.

Plaintiff's motion is granted as to defendants' sixth (mislabeled as 'fifth') affirmative defense. Defendants argue that "plaintiff's causes of action for legal fees

must be dismissed as plaintiff is not the prevailing party in any litigation regarding any provision or subject matter of the ... stipulation which is the precondition to obtaining reasonable legal fees" (Ans at ¶40). Defendants' reading of the Stipulation is misguided. Provision 18(v) clearly states that "upon respondents' breach of this stipulation or related stipulation and failure to cure... respondents and guarantors shall... be jointly and severally liable to petitioner for all reasonable attorneys' fees, costs and disbursements incurred by petitioner in connection with respondents' occupancy" (Stipulations at ¶18[v]). The sixth cause of action is dismissed.

Defendants' two counterclaims are also dismissed. Defendants first counterclaim states that they are entitled to a judgment declaring "that plaintiff misrepresented to the Appellate Term the facts and circumstances regarding defendants' inability to vacate the premises... that resulted in the ex parte order vacating the temporary restraining order" leading to the wrongful eviction of the defendants (Ans at ¶¶ 42-58). Defendants' second counterclaim alleges that plaintiff's "improper application made to Justice Schoenfeld where the law and the facts were misrepresented" led to defendants' restaurants being wrongfully evicted and the Civil Court order staying their eviction was wrongfully vacated and are now entitled to $500,000.00 (*id.* at ¶¶59-61). For the reasons stated in the discussion above regarding defendants fifth affirmative defense, these two counterclaims are likewise dismissed (*see Mears*, 243 AD2d at 272; *Yalkowsky v Century Apartments Associates*, 215 AD2d 214, 215 [1st Dept 1995]).

SUMMARY JUDGMENT

Plaintiff also moves for summary judgment pursuant to CPLR 3212 on the issue of defendants' liability as guarantors on the Stipulations of Settlement. On a motion for summary judgment it is necessary that the movant establish a cause of action or defense sufficiently to warrant the court directing judgment in its favor, and the movant must do so by tender of evidentiary proof in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [lst Dept 2002]).

"On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (*Davimos v Halle*, 35 Ad3d 270, 272 [1st Dept 2006]). Guaranties are strictly enforced – "[w]here a guaranty is clear and unambiguous on its face and... absolute and unconditional, the signer is

conclusively bound by its terms" (*National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470 [1st Dept 1991]).

Here, the undisputed facts show that defendants are liable as guarantors, jointly and severally, for the damages incurred by plaintiff due to former tenants' default under the Stipulations by failing to "fully[y] and time[ly] perform" the monetary and non-monetary obligations contemplated under the Stipulations (Stipulations at ¶9). Defendants are specifically in breach of: (1) Stipulations ¶22 by filing the first and second Orders to Show Cause in Civil Court' (2) Stipulations ¶16 by failing to deliver the vacatur affidavit and keys to plaintiff; and (3) Stipulations ¶16 by failing to deliver the premises in broom clean condition. There is no dispute that Stipulations ¶9 is "absolute and unconditional".

To counter plaintiff's motion for summary judgment, defendants allege that plaintiff's affidavit of merit from Andrew Levin is improper. Defendants argue that Levin "is a stranger to this litigation and does not have the requisite knowledge to be the proponent" on the motion for summary judgment (Aff in Opp. at ¶22). Defendants further allege that Levin's affidavit does not "indicate that he was employed by plaintiff at the time of the Civil Court litigation...that would afford him the right to submit an affidavit based upon personal knowledge" (*id.* at ¶21). Defendants claim that they deserve to have documentation corroborating Levin's employment with Boston Properties Inc., which is the general partner of Boston Properties Limited Partnership, and the entity hired to manage the premises (*id.*).

Defendants allegations are unfounded. Mr. Levin is the "Senior Vice-President of Leasing" and his "duties and responsibilities include...negotiating lease terms, reviewing lease provisions, interfacing with construction at Boston Properties in connection with preparing premises for new tenants, and overseeing issues with tenants involving the enforcement of leases in the buildings that Boston Properties manages" (Levin Aff at ¶¶1-2). Levin is fit to testify as to defendants' breach of the Stipulations. Further, defendants offer no reason to suspect that Levin was not employed by Boston Properties at all relevant times.

Defendants complains of plaintiff's use of "unauthenticated documents" in the instant motion (Aff in Opp at ¶26). To determine this summary judgment motion, the only documents needed are the leases, the Stipulations, and the Civil Court Orders to Show Cause. Defendants' own affidavit refers to these very same documents, and, indeed, they attached the same documents they now question to their own opposition of this motion (Maria Sausa Aff at ¶9; NYSCEF ## 32, 43, & 45). Accordingly, defendants' argument is rejected.

Defendants again argue plaintiff's alleged misrepresentation to the Appellate Term; that the Appellate Term's Order enforcing Stipulation ¶22 is against public policy; and that defendants substantially performed the Stipulation. Only the

substantial performance argument will be briefly addressed as the Appellate Term issues were previously addressed.

Defendants' substantial compliance argument is without merit. The Stipulations had no provision allowing for substantial compliance; in fact, the Stipulations mandated "full and timely compliance" and that "TIME IS OF THE ESSENCE" (Stipulations ¶¶ 9, 12, 16, 18). When a contract has unconditional and unequivocal obligations mandating "full and timely" compliance, substantial compliance is not enough and instead "strict compliance" is required (*see Oppenheimer & Co. v Oppenheim*, 86 NY2d 685, 692 [1995]). While defendants point to the seminal case of *Jacobs & Young v Kent*, 230 NY 239 [1921], the instant matter is readily distinguishable – this isn't an instance of a party merely using a different brand of pipe than contemplated under contract; this is a matter where Stipulations that were designed to be strictly followed due to the need to vacate the premises in a timely manner were willfully breached. As such, this court will follow *Oppenheimer* and not *Jacobs & Young* on this issue.

Accordingly, it is hereby ORDERED that plaintiff's motion to dismiss defendants' second through sixth affirmative defenses and first and second counterclaims is granted; plaintiff's motion to dismiss defendants' first affirmative defense is denied; it is further

ORDERED that plaintiff's motion for summary judgment as to defendants' liability as guarantors for the defaulting restaurants' breach of the stipulation of settlement is granted; it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report on the issues of ascertaining and computing the amount due to plaintiff by defendants for all damages incurred, together with the legal fees, and other costs and disbursements advanced as provided for by the terms of the Stipulations of Settlement; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of the Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days for the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the

information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; it is further

ORDERED that the plaintiff shall serve a proposed accounting within 30 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; it is further

ORDERED that, the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant and the Clerk of the Court within 20 days of entry; and it is further

ORDERED that the clerk of the court enter judgment as written.

2/14/2019
DATE

MARGARET A. CHAN, J.S.C.

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