

since then nor has the premises been re-rented. Plaintiff therefore sues for the balance of rent and additional rent due through the remainder of the lease term.

However, defendant states in an affidavit that plaintiff's attorney orally consented to his surrender of the premises in February 2018. Specifically, defendant claims the following:

Between February 19 and 26, 2018, I spoke to David Rosenbaum, attorney at Borah Goldstein, by telephone.

During my conversations with Mr. Rosenbaum, I offered to surrender the Premises. However, Mr. Rosenbaum advised me that Plaintiff believed that I owed two months' of rent. I understood Mr. Rosenbaum's statement to mean that Plaintiff was requesting that I pay two months' rent in exchange for surrendering the Premises. I advised Mr. Rosenbaum that I had limited resources. After some discussion, I offered to pay about \$30,000 and relinquish my security deposit in exchange for surrender of the Premises.

Based on my discussions with Mr. Rosenbaum, I understood that I had reached an agreement with Plaintiff, through Mr. Rosenbaum, for a surrender of the Premises. In reliance on my understanding, on or about February 22 and 23, 2018, I paid \$29,531.52 to Plaintiff.

Defendant has provided proof of the \$29,531.52 payment to the court. Defendant further states that "[a]t the trial of this matter, [he] intends to call Dr. Boris Zaretsky, a physical therapist, as a witness. Mr. Zaretsky was present when I spoke to David Rosenbaum and heard what I said to Mr. Rosenbaum."

In reply, Attorney Rosenbaum has submitted an affirmation essentially admitting to defendant's account, but notably differing on the terms of the subject oral agreement. Attorney Rosenbaum maintains that he only offered to settle a related non-payment proceeding, and that plaintiff refused to accept defendant's surrender in exchange for his security deposit. Attorney Rosenbaum unequivocally states that "At no time did I ever tell, notify, advise or hint to Defendant that I was authorized to waive the balance of the Lease claims or that I would."

Plaintiff maintains that the defendant's affidavit is self-serving, argues that the alleged oral agreement cannot modify the written commercial lease based upon its own terms, and that defendant has failed to raise a triable issue of fact. Here, the court agrees.

As plaintiff's counsel correctly points out, the subject lease contains a provision which prohibits oral modifications. A written lease provision precluding oral modifications is generally enforceable (see GOL § 15-301 [1]; *Joseph P. Day Realty Corp. v. Jeffrey Lawrence Associates, Inc.*, 270 AD2d 140 [1st Dept 2000] citing *99 Realty Co. v. Eikenberry*, 242 AD2d 215 [1st Dept 1997]). Exceptions to this rule are where a party can demonstrate partial performance which is "unequivocally referable to the claimed modification" or that a party should be equitably estopped from enforcing the no oral modifications clause (*Joseph P. Day Realty Corp.*, *supra* citing *Rose v. Spa Realty Assoc.*, 42 NY2d 338).

Here, defendant has failed to even raise a triable issue of fact as to whether the claimed oral modification is enforceable under either the concept of partial performance or equitable estoppel. That defendant made a payment of outstanding rent due or that plaintiff discontinued the nonpayment proceeding is of no moment, since defendant was already obligated to pay outstanding rent and once that payment was made, there was no basis for plaintiff to maintain the housing court proceeding.

In light of the foregoing, plaintiff's motion for summary judgment must be granted. As for its damages, plaintiff seeks a money judgment for unpaid rent and additional rent due through the end of the lease term, to wit, \$301,599.93, as well as an award for its reasonable attorneys' fees. In support of its calcu-

lations, plaintiff has provided the affidavit of Adam Abramson, one of its members, who "oversee[s] all aspects of managing the building..."

Since there is no dispute as to the amounts due under the lease, plaintiff is entitled to a money judgment for \$301,599.93. Further, since the lease provides that defendant shall reimburse plaintiff for "reasonable attorneys' fees in instituting, prosecuting or defending any action or proceeding" should plaintiff prevail, a hearing must be held to determine what attorneys' fees plaintiff is entitled to recover from defendant.

Accordingly, it is hereby

ORDERED that the motion is granted in its entirety; and it is further

ORDERED that the Clerk is directed to enter a money judgment in favor of plaintiff and against defendant for \$301,599.93 plus interest from February 1, 2018 together with costs and disbursements; and it is further

ORDERED that the issue of what attorneys' fees plaintiff is entitled to recover from defendant in instituting and prosecuting this action is referred to a special referee to hear and **report** and, pending receipt of the report and a motion pursuant to CPLR 4403, final determination of that branch of the motion is held in abeyance; and it is further

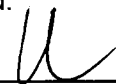
ORDERED that plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry and the accompanying Order of Reference, together with a complete Information Sheet¹, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date subsequent to the conclusion of the stay fixed above.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

11/17/18
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.

¹ Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh (under the "References" section of the "Courthouse Procedures link).

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 8

-----X
 FIFTY EAST FORTY SECOND COMPANY LLC

Plaintiff,

-against-

DR. ILYA AKSELRUD et al.

Defendant.
 -----X

**ORDER OF REFERENCE TO
 HEAR AND REPORT**

Index No. 154249/18

Present:

Hon. Lynn R. Kotler, J.S.C.

This matter having come on before the court on motion of PLAINTIFF for SUMMARY JUDGMENT and, pursuant to CPLR 4212, the court having on its own motion determined that it is appropriate to appoint a referee to hear and report the issue of what attorneys' fees plaintiff is entitled to recover from defendant in instituting and prosecuting this action, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the issue of what attorneys' fees plaintiff is entitled to recover from defendant in instituting and prosecuting this action; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M) for placement at the earlier possible date upon the calendar of the Special Referees Part, which, in accordance with the Rules of that Part, shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon.

Dated: New York, New York

11/13, 2015

SO ORDERED:



 LYNN R. KOTLER, J.S.C.