

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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EMPIRE, LLC,	INDEX NO.	<u>160102/2017</u>
	MOTION	
Plaintiff,	DATE	<u>10/17/2018</u>
	MOTION	
- v -	SEQ. NO.	<u>001</u>
ARMIN A. MEIZLIK CO., INC., and HAROLD WEISS,		
Defendants.	DECISION AND ORDER	

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HON. ANTHONY CANNATARO:

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, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff, Empire, LLC, the owner of the commercial building located at 37 West 47th Street in Manhattan, entered into a lease agreement with defendant Armin A. Meizlik Co. Inc. (Armin), for certain office space at the building, known as Suite 801. Defendant Harold Weiss executed an agreement with plaintiff guaranteeing Armin’s obligations under the lease. Plaintiff now moves pursuant to CPLR 3212 for summary judgment on the complaint seeking a judgment for \$77,399.76 for unpaid rent, additional rent, and liquidated damages, and for attorney’s fees either in the amount of \$10,000 or in an amount to be determined by the Court after a hearing. Defendants cross-move for summary judgment dismissing the complaint and to amend their answer to include a counterclaim.

With respect to defendants' cross motion for leave to amend their answer, CPLR 3025 (b) requires that motions to amend be freely granted in the absence of prejudice or unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit (*Thomas Crimmins Contr. Co., Inc. v City of New York*, 74 NY2d 166 [1989]). CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice (*Atlantic Mut. Ins. Co. v Greater N.Y. Mut. Ins. Co.*, 271 AD2d 278 [1st Dept 2000]).

In the instant case, defendants seek to add an "estoppel and counterclaim" to their answer. The counterclaim pertains to allegations contained in defendants' previously asserted defenses. Allowing defendants to include that counterclaim would not prejudice plaintiffs. Accordingly, the branch of defendants' motion for leave to amend their answer is granted, and the proposed answer attached to their motion papers is deemed the answer in this action.

The Court next addresses the motions by both parties for summary judgment. On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When there are no triable material issues of fact, it is incumbent upon a court, in the interests of judicial economy, to grant summary judgment (*Andre v Pomeroy*, 35 NY2d 557 [1980]).

In the instant case, it is undisputed that due to financial hardship and a consequent inability to pay the rent, Armin prematurely vacated the premises on or about July 31, 2017, ahead of the termination of the lease, which ran through September 2018. The dispute between the parties concerns only whether there was a valid surrender of the premises sufficient to relieve defendants of their obligations under the lease to pay all rents due through the end of the lease term. Defendants maintain that plaintiff accepted Armin's surrender of the premises, and, as such, that they are entitled to summary judgment. In the alternative, defendants maintain that there is at least an issue of fact as to whether Armin properly surrendered the premises, and so, plaintiff's motion for summary judgment must be denied. Plaintiff argues that there was never a signed surrender agreement, as required by the lease, and so the terms of the lease control.

In support of their contention, defendants provide an affidavit from Tomas Greenberger, the attorney who represented them at the time of their departure from the premises. Mr. Greenberger states that, before Armin vacated the premises, he personally contacted plaintiff to negotiate a surrender of the premises, and that plaintiff orally agreed to release defendants from the remainder of the lease provided that Armin paid rent through the date of surrender, did not rent a different location, and agreed to forfeit the security deposit. Armin then vacated the premises and gave the keys to the building's security guard. Plaintiff responds to Mr. Greenberger's version of events with its own affidavit from attorney Adam Abramson, who apparently was the person communicating with Mr. Greenberger, stating that plaintiff never accepted a surrender and that Mr. Abramson merely responded to defendants' inquiries about surrendering the premises by restating the terms by which the guarantor could be released.

Based on the foregoing, plaintiff has met its initial burden of demonstrating entitlement to summary judgment and defendants have failed to raise a factual issue sufficient to require trial. The law, while perhaps harsh, is clear that a commercial tenant's obligation to pay rent through the term of the lease is fixed, and a landlord is not obligated to mitigate its damages upon a tenant's decampment during the lease term (*Holy Props., Ltd. v Kenneth Cole Prods. Inc.*, 87 NY2d 130, 133-34 [1995]; *BP 399 Park Ave. LLC v PRET 399 Park Inc.*, 150 AD3d 507 [2017]; *New 24 West 40th St. LLC v XE Capital Mgmt., LLC*, 104 AD3d 513 [2013]).

Moreover, article 25 of the lease in effect between the parties required any modification of the lease, including terms relating to surrender by the tenant, to be in writing and signed by the landlord. Where a lease contains such a provision, in the absence of a writing, the tenant is liable for rent through the end of the lease term, and disputed allegations of an oral agreement to release the tenant from the lease are insufficient to raise an issue of fact (*see 99 Realty Co. v Eikenberry*, 242 AD2d 215 [1997] [the tenant's delivery of a letter unilaterally declaring a surrender and end of the lease does not modify a lease containing "no waiver" and general merger clauses barring modification except by writing and providing that a surrender would be accepted only in writing by the landlord; nor did an alleged oral promise support an estoppel defense]; *47 W. 14th St. v New York Wigs and Plus, Inc.*, 106 AD3d 527 [2013] [a surrender document is nonbinding where the lease between the parties required that modification or discharge be in a writing signed by the parties]). Further, the fact that Armin delivered the keys to the building's security guard does not amount to acceptance of a surrender by plaintiff since the lease specifically required Armin to return the keys to an authorized agent of plaintiff, and the security guard was not so authorized (*see Connaught Tower Corp. v Nagar*, 59 AD3d 218 [2009]).

As there has been no valid surrender in this case, plaintiff is entitled to a money judgment against Armin in the sum \$77,399.76 for rent due through the date tenant vacated, additional rent, and liquidated damages accruing through the end of the lease. Plaintiff is also entitled to a money judgment for the same amount against defendant Harold Weiss as guarantor of the lease. Here, defendant Harold Weiss signed a guaranty agreement with plaintiff dated October 4, 2013. Due to Armin's failure to abide by the provisions of the lease, having vacated mid-lease with unpaid rent outstanding and without surrendering the premises in accordance with the lease terms, per the guarantee agreement, Mr. Weiss remains liable to plaintiff for all of the tenant's monetary obligations (*see Gansevoort Realty, LLC v Laba*, 130 AD3d 521 [2015] [to prevail in an action on a 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"]).

Additionally, pursuant to paragraphs 18 and 19 of the lease, plaintiff is entitled to legal fees, and the matter will be set down for a hearing to determine the amount of fees and costs due to plaintiff as the prevailing party.

Accordingly, it is

ORDERED that the branch of the cross motion by defendants for leave to amend their answer is granted and the proposed answer attached to their motion papers is deemed the answer in this action; and it is further,

ORDERED that the branch of defendants' cross motion seeking summary judgment is denied, and it is further,

ORDERED that plaintiff is granted summary judgment in its favor on the first, second, third, and fourth causes of action of the complaint and may enter judgment as against both defendants, jointly and severally, in the sum of \$77,399.76, plus statutory interest from September 30, 2018 and it is further,

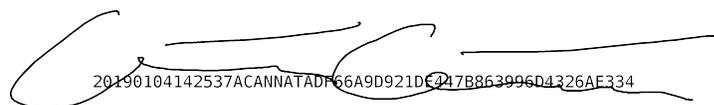
ORDERED that plaintiff is granted judgment in its favor on its fifth and sixth causes of action for legal fees on the issue of liability and the amount of attorney's fees is to be determined at a hearing, and it is further,

ORDERED that the Clerk shall enter judgment accordingly, and it is further,

ORDERED that the parties shall appear for scheduling of a fees hearing in Part 41 at 2:15 p.m. on February 6, 2019.

1/4/2019

DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE