SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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KATO INTERNATIONAL LLC,

Plaintiff,

DECISION AND ORDER

Index No. 652468/2018

- v -

MOT SEQ 001

GERARD FOX LAW, P.C., GERARD FOX

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

This is an action for breach of a commercial lease between plaintiff-landlord Kato International, LLC (landlord) and defendant-tenant, Gerard Fox, P.C. (tenant), breach of a guarantee of the lease by defendant Gerard Fox (the guarantor), and for attorneys' fees due under the lease and guarantee for the landlord's enforcement. The landlord now moves, prior to the commencement of discovery, for (i) summary judgment on the complaint against the defendants, (iii) immediate entry of judgment against the tenant and the guarantor in the amount of $547,413.26 plus interest (the proposed judgment amount); (iv) severance of the defendants' counterclaims, an order directing a separate hearing on additional amounts above due and owing under the lease and guarantee above the proposed judgment amount, and

a hearing on the amount of attorneys' fees due to landlord for its enforcement of the lease and guarantee. The defendants oppose the motion. In reply, the landlord seeks sanction pursuant to 22 NYCRR 202.7 for frivolous litigation conduct. The motion is granted to the extent discussed herein.

II. BACKGROUND

The landlord owns the building located at 12 East 49th Street, New York, New York. The tenant is a law firm with several offices in the United States. In October 2015, the tenant entered into a commercial lease with the landlord to occupy a portion of the 26th floor of the landlord's building for a base rent of $714,000.00 per year payable in monthly installments of $59,500.00. On October 11, 2016, landlord and tenant amended the lease, *inter alia*, to demise the remaining portion of the 26th floor to the tenant. Under the amended lease, the base rent increased to $1,123,000.00 annually, payable in monthly installments of $110,250.00. Base rent was due to be paid to the landlord on or before the first day of each calendar month. The tenant tendered a $613,000.00 security deposit in connection with the lease in the form of a letter of credit.

In addition to the base rent, the lease obligated the tenant to pay certain amounts as additional rent. Additional rent included, among other things, the tenant's share of: (1)

the real estate taxes imposed against the building (2) the building's operating expenses as enumerated in the lease; (3) the building cleaning costs; (4) the building's electricity costs as set forth in the lease; and (5) a "Skylobby Payment" for, *inter alia*, personnel costs involved in maintaining a reception desk in the lobby of the building. Additional rent also included charges for electricity supplied to the premises as set forth therein, charges for condenser water supplied to the premises, and charges for the removal of rubbish from the premises. The lease provided base rent and additional rent were payable when due, "without notice or demand, and without any abatement, deduction or set off."

The lease obligated the tenant to pay interest on untimely payments not received by the landlord within five days after the due date thereof. Interest was to be calculated from the due date of the missed payment until the date of receipt by the landlord of the monies owed at a rate of the lesser of (a) four percent (4%) above the then current "prime" or "base" rate of JPMorgan Chase Bank, or its successor, from time to time in effect in New York, New York or (b) the maximum rate of interest chargeable under applicable law. The tenant also agreed to pay late charges on any rent payments not received by landlord within 15 days after the due date thereof at a rate of 5% of all

of the overdue amounts in order to defray the landlord's administrative costs in handling such late payment.

The lease's default provisions provided that if the tenant failed to pay any amounts when due and such failure continued for three days after the landlord served a notice on the tenant, the landlord could then serve a notice on the tenant that the lease term would automatically expire and terminate on a date not less than five days after such notice. Upon the expiration of that five-day period, the tenant was to immediately quit the premises and surrender possession to the landlord. If the lease terminated due to such a payment default, the tenant agreed to pay all base rent and additional rent due "through the date upon which the lease and the lease term expired or the date of re-entry by the landlord into the premises." In the event the tenant vacated the premises due to a default, the tenant also agreed to pay the landlord certain additional sums for the portion of the lease term that remained after the lease term ended and the tenant vacated in accordance with terms set forth in the lease.

The tenant also agreed to pay all of the landlord's costs and expenses, including attorneys' fees, involved in collecting rents or enforcing the obligations of the tenant under the lease, "including the cost and expense of instituting and prosecuting legal proceedings or recovering possession of the

[p]remises after [a] breach by [the] tenant or upon expiration or earlier termination of the lease." Such amounts were due and payable to the landlord "on demand" and also constituted additional rent.

At the time the lease was signed, the guarantor executed a limited personal guarantee, dated October 28, 2015, in favor of the landlord pursuant to which he "unconditionally and absolutely" guaranteed to the landlord:

> "the payment of any base rent, operating payments, tax payments, cleaning cost payments, additional rent in respect of building electricity costs and tenant charges (i.e., overtime HVAC, overtime freight elevator usage and the like) due under the Lease."

The guarantee further provided that it would be in full force and effect until all of the following four conditions were satisfied:

> "This guaranty extended through and including the date that all of the following four conditions were satisfied; (a) Tenant shall have given Landlord at least 30 days' prior written notice of its intent to vacate and surrender the premises to the landlord, (b) the tenant (including any subtenants and licensees) vacated and surrendered the Premises to Landlord in the condition required under the lease, (c) the tenant delivered the keys to the premises and security cards, if applicable, to the landlord and (d) paid to Landlord all of the obligations through and including the date when all of the prior conditions had been met."

The guarantee also obligated the guarantor to reimburse the landlord for any costs, including reasonable fees and

disbursements, incurred by the landlord in enforcing the guarantee.

It is also undisputed that the tenant did not pay the base rent or the additional rent that was due and owing under the lease for the months of February, March, and April 2018. On April 18, 2018, in accordance with the default provisions of the lease, the landlord served the tenant a notice of default stating that the tenant was in default under the lease and demanding, the payment to the landlord of the total amount of $405,310.31 on or before April 27, 2018. The default notice further provided that the tenant was required to cure its defaults by paying those arrears, which were broken down in a detailed chart, on or before April 27, 2018.

On April 27, 2018 the tenant commenced an action entitled, Gerard Fox Law, P.C. v Kato Intl. LLC, Index No. 652071/2018 (Melissa Crane, J.) seeking a Yellowstone injunction to toll the time to cure its payment default. In the affidavit of Gerard Fox in support of that motion, the tenant did not dispute that it was in default. Instead, the tenant sought additional time to cure the payment defaults. The court declined to sign the tenant's order to show cause on the grounds that the case was moot because the tenant intended to vacate the premises.

On or about April 30, 2018, the landlord delivered to the tenant a five-day notice terminating the lease as of May 8,

2018. On the same day, the tenant delivered to the landlord a 30-day notice of intent to vacate the premises stating that the tenant intended "to vacate and tender the Premises to Landlord effective as of May 31, 2018," and that the tenant "shall quit, surrender and deliver possession of the Premises to Landlord broom clean and in good order, condition and repair as required by Section 15.1 of the Lease, on May 31, 2018."

On May 1, 2018, the landlord responded to the tenant's letter and advised the tenant that the landlord had delivered to the tenant a five-day notice terminating the lease effective as of May 8, 2018 and any surrender or tender of possession of the premises to the landlord after that date shall be without prejudice to, and with full reservation of the landlord's rights and remedies against the tenant and guarantor under the lease and guaranty and applicable law, including the landlord's right to recover damages against the tenant and the guarantor. Any such surrender or tender of possession to the landlord shall also be without prejudice to the landlord's rights and remedies with respect to the Termination Notice.

The tenant vacated and surrendered the premises to the landlord on May 7, 2018 along with a surrender notice whereby the tenant attested that it was surrendering the premises "[i]n connection with the [five-day] Notice of Termination of Lease, dated April 30, 2018."

On May 17, 2018, the landlord commenced the instant action against the tenant. The verified complaint contains three causes of action. The first cause of action is for breach of contract seeking a money judgment against the tenant for the $547,413.26 allegedly owed as of May 1, 2018 as well as additional amounts due under the lease for periods thereafter. The second cause of action is for breach of the guarantee seeking a money judgment against the guarantor for the $547,413.26 allegedly owed by May 1, 2018 as well as additional amounts due under the lease for periods thereafter. The third cause of action is against both the tenant and the guarantor for attorneys' fees and expenses due and owing for enforcement of the lease and guarantee for which the landlord seeks a hearing to determine the amount it is owed.

The defendants answered on July 20, 2018, interposing three counterclaims. Those counterclaims are for (i) breach of lease; (ii) breach of the implied duty of good faith and fair dealing; and (iii) fraudulent inducement by the landlord for tenant to enter into the lease.

III. DISCUSSION

A. Summary Judgment Standard

It is well settled that the movant on 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." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form, see Zuckerman v City of New York, 49 NY2d 557 (1980), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "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). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

B. The First Cause of Action for Breach of Lease

The landlord has satisfied its *prima facie* burden for entitlement to summary judgment as to liability against the tenant for breach of the lease. "The obligation to pay rent pursuant to a commercial lease is an independent covenant, and thus, cannot be relieved by allegations of a landlord's breach, absent an express provision to the contrary." Universal Commc'ns Network, Inc. v 229 W. 28th Owner, LLC, 85 AD3d 668, 669 (1st Dept. 2011) *citing* *Westchester County Indus. Dev. Agency*

v Morris Indus. Bldrs., 278 AD2d 232 (2nd Dept. 2000), *lv dismissed* 96 NY2d 792 [2001]

In support of its motion for summary judgment on the first cause of action for breach of the lease, the landlord submits the affidavit of the landlord's asset manager Robert Bakst annexing the lease, the amended lease, the guarantee, the notice of default from the landlord with proof of service, the affidavit of defendant Gerard Fox submitted in the prior action for a Yellowstone Injunction, the landlord's termination notice with proof of service, the surrender notice of defendant Gerard Fox, P.C., and the invoices transmitted to the defendant showing amounts due for, *inter alia,* base rent under the lease between February 1, 2018 and May 1, 2018.

In opposition, the defendants offer no evidence disputing that the tenant was in default of their obligation to pay base rent under the lease for February, March, and April 2018. Nor do they argue, because they cannot, that the lease contains any clause relieving them of the obligation to pay base rent in the event that the landlord allegedly breached the lease.

Instead, the defendants raise three meritless arguments to avoid summary judgment for the first cause of action for breach of the lease: (1) the defendants assert they were fraudulently induced to entering into the lease; (2) the landlord lacks standing because there is sufficient security on deposit to

satisfy its damages; and (3) the landlord allegedly breached the lease as set forth in the defendants' counterclaims.

In order to maintain a claim of fraudulent inducement, "it must be demonstrated that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged." Perrotti v Becker, Glynn, Melamed & Muffly LLP, 82 AD3d 495, 498 (1st Dept 2011). The defendants' assertions, contained in the affidavit of Gerard Fox, which avers that the landlord's representative, Robert Bakst, "mispresented" that the rent due under the lease was "below market" and that the premises could be easily sublet if the tenant desired to do so fails to meet this standard. The lease provides that: "Landlord and landlord's agents have made no representations, warranties or promises whatsoever with respect to the Premises. The Building, the land underlying the building, the rents, leases, taxes, expenses or… or any other matter or thing…" The lease further states that it was tenant who represented and warranted that it is fully familiar with the [p]remises and the [b]uilding and has thoroughly inspected same." In addition the lease further provided that "This Lease contains all of the agreements and understandings related to the leasing of the Premises and the respective obligations of Landlord and Tenant in connection therewith. All prior

agreements and understandings between the parties have merged into this Lease." Contrary to the defendants' argument, these were not general disclaimers that would otherwise permit a claim for fraud to survive, but instead they are specific disclaimers that the tenant was relying upon representations about the rent for the premises. Such specific disclaimers are fully legally enforceable. See Rosenblum v Glogoff, 96 AD3d 514, 514-15 (1st Dept 2012), *citing* Danaan Realty Corp. v Harris, 5 NY2d 317, 320 (1959); DiBuono v Abbey, LLC, 95 AD3d 1062 (2d Dept 2012).

Furthermore, the tenant's argument that it was "duped" into signing the lease is further belied by the first amendment to the lease where, as an inducement for the landlord to enter into the amendment, the tenant expressly waived any such counterclaim and affirmative defense by representing and warranting to the landlord that "As of the date hereof, (a) the Lease is in full force and effect and has not been modified except pursuant to this Amendment; (b) there are no defaults existing under the Lease by either Landlord or Tenant; (c) Tenant has no valid abatements, causes of action, counterclaims, disputes. defenses. offsets. credits, deductions, or claims against the enforcement of any of the terms and conditions of this Lease; and (d) this Amendment has been duly authorized, executed and delivered and constitutes the legal, valid and binding obligation of Tenant." This express waiver constitutes an absolute bar to the

fraudulent inducement defense. See Citibank v Plapinger, 66 NY2d 90 (1985); Bernstein v Dubrovsky, 169 AD3d 410 (1st Dept. 2019) *citing* Red Tulip v Nelva, 44 AD3d 204 (1st Dept. 2007).

Independent of the express language of the lease, the defendants fail to satisfy the element of justifiable reliance upon these alleged misrepresentations. The market for rent and the ease of subletting the premises was independently discoverable by landlord before they executed the lease and the guarantee. As the landlord's submissions establish, this was undisputedly an arms' length commercial lease between a landlord and a national law firm that advertised on its website that it specialized in real estate litigation. Furthermore, the tenant was represented during the lease negotiations by a commercial broker, the Vortex Group LLC. Thus, assuming, without deciding, that the landlord actually made these representations, the defendants' fraudulent inducement defense is without merit as they failed to make use of the means of verification that were available to them. See Perrotti v Becker Glynn, Melamed & Muffly LLP, supra; UST Private Equity Investors Fund, Inc. v Salomon Smith Barney, 288 AD2d 87, 88 (1st Dept 2001) ("[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to

it..."); Urstadt Biddle Properties, Inc. v Excelsior Realty Corp., 65 AD3d 1135 (2d Dept 2009) ("Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on his opponent's misrepresentations.")

In further support of its fraudulent inducement argument, the tenant makes the unpersuasive argument that it was "duped" into the lease because the landlord reneged on an alleged oral promise to afford the tenant a rent abatement to renovate the premises and that it would not have been otherwise liable for arrears. The tenant argues that because the lease amendment contains no integration clause alleged oral agreement creates a triable issue of fact. Contrary to the tenant's argument, however, the Section 24.2 of the lease contains an integration clause and the lease amendment states that all terms of the original lease remain in full force and effect and have not been modified. That includes the integration clause in the original agreement. See Gutholtz v City of New York, 66 AD2d 707 (1st Dept. 1978).

Additionally, contrary to the assertions concerning an oral promise of a rent abatement, Section 9 of the amended lease expressly provided for a rent abatement only for the portion of the rent due for the additional premises leased by the tenant in

the amended lease. That abatement applied in certain limited circumstances where the landlord failed to complete building-department approved renovations at the tenant's expense pursuant to a specifically bargained-for formula. However, assuming, without deciding that the tenant may have been entitled to some abatement of rent for the additional premises rented in the amended lease, for which no evidence has been provided on this motion, any such rent abatement did not apply to base rent for the portion of the premises rented under the original lease. Those arrears also undisputedly remain unpaid since February 2018. Thus, this does not raise an issue of fact precluding summary judgment on the first cause of action for breach of the lease. As discussed herein, the defendants are free to argue the amounts due to landlord at trial.

The defendants next argue that the landlord lacks standing because they could have drawn down on the $613,000 letter of credit on deposit as security and that because this amount exceeds the proposed judgment amount, the landlord has not suffered any damages. However, contrary to the defendants' argument, the landlord has no obligation to apply the security deposit for arrears in the payment of base rent or additional rent to maintain an action for breach of lease. See Wiener v Tae Han, 291 AD2d 297 (1st Dept. 2002). On the contrary, this argument is belied by the plain terms of the lease. In the

lease, the tenant expressly forfeited any of its rights to demand that the security deposit be applied to satisfy its arrears. Instead, in Section 25.2 of the lease, the tenant bargained for the landlord to have the sole discretion to decide whether to draw on the security deposit towards satisfying any damages due from tenant, including for any money judgment obtained against the tenant as a result of the tenant's default under the Lease. Such a clause in a lease is fully enforceable under well-settled law and, as such this argument fails to raise a triable issue of fact to deny summary judgment on liability for breach of the lease. Id.

Even absent this clause, defendants also incorrectly argue that the evidence they submit demonstrates that the $613,000 in security that was on deposit satisfies all of landlord's damages. According to the landlord, the tenant owed $547,413.26 in base rent and additional rent as of May 2018, when the landlord commenced this action. However, there is no evidence that $613,000 exceeds the amounts due to landlord under the lease. The landlord is entitled to a yet undetermined amount of contractual attorneys' fees expended in enforcing the lease and the guarantee. Additionally, the lease provides for additional amounts owed to the landlord for the periods that post-date the landlord vacating the premises on May 8, 2018, which amounts the landlord is also suing to recover in this action.

Finally, there is no merit to the defendants' argument that any purported breach of the lease by the landlord, such as allegedly failing to perform certain repairs and failing to install a submeter in the premises for the tenant's electricity usage, is sufficient to defeat summary judgment. In fact, the defendants acknowledge as much in their own memorandum of law agreeing that it is well-settled that "the obligation to pay rent pursuant to a commercial lease is an independent covenant, and thus, cannot be relieved by allegations of a landlord's breach, absent an express provision to the contrary." Universal Communications Network, Inc. v 229 W. 28"' Owner, LLC, supra. 100 years of settled law on this issue belies the defendants' argument that this court should overlook precedent as "lacking a rational basis" "unreasonably discriminatory against tenants," "arbitrary and capricious," and "violative of sound public policy." This is particularly so as the lease provided that base rent and additional rent were payable when due, "without notice or demand, and without any abatement, deduction or set off." Thus, summary judgment is granted as to liability against the tenant on the first cause of action for breach of the lease.

C. Breach of Guarantee

The defendants have also met their burden *prima facie* to establish entitlement to summary judgment on the second cause of

action for breach of the guarantee. "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 A.D.3d 270, 272 (1st Dep't 2006).

Here, all of the admissible evidence demonstrates that the guarantor, Gerard Fox, executed a guarantee that obligated him to pay tenant's financial obligations under the lease. The guarantor also does not dispute that, at least as of May 1, 2018, he failed to satisfy the four conditions necessary to vitiate his personal liability under the guarantee. Specifically, as of that date the tenant had not (1) given the landlord at least 30 days' prior notice of its intent to vacate and surrender the premises; (2) vacated and surrendered the premises, (3) delivered the keys and security cards to the landlord and (4) paid to the landlord all arrears that the tenant owed prior to the termination of the guarantee. All of the admissible evidence submitted by the landlord demonstrates that tenant and the guarantor have paid no arrears whatsoever. Absent meeting all four of these conditions, which the guarantor has failed to do, the guarantor remains liable under the guarantee. See 300 Park Avenue Inc. v. Café 49, Inc., 89 AD3d 634 (1st Dept. 2011).

In opposition, the guarantor does not dispute that he failed to comply with all four of these conditions, inter alia, as to the arrears that had accrued prior to the commencement of the lawsuit. Instead, the guarantor argues that he should not be held liable any amounts due under the lease after the tenant vacated the premises on May 8, 2018. However, that argument does not raise a triable issue of fact as to whether the guarantee has been breached. The undisputed evidence on this motion establishes is that the guarantor has not yet complied with all of the terms necessary to terminate his obligations under the guarantee and as such is liable for breach of the guarantee. As such, the landlord is entitled to summary judgment on the second cause of action for breach of the guarantee.

D. The Third Cause of Action for Attorneys' Fees and Costs

The landlord is similarly entitled summary judgment on the third cause of action for reasonable attorneys' fees and expenses in connection, inter alia, with its enforcement efforts in connection with the lease and guarantee. Generally, in a cause of action seeking attorneys' fees, such fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health

Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept 1976); see also Goldberg v Mallinckrodt, Inc., 792 F2d 305 (2nd Cir. 1986); Rich v Orlando, 108 AD3d 1039 (4th Dept 2013).

Here, there is such a contractual provision. The lease provides that: "all costs and expenses, including attorneys' fees, involved in collecting rents or enforcing the obligations of Tenant under this Lease, including the cost and expense of instituting and prosecuting legal proceedings or recovering possession of the Premises after breach by Tenant or upon expiration or earlier termination of this Lease, shall be due and payable by Tenant, on demand, as Additional Rent." Likewise, the guarantee provides that: "Guarantor shall ... be responsible for reimbursing Landlord for any costs, including reasonable fees and disbursements of counsel, incurred by Landlord in enforcing this Guarantee." As such, both Tenant and Guarantor are liable for Landlord's reasonable attorneys' fees and expenses incurred in enforcing Landlord's rights under both the Lease and the Guarantee.

E. The Landlord's Request for an Immediate Judgment, a further hearing on damages due under the lease, and severance of the counterclaims

For several reasons, the court denies the remaining portions of the landlord's motion for (i) entry of an immediate judgment of $547,413.26 in favor of the landlord and against the

guarantor, (ii) a separate hearing on additional amounts to be due and on attorney' fees;(iii) and severance of the counterclaims to litigate to conclusion in this action.

CPLR 5012 provides that the court must order severance of one or more causes of action to issue a separate judgment. See also Bennett v Long Is. Light. Co., 262 A.D.2d 437, 438 (2d Dep't 1999) (reversing lower's issuance of multiple judgments because "Without severance, there can be only one judgment entered in a civil action.") CPLR 603, entitled "severance and separate trials" provides that "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others." "Although it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly. Where complex issues are intertwined . . . it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one." Shanley v. Callanan Indus., Inc., 54 N.Y.2d 52, 57 (1981).

Here, this branch of the landlord's motion runs afoul of the Court of Appeals' holding in Shanley. Entering an immediate judgment for the proposed judgment amount against the tenant for arrears allegedly due to the landlord as of May 2018 and then continuing this litigation to conduct (i) separate hearings on additional amounts owed after that time and on the amount of attorneys' fees due owed under the lease and guarantee and (ii) a separate litigation on the tenant's counterclaims places an unnecessary burden on the court.

This is particularly so given that the defendants have raised triable issues of fact as to the calculations of the amount of additional rent that were due and payable under the lease as of May 1, 2018. Specifically, in the affidavits of defendant Gerard Fox and Edward Altabet, they submits emails documenting disputes with the landlord for amounts due for additional rent under the lease such as the landlord's failure to install a submeter for the premise to accurate document the amounts due and owing for the tenant's share of electricity. The landlord fails to specifically address those claims.

While it is undisputed that the tenant and guarantor owe arrears in base rent and are liable for those breaches without abatement or set off, the issue of arrears for unpaid rent is an issue of fact inextricably intertwined with the defendants' counterclaims asserting breach of lease for being overcharged

for additional rent. Thus, severance of the counterclaims and an immediate trial on the amounts due to the landlord are impractical and do not further the convenience of the court. Nor has the landlord demonstrated that prejudice would result absent severance.

F. The Landlord's Application for Sanctions

In its reply, the landlord requests sanctions arguing that the defendants' opposition is frivolous with the meaning of 22 NYCRR1301.1. 22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct ... In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." 22 NYCRR 130-1.1(b) provides that the court, as appropriate, "may make such award of costs or impose such financial sanctions against ... a party to the litigation." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c).

Applying this standard, the court concludes that sanctions are not appropriate.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of the plaintiff Kato International LLC for summary judgment is granted as to liability only on the first, second, and third causes of action in the complaint with damages, including any attorneys' fees and costs to be awarded to the plaintiff on the lease and guarantee to be determined at trial, and the motion is otherwise denied, and it further

ORDERED that the parties shall contact chambers to schedule a preliminary/settlement conference on or before June 30, 2020.

This constitutes the Decision and Order of the court.

Dated: May 26, 2020 ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON