SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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274 MADISON COMPANY LLC.,

Plaintiff,

- v -

TRU LEGACY PARTNERS and SHAWN ROGERS,

Defendants.

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INDEX NO. 156875/2016

MOTION DATE 05/22/2019

MOTION SEQ. NO. 004

DECISION AND ORDER

NYSCEF Doc Nos. 137–178 were read on this motion for summary judgment.

Motion by Plaintiff 274 Madison Company LLC for summary judgment in favor of Plaintiff and against defendant Shawn Rogers on the fourth and sixth causes of action is granted.

BACKGROUND

Plaintiff/Landlord 274 Madison Company LLC commenced the instant action on August 16, 2016, suing Tenant/defendant Tru Legacy Partners and Guarantor/defendant Shawn Rogers for rent, additional rent, and liquidated damages under the unexpired term of the lease. As is relevant here, on June 14, 2017, this Court issued an order directing the entry of a default judgment against Tenant in motion seq. 001 on the complaint as to liability and held an assessment of damages in abeyance until the time of trial or final disposition. (NYSCEF Doc No. 73.) The action then continued as against Guarantor, who had answered on April 26, 2017.

On September 19, 2017, this Court granted Landlord's pre-discovery motion seq. 002 pursuant to CPLR 3212 for summary judgment against Guarantor on the third cause of action, which was for rent and additional rent from the beginning of the nonpayment period, May of 2016, to the date of eviction, August 16, 2016, and otherwise denied the remainder of the motion, which was on the fourth cause of action, for liquidated damages, and on the sixth cause of action, which was for attorney's fees. (NYSCEF Doc No. 92 [Tr].) Specifically, the Court found that there were issues of fact on the motion as submitted pre-discovery as to any limitation of liability pursuant to the express terms of the guaranty. The action has since continued, and on December 10, 2018, Landlord filed the note of issue. On December 18, 2018, the Court issued an order resolving motion seq. 003 pursuant to CPLR 5229 which had been to restrain Guarantor's assets based upon the judgment in seq. 002 by severing the third cause of action from the remainder of the case and directing the entry of judgment based on the amount awarded in seq. 002, $31,645.00.

Now, Landlord moves pursuant to CPLR 3212 for summary judgment on the remainder of the action as to Guarantor on the fourth and sixth causes of action for liquidated damages and attorney's fees, respectively. Landlord argues, in sum and substance, that, pursuant to the lease

and guaranty, and as supported by discovery in this case, Guarantor failed to perform under the guaranty, and his liability as to liquidated damages under the lease, discussed infra, is not limited by the express terms of the guaranty. Guarantor argues in opposition, in sum and substance, that he has substantially complied with the terms of the guaranty and should not be liable for the liquidated damages. As framed by Guarantor, the "entire case [] boils down to the simple allegations that Defendant Shawn Rogers left a few pieces of furniture behind when he left, along with the possibility that a key hand-off didn't go exactly right." (Affirmation of Creedon ¶ 7.) At the May 22, 2019 oral argument, Landlord further argued that it never mutually agreed to let Guarantor out of his obligations, as evidenced by that it had Tenant evicted, and Guarantor reiterated his substantial compliance argument.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Once this showing has been made, the burden shifts to the nonmoving 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].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) 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 Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

The February 26, 2015 guaranty by defendant Shawn Rogers is annexed to the motion papers. (NYSCEF Doc No. 147.) Its authenticity is not in dispute, nor is there any dispute among the parties that, upon the default of Tenant, Guarantor takes on all lease obligations of Tenant pursuant to the guaranty. Further, it is the law of the case that the Guarantor is liable under the guaranty based upon this Court's order in motion seq. 002, for which judgment has since been directed pursuant to motion seq. 003. The only remaining issue in this case is whether Guarantor's liability is limited pursuant to the express terms of the guaranty. Those terms are as follows (emphasis added):

> "Anything herein and contained to the contrary notwithstanding[,] upon Tenant's (a) having vacated and surrendered the demised premises to Owner [Landlord] free of all subleases or licenses and in a broom clean condition *and as otherwise required by this 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."

Paragraph 25 of the lease provides, in relevant part, that "[n]o act or thing done by Owner or Owner's agents during the term hereby demised shall be deemed an acceptance of a surrender of the demised premises, and no agreement to accept such surrender shall be valid unless in writing signed by Owner." (NYSCEF Doc No. 146 [Lease] at 4.)

Paragraph 18 of the Lease provides that in the event of a default Tenant shall owe liquidated damages in the net amount of the amount covenanted to be paid monthly in the Lease and the amount received by Landlord for the balance of the term of the Lease.

It is undisputed that the Lease period ran from March 1, 2015, to February 28, 2018, and that Landlord mitigated its damages beginning September 14, 2017 and through the end of the Lease period. Landlord claims entitlement to $308,450.28 in liquidated damages from September 1, 2016—the first full month after the eviction of Tenant—to September 14, 2017—when Landlord began mitigating its damages, plus attorney's fees. Paragraphs 18 and 19 of the Lease provide for reasonable attorney's fees; paragraph 19 contains a standard prevailing party clause.

In *274 Madison Co. LLC v Ramsundar* (2016 NY Slip Op 30530[U] [Sup Ct, NY County 2016, Edmead, J.]), Landlord brought an action nearly identical to the instant action, seeking to enforce guaranty and lease provisions identical to those in the instant action against guarantor Ramsundar. The motion court found that Landlord met its prima facie burden of showing an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty. The motion court further found that Ramsundar failed to establish that his liability was limited pursuant to the express terms of the Guaranty. As is relevant here, the motion court found that, on a plain reading of the clear and unambiguous terms of the Guaranty, in conjunction with the Lease which requires a writing signed by Landlord to effectuate a valid acceptance of surrender, Landlord was entitled to summary judgment against Ramsundar. (*See also 149 Madison LLC v PSF Shoes Ltd.*, 2016 NY Slip Op. 31726[U] n 1 [Sup Ct, NY County 2016, Edmead, J.] [the language 'and as otherwise required by this lease' [] would implicate an additional requirement that the Owner consent to the surrender in writing.]; *Fifty E. Forty Second Co. v Affinity, LLC*, 2014 WL 5812144 [Sup Ct, NY County 2014, Bannon, J.].)

In the instant action, similarly, Landlord has met its prima facie burden, as it is undisputed that there exists "an absolute and unconditional guaranty, the underlying debt [of liquidated damages], and the guarantor's failure to perform under the guaranty." (*Davimos v Halle*, 35 AD3d 270 [1st Dept 2006].) The Court finds that the guaranty provides for the manner of surrender, and that the catch-all clause, "and as otherwise required by this lease," implicates paragraph 25 of the Lease. The catch-all clause operates as an express term in the guaranty, pulling in relevant terms from the preceding Lease pages. The Court agrees with Plaintiff that the relevant terms are to be found in paragraph 25, specifically, that, in order for any offer of surrender by the Tenant to be accepted by Landlord, there must be a writing signed by Landlord that the Landlord accepts the surrender. The clause, in effect, prevents the Guarantor from limiting his liability without a written surrender agreement between Landlord and Tenant or some other written modification of the Lease and guaranty.

Here, there is no such writing. Specifically, in opposition, Guarantor has failed to come forth with a valid acceptance of Tenant's alleged surrender to Landlord. It is undisputed in the

instant action that Tenant was in fact evicted from the premises on August 16, 2016. Tenant's letter sent on or about August 4, 2016, indicating an intent to vacate the premises by the end of the month—after the eviction had already been ordered—was never countersigned. The letter did not operate to unilaterally create an effective or valid surrender for the purposes of the guaranty, which required that the surrender be done in the manner "otherwise required by this lease."

In his opposition papers, Guarantor does not address the Guaranty clause, "as otherwise required by this lease," in any way, nor does he address the requirements of the Lease or any prior case law analyzing the interplay between the form of lease and guaranty in the instant case. Rather, Guarantor has elected to focus his opposition on, as titled in his papers, "the furniture" and "the keys." Guarantor requests that this Court find that Tenant substantially complied with the terms of the Lease when leaving the premises but does not cite to any such terms. Nevertheless, because this Court finds that Tenant failed to surrender in the manner required by the Lease, the issues of whether Tenant vacated in a broom-clean condition, whether his efforts to do so were frustrated by Landlord or its agents, or whether the keys were delivered to Owner or its Managing agent are moot for the purposes of the instant motion.

As such, Guarantor has failed to raise a genuine issue of material fact, in response to Landlord's prima facie showing, as to whether Tenant offered, and Landlord accepted, a valid surrender under the Lease that would limit Guarantor's liability under the guaranty.

CONCLUSION

Accordingly, it is

ORDERED that the motion is granted to the extent that it is

ORDERED that Plaintiff's motion for summary judgment on the fourth and sixth causes of action is granted as against defendant Shawn Rogers as to liability; and it is further

ORDERED that the matter shall proceed to an inquest as to damages owed to Plaintiff by Defendants Tru Legacy Partners and Shawn Rogers based upon this order and the Court's order in seq. 001, which have granted judgment in favor of Plaintiff and against Defendants on the issue of liability as to the first, second, fourth, fifth, and sixth causes of action; and it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry on Defendants within 10 days of the NYSCEF filing date of the decision and order on this motion.

The foregoing constitutes the decision and order of the Court.

6/11/2019
DATE

HON. ROBERT D. KALISH 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