SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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1995 CAM LLC,

Plaintiff,

- v -

WEST SIDE ADVISORS, LLC,GARY LIEBERMAN

Defendant.

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INDEX NO. 159492/2021

MOTION DATE 01/06/2022

MOTION SEQ. NO. 001

DECISION ON MOTION - SUBMIT ORD / JGMT (AMENDED)

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for DISMISS.

Oral argument took place on June 1, 2022. with David Rosenbaum appeared for Plaintiff 1995 Cam LLC ("Landlord") and Thomas C. Lambert appeared for Defendants West Side Advisors, LLC ("Tenant") and Gary Lieberman ("Guarantor") (collectively "Defendants"). Upon oral argument and the foregoing documents, the Court's decision is as follows.

I. Factual Background

Landlord owns Suite 800 of 1995 Broadway, New York, New York 10023 (the "Premises") (NYSCEF Doc. 1 at ¶¶ 2, 5). Tenant and Landlord executed a written agreement dated November 23, 2004 (the "Lease") wherein Tenant leased the Premises from Landlord (*id.* at ¶ 5). The Premises were leased to operate an executive and administrative office for Tenant's asset management business (*id.* at ¶ 7). The Lease went through various modifications extending the lease term, including a second modification dated March 23, 2016 (the "Second Modification") which extended the lease term to February 28, 2023 (*id.* at ¶¶ 8-11).

Pursuant to the terms of the Second Modification, Tenant agreed to pay Landlord monthly rent in the amount of $24,835.79 from March 1, 2020 through February 28, 2021, on or before the first day of each month (*id.* at ¶¶17-18). The monthly rent increased to $27,378.56 from March 1, 2021 through February 28, 2022 and to $28,063.02 per month from March 1, 2022 through February 28, 2023 (*id.* at ¶¶ 19-20). Tenant also agreed to pay, as additional rent, electric charges at a rate of $1,218.75 per month, and upon signing a third modified agreement, agreed to pay as additional rent air conditioning electric charges in the amount of $208.33 per month (*id.* at ¶¶ 22-23). Tenant also agreed to pay a variety of other fees as additional rent, including a real estate tax escalation charge, freight elevator charges, water meter usage charges, cleaning services charges, trash removal services, and late fees (*id.* at ¶¶ 24-28). Finally, Tenant also agreed to a liquidated damages clause which required payment of the rent and additional rent constituting the balance of the term of the Lease as if Tenant had remained in possession through completion of the Lease, along with costs in re-letting the Premises, as said damages accrued each month (*id.* at ¶ 29). Tenant agreed that if Landlord had to enforce the terms of the Lease, Tenant would pay Landlord for reasonable attorneys' fees (*id.* at ¶ 30).

The Second Modification contained a guaranty (the "Guaranty") whereby Guarantor agreed to pay for all of Tenant's monetary obligations (*id.* at ¶ 31). The Guaranty limited Guarantor's liability if Tenant gave thirty days' notice of its intent to vacate the Premises, that all rent is paid up to the date the Premises were vacated, and that the Premises are completely vacated and surrendered pursuant to the terms of the Lease (NYSCEF Doc. 16 at ¶ 9).

Tenant has stopped paying rent, electric charges, A/C electric charges, late fees, and real estate tax charges since July 2020 (NYSCEF Doc. 23 at ¶¶ 47-49; 51). On October 28, 2020, Tenant sent Landlord a notice of its intention to surrender the Premises as of November 30, 2020,

and Tenant did vacate the Premises on or before November 30, 2020 (NYSCEF Doc. 1 at ¶¶ 14-15). Tenant is no longer in business (NYSCEF Doc. 47 at ¶ 5). There was no written agreement whereby Landlord accepted Tenant's surrender of the Premises (NYSCEF Doc. 48 at ¶ 9).

II. Procedural Background

Landlord filed a Complaint seeking to recoup damages for Tenant's breach of the Lease allegedly incurred both pre- and post-vacatur, as well as attorneys' fees. (NYSCEF Doc. 1). Landlord also seeks declaratory judgment that Guarantor is not protected by New York City Administrative Code § 22-1005 (the "Guaranty Law"). Defendants filed a pre-answer motion to dismiss seeking dismissal of Landlord's second, third, and fourth causes of action based on CPLR §§ 3211(a)(1) and (7) (NYSCEF Doc. 9). Tenant argued it surrendered the Premises in accordance with the terms of the Lease, and that the Guaranty is unenforceable against Guarantor pursuant to the Guaranty Law. Landlord in turn opposed Tenant's motion to dismiss arguing that the Guaranty Law does not apply, and cross-moved for summary judgment and to amend its pleadings to conform to new amounts due pursuant to CPLR § 3025(c).

III. Discussion

A. Amend Pleadings

Pursuant to CPLR 3025(b), absent prejudice, a party may amend its pleading at any time upon such terms as may be just (*see also Hancock v 330 Hull Realty Corp.*, 225 AD2d 365 [1st Dept 1996]). CPLR 3025(c) provides that "the court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances." Defendants have not opposed this branch of Landlord's motion, nor have they shown how they might be prejudiced. Therefore, Landlord's motion seeking to amend its Complaint to conform to the evidence in the record is granted.

B. Motion to Dismiss

i. Standard

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

On a motion to dismiss based on failure to state a cause of action pursuant to CPLR § 3211(a)(7) the Court must accept as true the facts as alleged in the Complaint and afford a plaintiff the benefit of every possible favorable inference (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]; *Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). The Court's inquiry in determining a motion to dismiss pursuant to CPLR § 3211(a)(7) is whether the alleged facts fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

ii. The Complaint Partially Survives Defendants' Motion to Dismiss

Tenant argues that the documentary evidence conclusively establishes that Tenant properly surrendered the Premises so as to cut off Guarantor's liability pursuant to the terms of the Guaranty. Moreover, Tenant argues that the Guaranty is unenforceable against Guarantor for rent accrued between March 7, 2020 and June 30, 2021 pursuant to the Guaranty Law. The Court rejects both arguments.

First, the terms of the Guaranty expressly state that Guarantor's liability is limited only if Tenant "completely vacated and surrendered the Demised Premises to Owner free and clear of any and all subtenants and/or occupants **pursuant to the terms of the Lease**" (NYSCEF Doc. 28 at ¶ 9) (emphasis added). Pursuant to the terms of the Lease, "No act or thing done by Owner or Owner's agents during the term hereby demised shall be deemed an acceptance of a surrender of said premises and no agreement to accept such surrender shall be valid unless in writing signed by Owner" (NYSCEF Doc. 26 at ¶ 25). Moreover, the Lease explicitly provides that "No employee of Owner or Owner's agent shall have any power to accept the keys of said premises prior to the termination of the Lease and the delivery of keys to any such agent or employee shall not operate as a termination of the Lease or a surrender of the premises." (*id.*). Because there is no documentary evidence of any written agreement whereby Landlord accepted Tenant's surrender, the Complaint cannot be dismissed according to documentary evidence as, per the terms of the Lease, Tenant did not validly surrender the Premises.

Defendants' argument based on the Guaranty Law is similarly unavailing. The Lease states that the Premises shall be used as executive and administrative offices in connection with Tenant's asset management business (*id.* at ¶ 2). To qualify for the protections of the Guaranty Law, one of the following conditions must be satisfied: (1) the tenant was required to cease serving customers food or beverage for on-premises consumption or to cease operation; (2) the tenant was a non-essential retail establishment subject to in-person limitations or (3) the tenant was required to close to the public (New York City Admin Code § 22-1005). Tenant falls within the category of essential services related to financial markets (Executive Order [Cuomo] No. 202.6 [9 NYCRR 8.202.6]; *see also "Guidance on Executive Order 202.6"*, Empire State Development (Guidance on Executive Order 202.6 | Empire State Development (ny.gov)). Therefore, since Tenant does not

meet any of the three categories required for the Guaranty Law to apply, Defendants' argument that the Guaranty Law bars Landlord's cause of action seeking enforcement of the Guaranty is without merit.

However, Defendants have successfully shown documentary evidence sufficient to dismiss Landlords' claims for accelerated rent that may accrue after the date of this decision. As a general matter, "no action can be brought for future rent in the absence of an acceleration clause." *Long Island R. Co. v Northville Industries Corp.*, 41 NY2d 455, 467 [1977]; *23 East 39th Street Developer, LLC v 23 East 39th Street Management* Corporation, 172 AD3d 964, 201 [2d Dept 2019]; *Beaumont Offset Corp. v Zito*, 256 AD2d 372, 373 [2d Dept 1998]; *Utility Garage Corp. v National Biscuit Co.*, 71 AD2d 578, 579 [1st Dept 1979]). Here, the Lease at ¶18 expressly provides that any deficiency in rent stemming from Tenant's default "shall be paid in monthly installments by Tenant on the rent day specified in this Lease and any suit brought to collect the amount of the deficiency for any month shall not prejudice in any way the rights of Owner to collect the deficiency of any subsequent month by a similar proceeding." (NYSCEF Doc. 26). The rent day is the first day of each month, therefore the Lease requires Plaintiff to wait until future rents accrued on the first of each month to recover future damages. Therefore, Landlord cannot maintain an action insofar as it seeks future rent beyond that which has accrued as of the date of this decision (*525 Delaware LLC v Volumecocomo Apparel, Inc.*, 2022 NY Slip Op 30459 (U) [Sup Ct, New York County 2022]).

Although Landlord has also posited its second cause of action seeking accelerated damages under a theory of anticipatory breach, the Court finds that this legal theory still does not allow Landlord to recover all rent that may be due under the term of the Lease at once. First, this theory contradicts the plain, clear, and unambiguous terms of the contract which requires Landlord to

seek any deficiencies on a monthly basis (*W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020] [where the language of the lease is unambiguous and was negotiated in an arm's-length transaction, the terms of the lease are to be strictly construed]). Second, to allow Landlords who do not include an accelerated damages provision in their Lease to collect accelerated damages merely by pleading anticipatory breach would eviscerate decades worth of New York precedent laying out, as a matter of law, that future rent cannot be collected without an accelerated damages provision (*Long Island R. Co. v Northville Industries Corp.*, 393 NYS2d 925, 931 [1977]; *Maflo Holding Corp. v S. J. Blume, Inc.*, 308 NY 570 [1955]; *Runfola v Cavagnaro,* 78 AD3d 1035 [2d Dept 2010]; *Gotlieb v Taco Bell Corp.*, 871 F.Supp. 147, 155 [EDNY 1994]; *Utility Garage Corp v National Biscuit Co.*, 71 AD2d 578 [1st Dept 1979]).

Regarding Defendants' CPLR § 3211(a)(7) motion, the Court finds that Landlord has sufficiently pled causes of action seeking pre-vacatur arrears, post-vacatur arrears to the date of this decision, enforcement of the Guaranty for defaults to the date of this decision, and for attorneys' fees. The Court finds that Landlord's allegations most certainly fit within legally cognizable claims for the challenged Second, Third, and Fourth causes to the extent they were not dismissed for damages related to future rent per the reasoning laid out in the paragraph above.

C. Summary Judgment

i. Standard

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Once this showing is made, the burden shifts to the

party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*see e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

To sustain a cause of action for breach of contract, Plaintiff must prove the existence of a contract, Plaintiff's performance, Defendant's breach, and damages (*see Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." (*L. Raphael NYC C1 Corp. v Solow Building Company, L.L.C.*, 206 AD3d 590, 592-593 [1st Dept 2022], quoting *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

ii. Pre-Vacatur Arrears

Landlord has made a prima facie showing of entitlement to unpaid rent as the existence of the Lease is not in dispute, there is no dispute over whether Landlord performed its obligations under the Lease, and it is uncontroverted that Tenant breached by failing to pay rent. Landlord has been damaged since it has lost expected income from the Lease and allowing Tenant to use and occupy the Premises (*Jimenez v Henderson*, 41 NYS3d 26, 27 [1st Dept 2016]).

Defendants oppose Landlord's cross-motion for summary judgment on Landlord's first cause of action seeking pre-vacatur rent arrears on the basis that issue has not yet been joined and therefore summary judgment is inappropriate. Defendants rely on CPLR § 3211(c) in support of this assertion; however, that rule expressly states that "Whether or not issue has been joined, the

court, after adequate notice to the parties, may treat the motion [to dismiss] as a motion for summary judgment." (*see also Huggins v* Whitney, 239 AD2d 174 [1st Dept 1997]; *Four Seasons Hotels Ltd. V Vinnik*, 127 AD2d 310, 319-321 [1st Dept 1987]). Where, as here, one party moves for summary judgment, the parties have revealed their proof and clearly charted summary judgment, and the action exclusively involves issues of law, namely matters of contract interpretation, a pre-joinder motion for summary judgment is appropriate (*California Suites, Inc. v Russo Demolition Inc.*, 98 AD3d 144, 156 [1st Dept 2012]; *Mic Property and Cas. Ins. Corp. v Custom Craftsman of Brooklyn, Inc.*, 269 AD2d 333, 334 [1st Dept 2000]; *see also Huggins* at 174). Therefore summary judgment awarding pre-vacatur arrears is appropriate.

iii. Post-Vacatur Arrears and Liquidated Damages

Landlord claims to have met its prima facie burden to recover accelerated damages pursuant to ¶ 18 of the Lease. Defendants oppose Landlord's motion for summary judgment on its cause of action for liquidated damages for deficiencies owed post-vacatur on the basis that the lease does not include an acceleration clause but instead calls for Landlord to use commercially reasonable efforts to re-let the premises and that Tenant is only to pay Landlord for any deficiencies in the rent on a monthly basis. (NYSCEF Doc. 26 at ¶ 18). The Court agrees with Defendants that Landlord has not met its prima facie burden entitling it to accelerated damages.

Summary judgment should not be granted when discovery has not been exchanged which is exclusively and peculiarly in the possession of the party seeking that relief (*The Execu/Search Group, Inc. v Scardina,* 70 AD3d 451 [1st Dept 2010]). Although a commercial landlord normally does not have a duty to mitigate its damages if a commercial tenant vacates the premises prior to termination of the Lease, here the Lease places a burden on the Landlord to use commercially reasonable efforts to re-let the premises. Since Landlord is the only party with knowledge of what

efforts it has undertaken to re-let the premises, and there has not yet been any discovery exchanged, nor has Landlord shown what efforts it has taken to relet the premises, the Court finds it premature to grant summary judgment on any post-vacatur damages.

iv. Guarantor's Liability

Landlord has made a prima facie showing that it is entitled to damages from Guarantor for Tenant's defaults and the damages associated with that default (*W. & M. Operating, L.L.C. v Bakhshi*, 159 AD3d 520, 521 [1st Dept 2018]). Guarantor's liability was not cut off when Tenant vacated because the express terms of the guaranty were not complied with, namely, there was no written agreement accepting Tenant's surrender pursuant to ¶ 25 of the Lease. Guarantor has not paid for any of Tenant's monetary obligations as contemplated by the terms of the Guaranty.

Although Defendants oppose the Guarantor's liability according to the terms of the Lease and the Guaranty Law, the Court finds these arguments unavailing for the reasons set forth in Section (III)(B)(ii) of this decision. Therefore, Landlord motion seeking declaratory judgment that the Guaranty Law is inapplicable to the premises is granted. To the extent Landlord seeks to hold Guarantor liable for Tenant's pre-vacatur arrears, that branch of the motion is similarly granted. To the extent Landlord seeks to hold Guarantor liable for any accrued rent post-vacatur, that branch of the motion is denied for the reasons set forth in Section (III)(C)(iii).

v. Attorneys' Fees and Disbursements

Where a lease provides for the payment of legal fees, the prevailing party in litigation is entitled to recover fees and disbursements (*Sykes v RFD Third Avenue*, 227 AD2d 146 [1st Dept 2007]). Both the Lease and the Guaranty contain language making Tenant and Guarantor liable for costs expended in enforcing the terms of the Lease in the event of default (NYSCEF Docs. 19-20). Because Landlord has prevailed on its motion for summary judgment, Landlord is entitled to

recoup reasonable attorneys' fees and disbursements expended to date. This is a non-final disposition of Landlord's cause of action for Attorneys' Fees and Disbursements since there remains to be tried the issue of post-vacatur damages accrued at the time of this Decision.

vi. Late Fees

Landlord also seeks to recoup late fees for delinquent payments which, pursuant to ¶ 52 of the Lease, is calculated as a sum equal to five (5%) percent of the rents due and owing each month (NYSCEF Doc. 26). This late fee provision is unenforceable as against public policy since it is in excess of the per annum rate of 25% which is prohibited as criminal usury in the second degree. (*See* N.Y. Penal Law § 190.40; *ESRT 501 Seventh Avenue, LLC v Regine, Ltd.*, 206 AD3d 448, 449 [1st Dept 2022]; *Cleo Realty Associates, L.P. v Papagiannakis*, 151 AD3d 418, 419 [1st Dept 2017]). Therefore, Landlord is not entitled to late fees.

Accordingly, it is hereby,

ORDERED that this amended Decision and Order supersedes the Decision and Order issued on August 16, 2022 (NYSCEF Doc. 49); and it is further

ORDERED that Landlord's motion to amend its Complaint to include rent, additional rent, and other damages accrued to the date of this decision is granted; and it is further

ORDERED that Defendants' motion to dismiss Plaintiff's second and third causes of action is granted to the extent Landlord seeks to prematurely collect future rent and damages after the date of this decision that have not yet accrued; and it is further

ORDERED that Defendants' motion to dismiss Plaintiff's fourth cause of action is denied; and it is further

ORDERED and ADJUDGED that Landlord's motion for summary judgment on its first cause of action holding Defendants jointly and severally liable for pre-vacatur damages in the amount of $63,243.61[1] is granted, and it is further

ORDERED and ADJUDGED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED and ADJUDGED that New York City Admin Code § 22-1005 does not preclude enforcement of the Guaranty against Guarantor; and it is further

ORDERED that Landlord's motion for summary judgment seeking post-vacatur damages through the date of this decision is denied without prejudice; and it is further

ORDERED that Landlord is entitled to reasonable attorneys' fees and disbursements incurred in connection with Landlord's recovery of pre-vacatur rent and additional rent, and the amount of attorneys' fees and disbursements Landlord is entitled to recover is referred to a special referee to hear and report.

This constitutes the Decision and Order of the Court.

9/1/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, 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

[1] Landlord has shown it is entitled to $70,116.27 in pre-vacatur damages after applying Tenant's security deposit of $74,573.44 to its total damages of $144,689.71. Since $6,872.66 of Landlord's $70,116.27 amount of pre-vacatur damages are unenforceable late fees, Tenant and Guarantor are jointly and severally liable for $63,243.61 in damages.