Epic W14 LLC v Malter
2022 NY Slip Op 31760(U)
June 3, 2022
Supreme Court, New York County
Docket Number: Index No. 150148/2019
Judge: David B. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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EPIC W14 LLC,

Plaintiff,

- v -

STEFAN MALTER, SETH HIRSCHEL, MARC MILES, BARNET LIBERMAN, THE GYM AT UNION SQUARE, LLC D/B/A CLAY

Defendant.

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INDEX NO. 150148/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158

were read on this motion to/for SUMMARY JUDGMENT AS TO DAMAGES.

Plaintiff, Epic W14 LLC, moves for an order granting summary judgment as to its alleged damages. This Court previously granted Plaintiff's motion for summary judgment as to liability. (Docket no. 62). Familiarity with that decision is assumed. Plaintiff now seeks to establish its damages and Defendants oppose.

For the reasons set forth below, the motion is granted to the extent that Plaintiff is awarded damages of $1,543,113.71, and judgment may be entered in that amount as set forth herein.

Bankruptcy

Preliminarily, this Court notes that defendant Barnet Liberman filed a bankruptcy petition. (Plaintiff's exh. B, docket no. 114). As a result, pursuant to Section 362 of the Bankruptcy Code, 11 U.S.C. §362, this action is stayed as to him as this Court has previously

noted. All references contained herein as to the "defendants," including the three remaining "individual defendants" who are guarantors, against whom Plaintiff is principally proceeding, shall be deemed to exclude Mr. Liberman. (Plaintiff's Memorandum in Support, Docket no. 112).

Standard for Summary Judgment

In order to obtain summary judgment, a movant must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). If this *prima facie* showing is made, the burden shifts to the opposing party to produce evidence in admissible form that there is in fact a triable issue of fact. (*Id.*; *see also, Gammons v. City of New York*, 24 N.Y.3d 562 [2014]). Because summary judgment deprives a litigant of his day in court, "evidence should be analyzed in the light most favorable to the party opposing the motion." (*Martin v. Briggs*, 235 A.D.2d 192 [1st Dep't 1997]). But bare or conclusory allegations or assertions are insufficient to create genuine issues of material fact sufficient to defeat a motion for summary judgment. (See *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *See generally Taxi Medallion Loan Trust III v. D&G Taxi Inc.*, 2020 N.Y. Misc. LEXIS 508 [Sup. Ct. N.Y. County 2020] and cases therein cited). These are the same standards as the Court applied on plaintiff's motion for summary judgment as to liability.

For the reasons set forth below, plaintiff has amply satisfied these standards.

In its decision granting summary judgment as to liability, this Court noted that "defendants have established discrepancies as to the amount owed under the guaranty creating an issue of fact as to the amount of damages." (Docket no. 62 at 6). On this motion, plaintiff has

adequately cured those discrepancies by offering additional evidence, adequate explanations, or both.

Background

The Gym at Union Square LLC ("The Gym") was a commercial tenant in the building located at 25 West 14th Street, New York, New York pursuant to a written lease that had been assigned to it and which was subsequently amended (plaintiff's exhs. C-F, docket nos. 115-18) (together, the "Lease"). On September 8, 2009, Chip Fifth Avenue LLC assigned the Lease to The Gym with the consent of the then-landlord (*see* assignment of leases, plaintiff's exhs. G-H, docket nos. 119-20). There was a guaranty on the initial lease and the individual defendants entered in a "Modification and Reaffirmation of Guaranty" dated September 13, 2011 (plaintiff's exh. J, docket no. 122). On January 26, 2012, plaintiff purchased the property and also received an "Assignment of Leases and Rents" (plaintiff's exh. G, docket no. 121). The property is currently managed by Vornado. (*Id.*).

While in possession of the premises, The Gym failed to comply with its financial obligations under the Lease and subsequent amendments thereto, bouncing numerous checks and failing to pay rent when due (*see* rent history, plaintiff's exh. K) (docket no. 123). As a result, plaintiff commenced a summary nonpayment proceeding against The Gym in the Civil Court, New York County (*Epic W 14 LLC v. The Gym at Union Square, LLC d/b/a Clay*, Index No. L & T 87338/2015) (plaintiff's exh. L, docket no. 124). In August 2016, the parties entered into a Stipulation of Settlement withdrawing all claims and defenses and agreeing that $865,802.00 was owed to plaintiff at that time (Stipulation) (plaintiff's exh. N, docket no. 126). The guarantors signed the Stipulation guaranteeing payment. *(Id.)*.

The Stipulation is the starting point for the calculation of plaintiff's damages. Plaintiff's rent history (plaintiff's exh. K, docket no. 123) reflects that, as of August 1, 2016, there was $847,802 due on the Lease, exclusive of the rent due that day, together with stipulated legal fees of $18,000, for a total of $865,802 due pursuant to the Stipulation. The Stipulation provided for payment thereafter of current rent as due, and quarterly installment payments of the stipulated overdue amounts of $865,802 through the end of 2018, as well as a reaffirmation of the individual defendants' guaranty. The Gym was unable to meet its obligations under the Stipulation, or under a July 16, 2017 amended Stipulation to modify the amount and duration of monthly payments required in order for The Gym to meet its outstanding debt (Amended Stipulation, plaintiff's exh. O, docket no. 127). The Amended Stipulation provided, among other things, that "(t)he Guarantors under the August 2016 Stipulation each individually execute this Agreement to reaffirm their Guaranty of Lease and the Stipulation as set forth in the August 2016 Stipulation." *(Id.)*.

Plaintiff's Rent History is a Business Record

Significantly, the Stipulation amounts to a concession by defendants that plaintiff's rent history records (plaintiff's exh. K, docket no. 123) are accurate, since defendants stipulated to a judgment in the exact amount provided for by that document. Defendants nevertheless now contend that the rent records have not been properly authenticated as a business record under CPLR 4518(a), which provides:

> "Rule 4518. Business records. (a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time

> thereafter. An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record."

Plaintiff offers an affidavit of Matthew Lefkowitz, an employee of the managing agent, who states:

> "[T]he rent history was prepared in the ordinary course of business, with each entry made as the charge accrued and/or within a short time after payment is made."

(Lefkowitz Aff., ¶6; see also ¶12, docket no. 109). Defendants concede as much, but argue that plaintiff has failed to show "that it was the regular course of such business to make it," as CPLR 4518(a) also requires. This Court rejects defendants' objection. It is in the regular course of a commercial landlord's business to maintain contemporaneous records of rent and other charges, and tenant payments of those charges. (*See, e.g., 1328 Broadway LLC v. E. Express Group*, 2003 NYLJ LEXIS 1736 [Civil Ct. N.Y. Co. 2003] [computerized ledger of rents billed and paid admissible as a business record]). Thus, Mr. Lefkowitz's affidavit was sufficient to establish the foundation for the admissibility of plaintiff's rent history as a business record. That rent history reflects a net balance of $891,046 as of February 1, 2019, just days before the Lease was terminated (plaintiff's exh. K, docket no. 123).

The parties' 2016 Stipulation of Settlement also supports a finding that plaintiff's rent history is accurate. The parties stipulated that $865,802 was due as of the date of the Stipulation, which plainly reflects $847,802 net due and unpaid as of August 1, 2016, plus the agreed amount of $18,000 in attorney's fees. The defendants have thus conceded the accuracy of plaintiff's rent history up to that point in time which, notably, includes not only rent pursuant to the Lease and Stipulation, but many of the types of additional charges defendants contest on this motion. (see plaintiff's exh. K, docket no. 123)

Defendants next claim that "after the $865,802.00 Judgment against Tenant in Civil Court in 2016, Tenant paid landlord $3,052,947.03, covering the Judgment amount and more than $2.1 million in subsequent rent." (Lambert Aff., ¶11, docket no. 148). Indeed, plaintiff's rent history reflects $3,052,947.03 in payments and credits prior to February 1, 2019 (excluding an additional $240,000 security deposit credit discussed below). Although these payments of $3,052,947.03 were credited, there were ongoing rent charges incurred and defendants never fully paid their current rent and the arrears that the 2016 Stipulation of Settlement required them to pay.

Defendants assert that "[t]he 2016 Judgment against Tenant in no way establishes Landlord's claim for $841,046.10 in alleged subsequently accrued rent in this case." However, the records of charges and payments made after that date establish that $841,046.10 is due (plaintiff's exh. K, docket no. 123). The 2016 Stipulation of Settlement provided for the payment of current rent as due and payments to reduce the overdue arrearages over time, but defendants failed to fully comply with the Stipulation, leaving a net balance due of $841,046.10 due as of February 1, 2019. While The Gym may have paid $3,052,947.03 after the Stipulation of Settlement was signed in September 2016 until the Lease was terminated in February 2019, The Gym only reduced its rent arrearages by $24,756 ($865,802 - $841,046).

On January 25, 2019, the Civil Court denied The Gym's motion to stay/vacate the notice of eviction. At or about the same time, the State of New York closed The Gym's business and padlocked it, presumably for non-payment of sales taxes; on February 5, 2019, plaintiff evicted The Gym; and on February 7, 2019, the date as of which plaintiff seeks to calculate its damages on this motion, The Gym surrendered the premises (Plaintiff's exhs. P-S, docket nos. 128-31; Plaintiff's Memorandum of Law, docket no. 112).

Free Rent Clawback

Defendants dispute plaintiff's claim that it is "entitled to 'claw back' a $240,000.00 rent concession on the grounds that 'such abatement became void once the tenant materially defaulted under the Lease.'" (Lambert Aff., ¶81; see also Lefkowitz Aff., ¶42, docket nos. 148, 109). Paragraph 1E of the Lease provides:

> "Notwithstanding anything to the contrary hereinabove set forth, provided this Lease is in full force and effect and Tenant is not in default under this Lease, Tenant shall be entitled to a credit against the rent for the three (3) month period commencing on the commencement date. . . in the aggregate amount of $240,000.00 . . . The foregoing credit shall be null and void 'ab initio' if Landlord at any time terminates this Lease . . . . Landlord shall be entitled to recover from Tenant in addition to other amounts Landlord is entitled to recover, the aggregate amount of rent credit herein provided for."

(Plaintiff's exh. C, docket no. 115)

Apparently The Gym, or more accurately, its predecessor, was given three months' free rent, at the original monthly rental rate of $80,000, provided it was not in default and the lease was not terminated, in which case the landlord would be entitled to "claw back" its rent concession.

Defendants nevertheless claim that:

> "Landlord did not seek to terminate the Lease. Landlord commenced a non-payment proceeding, which I understand is a case seeking past and ongoing rent based on Landlord's claim that the Lease continues to be in effect and has not been terminated. My understanding of the phrase in ¶1E of the Lease 'terminates this Lease' is that it only applies if the Landlord issues a notice of termination."

(Malter Aff., ¶35; see also Lambert Aff., ¶¶81-84, docket nos. 148-149).

Although the Lease did not provide for any specific form for termination or notice thereof, the Lease was "terminated" on or about February 5, 2019, when The Gym was evicted

(Plaintiff's exhs. Q-S, docket nos. 129-31). Since plaintiff was deprived of the benefit of its bargain of full lease payments through the end of the Lease term, plaintiff is entitled to an additional $240,000.

Security Deposit

This Court notes there is a separate $240,000 credit, noted in plaintiff's rent history on January 30, 2019, marked "cash LC – applied LC as per attorney." (Plaintiff's exh. K, docket no. 123). The Court indicated in its prior decision on summary judgment as to liability that there was some confusion as to what that amount was for. (Docket no. 62, at 6). The confusion was caused by the identical figures of $240,000, for both the free rent clawback and the security deposit, and plaintiff has resolved that confusion on this motion. It appears there was a separate security deposit posted via a letter of credit (see Lease, article 31, plaintiff's exh. C, docket no. 115), on which plaintiff drew, also in the amount of $240,000), as it was entitled to do. (*See also* Third Amendment to Lease, Section 2[E], reducing the letter of credit posted as a security deposit to $240,000 [plaintiff's exh. E, docket no. 118]). This is unrelated to the $240,000 free rent clawback, although it is in the same amount. Plaintiff credited this amount against The Gym's unpaid rent, reducing the amount outstanding to defendants' benefit.

Lease Charges

The next issue in plaintiff's calculation of damages are charges for real estate taxes, water, and common area maintenance. It is not uncommon for commercial leases to have provisions for the tenant to pay or reimburse the landlord for a portion of these charges.

Preliminarily, defendants object that The Gym was never properly invoiced or sent statements for these charges in a manner provided for in the Lease. (Lambert Aff., ¶¶25-41, docket no. 148). That appears to be true in at least some instances. Conversely, prior to this

litigation, and the landlord-tenant case, none of the defendants ever challenged or questioned the calculation of the charges in any way, with one exception.

Paragraph 27 of the Lease provides that notices, including notices of the additional charges at issue here, "shall be deemed sufficiently given or rendered if in writing, sent by registered or certified mail (return receipt requested)." (Plaintiff's exh. C, Article 27, at p. 26, docket no. 115). Plaintiff concedes that was not always done, at least by registered or certified mail, and it appears it may never have been done in that specific fashion. (Defendants' exh. E at pp. 137, 151, docket no. 155). Although notices may be "sufficiently given" in this fashion, the Lease does not provide that this is the *only* way notice may be given. Defendants, with only one apparent exception, never objected, and the plaintiff's rent records reflect that when The Gym made payments it did so in the amounts assessed. This course of conduct creates several problems for the defendants.

First, contrary to defendants' suggestion, there was no breach. That a method of notice is *sufficient* does not make it *necessary*. There is no lease provision making a specific method of notice a condition precedent to The Gym's obligation to raise objections to specific charges. Yet that is at the core of defendants' objection to all of the Lease charges they contest.

Second, The Gym previously made the same argument in the landlord-tenant case. On January 10, 2019, in denying The Gym's motion to vacate plaintiff's Notice of Eviction, Justice Dakota D. Ramseur wrote:

> "To the extent that Tenant alleges overcharge of the water charges and other additional rent, and that Landlord failed to comply with notice requirements under the Lease (Resp Affirm ¶10, *et seq.*), Landlord notes correctly that such claims would be time-barred (*Goldman Copeland Assoc., P.C. v Goodstein Bros. & Co., Inc.*, 268 AD2d 370, 371 [1st Dept. 2000] [claims time-barred where landlord gave the tenant detailed yearly porter wage escalation statements for the years in question, paid by the tenant without

> protest, which consistently used the same formula in determining the escalation]). Here, over the course of a 15-year lease, as well as the Stipulation, Tenant did not, among other things, dispute the formula used by Landlord to calculate water charges (P*et'r Exh A*, Schedule A). Accordingly, Tenant may not now raise such challenges on the eve of eviction, particularly after the Stipulation acknowledged and encompassed prior water charges."

(Plaintiff's exh. Y, docket no. 137).

Justice Ramseur's ruling is entitled to collateral estoppel effect. This same issue has already been raised and litigated by The Gym, and determined against it. (*See, Why Gerard, LLC v. Gramvo Entertainment Corp.*, 94 A.D.3d 1205 [3rd Dep't 2012] [collateral estoppel doctrine applies in an action against tenant and guarantors based on prior result in eviction proceeding]; *McKeon v. Prudential Lines, Inc.*, 108 Misc.2d 873 [Civ. Ct. Kings Co. 1981] [collateral estoppel doctrine applies in commercial lease dispute]). Collateral estoppel prevents duplicative litigation and applies when:

> "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigation and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits."

(Conason v. Megan Holding, LLC, 25 N.Y.3d 1, 17 (2015) (internal quotation marks and citations omitted). Justice Ramseur's ruling satisfies each of these tests. The guarantors are in privity with The Gym and, therefore, are also bound by Justice Ramseur's determination. (*See, e.g., L. Raphael NYC C1 Corp. v. Solow Building Co., LLC*, 2019 N.Y. Misc. LEXIS 4447 [Sup. Ct. N.Y. Co. 2019, and cases therein cited] [guarantors of lease are privies of tenant for purposes of application of collateral estoppel doctrine based on outcome of landlord-tenant action in subsequent action against guarantors]).

Third, even if Justice Ramseur had not rendered her decision, defendants would still not prevail. Whether one labels it amendment by conduct, waiver or estoppel, the parties' long course of dealing belies the defendants' argument. (*See, e.g., Treeline 990 Stewart Partners LLC v. Rait Atria, LLC*, 33 Misc.3d 1226 [Sup. Ct. Nassau Co. 2011], *modified on other grounds*, 2013 N.Y. App. Div. LEXIS 4241 [2nd Dep't 2013] [parties may amend contract by subsequent conduct]; *Team Marketing USA Corp. v. Power Pact, LLC,* 41 A.D.3d 939 [3rd Dep't 2007] [parties may waive contract provisions by subsequent conduct]; *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Management, L.P.,* 7 N.Y.3d 96 [2006] [waiver]; *Rose v. Spa Realty Association*, 42 N.Y.2d 338 [1997] [estoppel]). Plaintiff billed The Gym and The Gym paid without raising objections. The parties' 2016 Stipulation of Settlement was based on a rent record that included these charges, conceded their validity, and thereafter on the rent payments that The Gym continued to make, to the extent that it made them, which also included these same categories of charges to which The Gym did not object prior to the onset of litigation between the parties.

Finally, as to the individual defendants, plaintiff correctly argues that an absolute and unconditional guarantor generally lacks standing to assert these types of defenses even if the debtor could assert them (which this Court concludes The Gym cannot). (Sperber Reply Aff., ¶¶12-13, docket no. 157). (*See Cooperative Centrale v. Navarro*, 25 N.Y.3d 485 [2015]; *Chemical Bank v. Kaufman*, 142 A.D.2d 526 [1st Dep't 1988] [guarantor cannot question debt when monthly statements received without objection]; *see generally Citibank v. Plapinger*, 66 N.Y.2d 90 [1985]).

For these reasons, this Court rejects defendants' assertion that, because plaintiff did not send notices by certified or registered mail, that The Gym's right to object to those notices, and the charges they contained, never began to run. (See Lambert Aff., ¶41, docket no. 148).

While any of these reasons would be sufficient to grant plaintiff summary judgment as to damages on the guaranty, this Court nevertheless turns to defendants' specific objections to specific categories of charges.

1. Common Area Maintenance/Operating Expenses

Defendants argue that, pursuant to paragraph 29(C) of the Lease, plaintiff was obligated to deliver a Landlord's Operating Statement at the beginning (estimated and projected) and end (actual) of each year, in the manner specified by Section 27 of the Lease (plaintiff's exh. C, docket no. 115). This is just a specific version of defendants' more general objection to the delivery of notices, which the Court rejects.

The Lease provides that "Landlord may furnish to Tenant, with respect to each Operating Year, a Landlord's Operating Statement setting forth Landlord's estimate of Tenant's Operating Payment for such Operating Year" (emphasis added), in which case plaintiff could bill The Gym monthly for one-twelfth of that amount (plaintiff's exh. C, Article 29(C), docket no. 115). It also provides that "[a]fter the end of each Operating Year, Landlord *shall* furnish to Tenant a Landlord's Operating Statement for such Operating Year" (emphasis added). (Id., Article 29[D]). Paragraph 29 (G) of the Lease provides:

> "(G) Any Landlord's Operating Statement sent to Tenant shall be conclusively binding upon Tenant unless, within sixty (60) days after such Landlord's Operating Statement was sent, Tenant shall send a written notice to Landlord objecting to such Landlord's Operating Statement and specifying the respects in which such Landlord's Operating Statement is disputed. If Tenant shall send such notice with respect to a Landlord's Operating Statement, and Landlord shall determine that such objection(s) are reasonable and

> are made in good faith, then Tenant may, on its own behalf by an independent certified public accountant (selected and paid by Tenant) examine Landlord's books and records relating solely to disputed aspects of the Operating Expenses to determine the accuracy of Landlord's Operating Statement."

Although plaintiff may not have strictly complied with these terms of the Lease in every respect, no objection was ever made and no such examination was ever conducted by an accountant. Certain statements of common area maintenance (CAM) were unquestionably sent (plaintiff's exh. X, docket no. 136), and The Gym never responded.

Defendants also complain that The Gym was doubled-charged for CAM, in particular for water, in 2017. But included in plaintiff's rent records are specific records of payments for specific amounts of these CAM charges, included in the $3,052,847.03 in rent and other charges defendants correctly assert were paid following the 2016 Stipulation of Settlement, without any evidence of questions having been raised, much less objections having been made. For the same reasons, defendants' objections to CAM charges for elevator service, building maintenance and sub-meter reading are also rejected.

In the case of the allegedly over-billed and duplicative water charges, this Court notes that, although some of the Operating Statements did include water charges, they were broken out separately and accurately from the rest of the CAM charges on the rent history. (Compare plaintiff's exhs. K and X, docket nos. 123 and 136)

Finally, defendants' object to certain CAM and operating expense charges dating back to 2014, including such items as elevator service (Malter Aff., ¶¶85-88, docket no. 49) (*see also* Malter Aff., ¶¶72-81, docket no. 149). These charges were incorporated into the parties' 2016 Stipulation of Settlement and the time to object to them has long since passed.

2. Water Charges

Paragraph 30 (E) of the Lease provides:

> Landlord shall provide water for ordinary drinking, cleaning and lavatory purposes, but if Tenant requires, uses or consumes water for any other purpose or in unusual quantities (of which fact Landlord shall be the sole judge), Landlord may install a water meter at Tenant's expense and thereby measure Tenant's water consumption for all purposes.

(Plaintiff's exh. C, docket no. 115)

Defendants concededly ran a gym facility, with showers and a sauna, which are not uses of water "for ordinary drinking, cleaning and lavatory purposes."

Defendants nevertheless assert that use as gym facility was a Permitted Use under the Lease and therefore they should not be charged for water. The use clause in the Lease ¶1(A)(xi), provides:

> "'Permitted Uses' shall mean an exercise and health club facility with ancillary facilities and general offices in connection with Tenant's business and the business of Tenant's assignees and permitted assigns or for general office use."

(Plaintiff's Exh. C, docket No. 115). Defendants' objection is of no moment herein. Something can be a Permitted Use at the same time that the landlord is contractually entitled to charge for it.

Defendants maintain that it is not clear how the water charges were calculated or whether there were any submeter readings. (Malter Aff., ¶¶49-54, docket no. 149). Although the quality of plaintiff's documentation of these charges could be better (see Plaintiff's exh. Y, docket no. 134), The Gym never questioned any of these charges prior to the litigation between the parties. The rent history reflects that The Gym was billed between $1,500-$2,000 per month for water, with very few months falling outside of that range. (Plaintiff's exh. K, docket no. 123).

Defendants also object that they were allegedly billed for roughly double the amount of water utilized per member at another gym owned by The Gym in Connecticut. (Malter Aff., ¶56, docket no. 149). However, the summary document proffered by defendants in support of this argument is not authenticated. Thus, there is insufficient evidence to create an issue of fact precluding summary judgment (compared to plaintiff's evidence that water charges were assessed at 14th Street over many years and The Gym never objected).

Finally, defendants assert that the building used water for façade work, which defendants assert may have been included in the water charges. (Malter Aff., ¶60, docket no. 149). Beyond this speculative assertion, there is no attempt to connect that statement to any evidence.

3. Real Estate Taxes

Defendants oppose rent charges for real estate tax escalations (Article 28 of the Lease), arguing they did not receive Landlord's tax statements as provided for by the Lease. Again, the parties' long course of conduct, including payment of these real estate tax escalations by The Gym without objection, belies the defense.

In fact, the one time in the record that The Gym did raise actual questions about the rent calculations related to real estate taxes. In 2015, The Gym raised questions about why the real estate taxes had increased, and the parties exchanged emails, including questions such as whether the real estate tax charges appropriately included so-called Business Improvement District, or "BID" charges, presumably for the Union Square BID which is where the building was located. (Malter Aff., ¶90, docket no. 149). Defendants claim that plaintiff never responded to the last email in the thread, but again The Gym paid the rent, including those charges, and never followed up any further. (Defendants' exh. D, docket no. 154). In fact, the email thread is consistent with the conclusion that The Gym was provided with a telephonic explanation. In any

event, because these questions were raised back in 2015, the amount of rent due, including amounts charged for real estate taxes, was incorporated in the 2016 Stipulation of Settlement. There is no evidence of a question ever having been raised about real estate tax charges prior to this motion.

Defendants also question certain real estate tax bills rendered by the New York City Department of Finance (Malter Aff., ¶89), although there is no effort by defendants to connect any such bills to actual transactions between plaintiff and The Gym. Indeed, amounts paid to the New York City Department of Finance following the parties' 2016 Stipulation of Settlement were consistent with amounts billed to The Gym, as reflected by both the statements furnished by plaintiff and the rent history (plaintiff's exhs. K, W, docket nos. 122, 135).[1]

Lease Brokerage Commission

Plaintiff next seeks $393,639.63 for a brokerage commission paid to secure a new tenant for the space after The Gym's surrender. (Plaintiff's exh. U, docket no. 133) Defendants do not appear to contest this element of plaintiff's damages, and the Lease provides that:

> "(b) *Tenant also shall be liable for and shall pay to Landlord, as damages*, any deficiency (referred to as 'Deficiency') between the Rent reserved in this Lease for the period which otherwise would have constituted the unexpired portion of the Tenant and the net amount if any, of rents collected under any reletting directed pursuant to the provisions of subsection A(j) of this Article 18 or any part of such period (first deducting for the rents collected under any such reletting *all of Landlord's expenses in connection with the termination of this Lease*, or Landlord's reentry upon the Premises and with such reletting, *including*, but not limited to, al

[1] Even if defendants' argument about real estate tax escalations had merit, this Court notes the miniscule amounts involved. The alleged "discrepancies," which this Court concludes are not actual discrepancies, total less than $10,000 over the entire period following the Stipulation of Settlement where the parties agreed to amounts then outstanding, as compared to the more than $1,000,000 per year in base rent alone. This difference may be why The Gym did not challenge the real estate tax escalation calculations until the parties began to litigate. The amount of the so-called "discrepancies" is dwarfed not only by the base rent, but also by the late fees, bounced check fees and other similar assessments based on The Gym's ongoing failure to meet its rent obligations. (Plaintiff's exh. K, docket no. 123). Defendants make no objection to any of these assessments, and could not given that The Gym was routinely tardy in paying its rent and the Lease allows for such assessments when the rent is not received on time.

> repossession costs, *brokerage commissions*, advertising, *legal expenses, reasonable attorneys' fees . . .* (*emphasis added*)."

(Plaintiff's exh. C, Article 18, docket no. 115).

Attorneys' Fees

Finally, plaintiff seeks $86,427.88 in attorneys' fees, and the Lease does provide for the recovery of "legal expenses [and] reasonable attorneys' fees." (Lease, Article 18, sections B[b] and C, Plaintiff's exh. C, docket no. 115). Since this Court has already ruled on plaintiff's motion for summary judgment as to liability, plaintiff is entitled to an award of attorneys' fees. (Docket No. 62, at 7). Defendants do not object to the reasonableness of particular time entries or categories of charges (plaintiff's exh. Z, docket no. 138), and indeed it would be difficult to do so in light of how vigorously they themselves have litigated this case. They also do not object to the hourly rates charged.

Instead, defendants argue that plaintiff "is not, under any circumstances the 'prevailing party' for purposes of attorneys' fees." (Lambert Aff. ¶86, docket No. 148) The basis for that argument is that plaintiff abandoned its claim for the 32 remaining months of base rent at the rate of $88,000 per month, totaling $2,816,000, which defendants say was 70% of plaintiff's damages alleged at the outset of the case. However, plaintiff has prevailed on all of its claims in this action and the mere fact that plaintiff mitigated its damages, thus reducing the amount of damages due from defendants, is not a basis upon which to find that plaintiff did not prevail in this action.

This Court does note, however, that plaintiff is attempting to charge defendants with legal fees incurred since 2015. (Plaintiff's exh. Z, docket No. 138). As noted above, the parties' 2016 Stipulation of Settlement included an agreed attorneys' fee amount of $18,000, which was

included in the $865,802 amount then agreed to be due. That amount rolled forward, with credits for payments and debits for new rent and other charges. (Plaintiff's exh. K, docket no. 123). Thus, if plaintiff were allowed here to charge *all* of its attorneys' fees incurred since inception, there would be a double-count of that $18,000 amount. Accordingly, this Court will only award plaintiff $68,427.88 in attorneys' fees.

Wrongful Eviction and Other Miscellaneous Factors

Finally, defendants argue they are not liable for damages due to wrongful eviction, loss of files and customer lists, and plaintiff's attempt to undermine The Gym's business by, inter alia, undermining its attempts to sell the same. (Malter Aff. ¶¶5-24, docket no. 149). Since each of these arguments was made in opposition to plaintiff's motion for summary judgment on liability and the Court rejected them at that time, they are not relevant to the calculation of plaintiff's damages.

Conclusion

For the reasons set forth above, this Court determines that plaintiff is entitled to judgment against all defendants except Barnet Liberman as follows:

$ 841,046.10	Rent and charges
$ 240,000.00	Free rent "clawback"
$ 393,639.63	Brokerage commission
$ 68,427.98	Attorneys' fees
$1,543,113.71	Total

Accordingly, it is hereby:

ORDERED that plaintiff Epic W14 LLC is entitled to a judgment against defendants Stefan Malter, Seth Hirschel, Marc Miles, and The Gym at Union Square, LLC d/b/a Clay, jointly and severally, in the following amounts:

a. $841,046.10 for unpaid rent and charges, plus interest, to be calculated by the Clerk, from February 7, 2019, the date on which The Gym at Union Square surrendered the premises;

b. $240,000, representing the amount of the free rent clawback to which plaintiff is entitled, plus interest, to be calculated by the Clerk, from February 7, 2019, the date on which The Gym at Union Square surrendered the premises;

c. $393,639.63, representing the amount paid by plaintiff as a brokerage commission, plus interest, to be calculated by the Clerk, from April 25, 2019, the date on which plaintiff paid the commission; and

d. $68,427.98, representing the amount of attorneys' fees paid by plaintiff, plus interest, to be calculated by the Clerk, running from the date of this decision and order.

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6/3/2022
DATE

DAVID B. COHEN, J.S.C.

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