SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

GLAZE TERIYAKI, LLC, Plaintiff/Counterclaim-Defendant, - v - MACARTHUR PROPERTIES I, LLC, Defendant/Counterclaim-Plaintiff.	**INDEX NO.** 653883/2013 **MOTION DATE** **MOTION SEQ. NO.** 010 **DECISION + ORDER ON MOTION**

HON. BARRY R. OSTRAGER

This commercial landlord-tenant dispute, involving claims and counterclaims between plaintiff Glaze Teriyaki, LLC as the Tenant and defendant MacArthur Properties I, LLC as the Owner, has a long and somewhat convoluted procedural history involving multiple motions and a trial, rulings by various Supreme Court Justices, proceedings before two different Referees, and decisions by the Appellate Division, First Department. It is undisputed that the tenancy was commenced by a lease dated July 31, 2010 for the ten-year period through July 31, 2020 for the use of the premises as a restaurant ("the Lease", NYSCEF Doc. No. 6) and that the Tenant's possessory rights were terminated and the Tenant was evicted on April 20, 2018. Before the Court at this time is the Owner's motion for (1) a declaratory judgment that Article 59B of the Lease, requiring the payment in certain circumstances of use and occupancy during the holdover period in an amount equal to 200% of the base rent (the "holdover rent"), is enforceable; and (2) a money judgment for holdover rent in the amount of $368,150.00, plus pre- and post-judgment interest at the rate of 18% annually and late fees at the rate of 5% pursuant to Article 59A of the Lease, for the period from October 1, 2016 (when the parties settled certain claims before JHO Ira Gammerman) through April 30, 2018, the month of the Tenant's eviction from the premises. The motion is granted in part and denied in part for the reasons that follow.

The key provision governing holdover rent is Article 59B in Rider B to the Lease (NYSCEF Doc. No. 7), which provides in relevant part as follows (with emphasis added):

> If the Tenant hereunder continues in possession ***after the expiration date of this Lease,*** without a new written lease, lease extension, or renewal, executed by the Landlord and Tenant and delivered to both parties as to Tenant's continued occupancy, the Tenant agrees that it shall be deemed an unauthorized holdover occupant in all respects and further agrees that the use and occupancy for the period it shall remain on the premises be deemed set at 200% of the last lease annual rental, that all of the obligations of the herein lease and rental agreement including, but not limited to, the provisions of the escalation clauses, are to apply, that such charges under escalation clauses are to be billed on a monthly basis, computed at the rate of 1/12 of the annual charge that would apply for the most recent current year, subject, however, to adjustment either by additional charge or credit in the event that final figures for the projected interval indicates that the estimated bill charges vary from the actual figures. As such a holdover occupant, Tenant shall continue to be liable for all damages, obligations and liabilities, none being deemed liquidated by virtue of this Article.

The first issue to address when determining the Owner's motion is whether Article 59B applies to the circumstances here, where the Appellate Division found the Owner was "entitled to a judgment of possession and the issuance and execution of a warrant of eviction resulting from [the Tenant's] continued holdover after its lease had been ***terminated*** as of January 21, 2014…." *Glaze Teriyaki, LLC v MacArthur Props. I, LLC*, 155 AD3d 427, 430 (1st Dep't 2017) (emphasis added, citation omitted). In supplemental papers requested by the Court, the Tenant relies on Article 21 of the Lease to argue that 59B does ***not*** apply because this case involved a lease ***termination*** found by the Appellate Division, and not a lease ***expiration*** at the end of the term of the written Lease, as referenced in Article 59B. Article 21 relied upon by the Tenant reads in relevant part as follows (with emphasis added): "End of Term: 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 excepted, and Tenant shall remove all its property." The Court rejects the Tenant's position that Article 59B

should be limited to a lease expiration, and not include a lease termination such as the one that occurred here by order of the Appellate Division. Article 21, if anything, appears to equate expiration of the lease with termination of the lease and in no way bars the application of Article 59B to this case.

In contrast, the Owner's position on this point is persuasive, as it finds direct support in Article 17 of the Lease. The Owner cites that provision, entitled "Default", to argue that the Lease termination in this case, based on the Appellate Division's finding of the Tenant's default under the Lease, qualifies as the lease "expiration" referenced in Article 59B that triggers the payment of holdover rent. Article 17 provides in relevant part (with emphasis added) that:

> If the Tenant defaults in fulfilling any of the covenants of this lease ... then [following the Owner's service of a notice of default] … the Owner may serve a written notice of cancellation of this lease upon Tenant, and upon the expiration of three (3) days after the serving of such notice, ***this lease and term shall end and expire as fully and completely as if the expiration of such three (3) day period were the day herein definitely fixed for the end and expiration of the lease and the term thereof*** and Tenant shall then quit and surrender the demised premises to Owner but Tenant shall remain liable as hereinafter provided.

Thus, Article 17 provides that the Lease termination upon the Tenant's default is equivalent to the Lease expiration at the end of the term, making Article 59B applicable here.

Having found that Article 59B applies to the Lease termination in this case, the next issue is whether the formula for use and occupancy payable during the holdover period following the Lease termination constitutes an unenforceable penalty.[1] That formula calls for the payment of

[1] The Tenant alleges another threshold issue; namely, that this motion should be denied without reaching the merits as an impermissible summary judgment motion that duplicates the summary judgment motion that had been referred to Referee Sambuco, whose recommendation to deny summary judgment was accepted by this Court (mot. seq. 009, NYSCEF Doc. No. 271). However, because the focus of the Referee's decision was base rent allegedly due and owing, and because the Referee's recommendation was somewhat ambiguous, this Court expressly granted the Owner leave to make this motion limited to the holdover rent. No claim is being made here for any base rent, that issue having been reserved for trial, along with any post-eviction damages and attorney's fees (NYSCEF Doc. No. 284).

use and occupancy at a rate "200% of the last lease annual rental." The Tenant argues that 200% is an unenforceable liquidated damages clause because the amount is a penalty in an excessive amount wholly disproportionate to any damages the Owner could possibly claim, especially since no such damages have been identified here.

The Tenant cites the landmark case *Truck Rent-A-Center v Puritan Farms 2nd,* 41 NY2d 420 (1977), where the Court of Appeals held (at 425) that:

> 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.

The Owner counters that, in 2010 when the Lease was drafted, the Owner could not precisely calculate how the real estate market would develop and what damages the Owner might incur based on the Tenant's potential default and an early termination of the Lease and that the 200% formula is reasonable. Moreover, the Owner correctly notes that the Appellate Division, First Department, has found enforceable a holdover rent provision in an amount two times the rent set forth in the lease. *Tenber Assoc v Bloomberg L.P.,* 51 AD3d 573 (1st Dep't. 2005).

As the Owner confirmed in its supplemental papers and during oral argument, the Owner is not seeking to recover any of the additional charges, such as escalators due on top of the base rent, which Article 59B arguably permits the Owner to charge. Rather, the Owner seeks only to recover an amount two times the base rent for the period following the settlement before JHO Gammerman, which was about two years after the termination of the Lease found by the Appellate Division, through the end of the month of the Tenant's eviction in April 2018. The burden is on the Tenant to establish that the holdover rent constitutes an unenforceable penalty under either the *Truck Rent-A-Center* or *Tenber* case cited above. The Tenant's conclusory claims fail to meet that burden. Accordingly, the Court finds that Article 59B, calling for

holdover rent two times the base rent, is enforceable and applicable under the circumstances presented here for the period from October 1, 2016 through April 30, 2018.

The second prong of the motion asks the Court to calculate the amount of the holdover rent and enter a money judgment. Pursuant to Article 59B, the amount is calculated using the base rent numbers set forth in Rider A to the Lease (NYSCEF Doc. No. 7); namely, $19,105.00 per month for the ten-month period from October 2016 through July 2017 totaling $191,050.00, plus $19,678.00 per month for the nine-month period from August 2017 through April 2018 totaling $176,502.00, for a grand total of $368,150.00.[2] Based on the above analysis, the Owner is entitled to a money judgment in the amount of $368,150.00 for the principal amount of the holdover rent.

As indicated earlier, the Owner also requests 18% interest and 5% late fees pursuant to Article 59A, which states in relevant part that:

> Any installment or installments of minimum rent, additional rent or any other charge accruing under the provisions of this Lease, which shall not be received by Landlord within ten (10) days of when due, shall accrue a late charge equal to five (5%) percent of the installment then due. If the amount remains due and outstanding for more than a period of thirty days from the date that it is due, then and in such event, the amount due shall also bear interest at maximum legal rate permitted to be charged on short term loans (currently 18%). Said interest shall be computed from the day that is thirty days from the date said installment or charge is payable under the terms of this Lease, until it shall have been paid by Tenant and received by landlord. However, no late charge or interest will be due and payable if Tenant shall have paid the installment or charge and Landlord shall have received same within ten (10) days from the date that said installment or charge shall be payable under this Lease.

In the opinion of the Court, the 5% late charge was not intended to apply to the holdover rent, as the charge of 200% of the base rent was intended to include all charges arguably due

[2] The total actually is $368,152.00, but the Court is accepting the Owner's number, which reflects a rounding to simplify the calculations.

under the Lease. Similarly, the interest provision cannot be applied to require the payment of 18% interest effective October 1, 2016 when the holdover period began, as such as calculation would increase the holdover rent substantially and render the amount an unenforceable penalty. The Court cannot overlook the fact that the Tenant was in possession with the imprimatur of the trial court's decision until the Appellate Division ruled otherwise on November 9, 2017, notwithstanding the Appellate Division's finding that the Lease had been terminated years earlier. Under the rather unique circumstances presented here, the Court finds that the just result would be to allow the 18% interest to be calculated by the Clerk of the Court on the entire amount of the holdover rent due in the sum of $368,150.00, effective November 9, 2017. As of that date, the Tenant was well aware that its possessory rights had been terminated, yet the Tenant remained in possession until evicted in April 2018.

Accordingly, it is hereby

ORDERED, ADJUDGED AND DECLARED that the motion by the defendant/counterclaim-plaintiff MacArthur Properties I, LLC for a declaratory judgment is granted, and the Court declares that that Article 59B of the Lease, requiring the payment in these circumstances of use and occupancy in an amount equal to 200% of the base rent (the "holdover rent") during the holdover period from October 1, 2016 through April 30, 2018, is enforceable and applicable here; and it is further

ORDERED that the motion is further granted to the extent of awarding the defendant/counterclaim-plaintiff MacArthur Properties I, LLC a money judgment in its favor against plaintiff/counterclaim-defendant Glaze Teriyaki, LLC in the amount of $368,150.00 plus interest at the rate of 18% per annum from November 9, 2017 through the entry of judgment and

at the statutory rate of 9% per annum thereafter, as calculated by the Clerk of the Court upon defendant's filing of a Proposed Judgment directed to the County Clerk; and it is further

ORDERED that the parties shall meet and confer regarding a schedule for outstanding discovery related to the limited issues remaining in this case; namely, the approximately $109,000.00 in base rent that the Owner claims to be due, as well as any post-eviction damages and attorney's fees. A status conference is scheduled for April 30, 2021 at 10:30 a.m. via a dial-in number to be provided by the Owner's counsel by letter efiled by April 23, 2021. The Court urges the Owner to provide the Tenant with a breakdown of the estimated sums claims so the matter can be discussed more fully at the conference.

Dated: April 15, 2021

BARRY R. OSTRAGER, J.S.C.

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