SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon *Justice* PART 42

SIXTH AVENUE WEST ASSOCIATES, LLC

- v -

MANHATTAN WHOLESALERS, INC. and SHAHLA HAMRAH

INDEX NO. 654165/2013

MOTION DATE 6/11/14

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on the plaintiff's motion for summary judgment.

Notice of Motion/Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	No(s). 1
Answering Affirmation(s) — Affidavit(s) — Exhibits — Memorandum of Law and Opposition to Motion	No(s). 2
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 3

The motion seeking summary judgment on the complaint is decided in accordance with the attached memorandum decision.

Dated: October 16, 2014

, JSC

HON. NANCY M. BANNON
J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42

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SIXTH AVENUE WEST ASSOCIATES, LLC,

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 654165/2013

MANHATTAN WHOLESALERS, INC. and SHAHLA HAMRAH,

Defendants

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NANCY M. BANNON, J.

In this action to recover damages for breach of contract and to recover under a guaranty, the plaintiff moves for summary judgment on the complaint. For the reasons set forth below, the plaintiff's motion is granted on the issue of liability.

The plaintiff is owner and landlord of a commercial building located at 121 West 27th Street, New York, NY. On February 19, 2009, the plaintiff and non-party CFD 27, Inc. entered into a lease for the subject premises. The lease commenced on March 1, 2009 and set forth an expiration date of February 28, 2019. On December 17, 2009, CFD 27, Inc. assigned the lease to the defendant Manhattan Wholesalers, Inc. ("Manhattan Wholesalers"). Defendant Shahla Hamra ("Hamra") executed the lease assignment, which incorporated all terms of the lease between the plaintiff and CFD 27, Inc. On December 15, 2009, Hamra executed a "Good Guy" guaranty, wherein she personally agreed to be the guarantor of Manhattan Wholesalers' performance of its obligations under the lease.

On February 18, 2013, Hamra sent a letter to the plaintiff informing it that Manhattan Wholesalers would be vacating the premises "before the end of June 2013." According to the defendants, Hamra's husband, who is the General Manager and Vice President of Manhattan Wholesalers, spoke to Steven Albert, member of the plaintiff, in July 2013. At that time, Albert allegedly expressed the plaintiff's difficulty locating a new tenant for the space and asked if Manhattan Wholesalers would continue to occupy the space for a few months until a new tenant could be found. According to the defendants, they agreed and stayed in the space until they were informed in mid-October 2013 that the plaintiff had rented the space. According to

the plaintiff, however, the defendants approached Albert in July 2013 seeking to extend their lease through October 2013. The parties agree that any such agreement was not reduced to a writing. On November 1, 2013, Manhattan Wholesalers faxed and mailed the plaintiff written notice that as of October 30, 2013, they vacated the premises and returned the keys to the landlord and its property manager.

The plaintiff commenced this action on December 4, 2013, asserting six causes of action to recover damages for breach of contract, to recover under the guaranty, and for attorney's fees. The plaintiff alleges, *inter alia*, that Manhattan Wholesalers did not pay the full amount of rent due for the months of July and August 2013, that it failed to pay any rent for the months of September and October 2013, and that the defendants are liable for rent through the expiration of the lease on February 28, 2019. Issue was joined by the defendant's answer on December 18, 2013. On February 28, 2014, the plaintiff brought the instant motion for summary judgment on the complaint.

The plaintiff argues that summary judgment on the issue of liability should be granted because there is no triable issue of fact that Manhattan Wholesalers breached the lease when it ceased paying rent and vacated the premises before the end of the lease term. The plaintiff contends that the defendants, as tenant and guarantor, are liable for all rent and "additional rent" through the end of the lease term, February 28, 2019, as well as its reasonable attorney's fees pursuant to the lease. The plaintiff also argues that Manhattan Wholesalers anticipatorily repudiated its contractual obligations by its November 1, 2013 notice of vacatur. The plaintiff disputes that 6 months notice was given and asserts that the premises was not surrendered in broom clean condition.

In opposition, the defendants argue that triable issues of fact exist as to whether the lease was breached. The defendant's contend that the lease was properly terminated pursuant to its February 2013 notice in accordance with the "Good Guy" guaranty and that the plaintiff accepted the early termination. The defendants contend that Manhattan Wholesale was thereafter a month-to-month tenant. The defendants argue that there are questions of fact as to the amount of damages owed to the plaintiff including whether the plaintiff mitigated its damages, whether the plaintiff is entitled to an acceleration of rents through the end of the lease term, and whether the premises was broom clean upon the defendants' vacatur. The defendants further argue that the guaranty confers liability upon the guarantor only in the event of a holdover and that the plaintiff is not entitled to recover its attorney fees.

It is well settled that the proponent of a motion for summary judgment must make a

prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

A lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); 1009 Second Avenue Assocs. v New York City Off-Track Betting Corp., 248 AD2d 106 (1st Dept. 1998); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995). Thus, a written lease "agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield v Philles Records, Inc., 98 NY2d 562, 569 (2002); see MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640 (2009); Ashwood Capital, Inc. v OTG Management, Inc., 99 AD3d 1 (1st Dept. 2012); 150 Broadway N.Y. Associates, LP v Bodner, 14 AD3d 1 (1st Dept. 2004). A lease or any other contract is unambiguous and may not be altered if "on its face it is reasonably susceptible of only one meaning." See Greenfield v Philles Records, 98 NY2d at 570. "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" by looking within the four corners of the document. Greenfield v Philles Records, Inc., 98 NY2d at 569; see W.W.W. Assocs. v Giancontieri, 77 NY2d 157, 162-163 (1990); Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade, 98 AD3d 403 (1st Dept 2012); Jet Acceptance Corp. v Quest Mexicana S. A., 87 AD3d 850 (1st Dept 2011). The court is concerned "with what the parties intended...only to the extent that they evidenced what they intended by what they wrote." Akaska Holdings, LLC v Sweet, 115 AD3d 556 (1st Dept. 2014) quoting Ashwood Capital Inc. v OTG Mgt., Inc., 99 AD3d 1, 7 (1st Dept. 2012).

Here, the executed lease, rider, and assignment agreement submitted by the plaintiff are clear and unambiguous that the plaintiff's written consent upon the defendants' notice of vacatur or surrender of the premises is required to terminate the lease before its expiration. Paragraph 21 of the lease states, "Upon the expiration or other termination of the term of this lease, and not before without the written consent of Owner, 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 rider provides in section 43.1, "Any

notice, request, consent, approval, or demand permitted or required to be given pursuant to the terms, covenants and conditions of this Lease, or pursuant to any law or governmental regulation, shall be in writing and, unless otherwise required by such law or regulation, be sent by certified mail, return receipt requested." The record establishes that the defendants provided notice via their February 2013 letter and vacated the premises on October 31, 2013 as per their November 1, 2013 letter surrendering the keys to the premises.

The defendants do not dispute that the plaintiff's consent in writing was never given. The defendants contend that the plaintiff verbally consented to their vacatur during their July 2013 conversation. The lease, however, requires the plaintiff's written consent to the vacatur. A notice letter with verbal consent, therefore, fails to meet the requirements of the lease. See Connaught Tower Corp. v Nagar, 59 AD3d 218 (1st Dept. 2009). The defendants argue that their February 2013 letter sufficiently terminated the lease as per the requirement of the guaranty that the guarantor, Hamra, will provide at least six months notice of Manhattan Wholesalers' intention to vacate the premises. Contrary to the defendants' contention, such notice without the plaintiff's written consent was insufficient for the purpose of terminating the lease, as the lease did not incorporate the terms of the guaranty. Even though the defendants provided notice in accordance with the guaranty, such notice did not operate to terminate the lease before the end of its term.

Once a lease is executed, a tenant's obligation to pay rent is fixed according to its terms. See Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc., 87 NY2d 130 (1995). The lease and rider establish that the lease did not expire until February 28, 2019. The plaintiff alleges that the defendants failed to pay the full amount of rent due for the months of July and August 2013 and that it failed to pay any rent for the months of September and October 2013. The defendants do not dispute that the full amount of rent due in July and August 2013 was not paid. However, the defendants contend that they applied their security deposit to the last two months rent because Steven Albert, member of the plaintiff, said that the security deposit would be returned to the defendants when they vacated the premises. The lease clearly specifies that, in the event the defendants default in the payment of rent, the plaintiff "may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any Rent and Additional Rent or any other sum as to which [the defendant] is in default or for any sum which [the plaintiff] may expend or may be required to expend by reason of [the defendant's] default in respect of any of the terms, covenants and conditions of this Lease..." (emphasis added). The lease does not require the plaintiff to apply the security deposit to unpaid rent and the defendants do not submit any evidence that the plaintiff consented to such an arrangement.

Parties to a lease are free to contract as they please. See Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc., 87 NY2d 130; Patchogue Associates v Sears Roebuck and Co., 108 AD3d 659, 660 (2d Dept. 2013); 1029 Sixth, LLC v Riniv Corp., 9 AD3d 142 (1st Dept. 2004). The parties may contract for the tenant to remain liable for the rent for the duration of the lease term, however no action can be brought for future rent in the absence of a provision permitting acceleration. See Van Duzer Realty Corp. v Globe Alumni Student Assistance Assoc., Inc., 102 AD3d 543 (1st Dept. 2013); Ring v Printmaking Workshop, Inc., 70 AD3d 480 (1st Dept. 2010). Paragraph 18 of the lease expressly provides that, upon the defendants' default, the plaintiff has no duty to mitigate its damages and the defendants remain liable for all monetary obligations under the lease. Paragraph 18 also states, "In case of any such default, reentry, expiration, and/or dispossess by summary proceedings or otherwise, (a) the Rent and Additional Rent, shall become due thereupon and be paid up to the time of such reentry, dispossess and/or expiration." Paragraph 18 continues to detail the manner of calculating the liquidated damages due to the plaintiff of "any deficiency between the rent...reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the Demised Premises for each month of the period which would otherwise have constituted the balance of the term of this Lease." Accordingly, the contract makes clear the parties' intention for the defendants to remain liable for rent for the duration of the lease term, less any rent collected by a subsequent tenant if the plaintiff leases the premises.

Furthermore, the plaintiff may recover for expenditures incurred prosecuting or defending any actions or proceedings that result from the defendants' default in the performance of any covenant or obligation under the lease. Paragraph 19 of the lease reads in pertinent part, "if [the plaintiff]... in connection with any default by [the defendant] in the covenant to pay Rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be Additional Rent thereunder and shall be paid by [the defendant]." Paragraph 18 also holds the defendants liable for expenses incurred due to their default. Paragraph 18 states, "In computing such liquid damages there shall be added to the said deficiency such expenses as [the plaintiff] may incur in connection with re-letting, such as legal expenses, attorney's fees, brokerage, advertising, and for keeping the demised premises in good order or for preparing the same for reletting." The language of paragraphs 18 and 19 is clear and unambiguous. By agreeing to the lease, the defendants agreed to be liable for attorney's fees, costs, and disbursements incurred by plaintiff in this proceeding.

Where "a creditor seeks summary judgment upon a written guaranty, the creditor need prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guarantee." Kensington House Co. v Oram, 293 AD2d 304, 304-305 (1st Dept. 2002). The plaintiff submitted the "Good Guy" guaranty executed by Hamra stating that she is responsible for the payment of rent, additional rent, and other charges "to the latest date that Tenant and its assigns and sublessees, if any, will have completely performed the following: 1. Vacated and surrendered the Demised Premises in broom clean condition to [the plaintiff] pursuant to the terms of the Lease, and 2. Delivered the keys to the Demised Premises to [the plaintiff], and 3. Paid to [the plaintiff] all Accrued Rent to and including the date which is the later of (a) the actual receipt by [the plaintiff] of said Accrued Rent, (b) the surrender of the Demised Premises, or (c) receipt by [the plaintiff] of the keys to the Demised Premises." The defendants contend that such provision applies only in the event that the plaintiff incurs damages resulting from a holdover, but do not provide any support for this assertion. The paragraph that follows addresses the event of a holdover, but pertains to payment of damages and legal fees incurred by the plaintiff in that scenario. The two paragraphs address distinct issues and the second paragraph's reference to a holdover does not render the entire guaranty subject to that condition. As the record establishes the defendants have vacated the premises and delivered the keys to the plaintiff, Hamra, as guarantor, is therefore liable for rent, additional rent, and other charges that accrue to the date Manhattan Wholesalers pays all accrued rent to the plaintiff. Moreover, as guarantor for all of Manhattan Wholesalers' financial obligations under the lease, Hamra is equally liable for attorney's fees, costs, and disbursements incurred by the plaintiff in this proceeding.

The plaintiff established its prima facie entitlement to summary judgment on the issue of liability on its claims for unpaid rent and additional rent under the lease and the guaranty and for reasonable attorney's fees. In opposition, the defendants failed to raise a triable issue of fact. Accordingly, the plaintiff's motion for summary judgment is granted on the issue of liability. Because issues of fact exist as to the amount of damages due to the plaintiff, the plaintiff's motion for summary judgment seeking damages in the amount of $1,070,066.79 plus interest, costs and disbursements, and legal fees is granted only to the extent that a hearing is directed.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted on the issue of liability, and it is further

ORDERED that the plaintiff's motion for summary judgment on the issue of damages is

granted to the extent that a hearing is directed, and it is further

ORDERED that the plaintiff's application for attorney's fees is granted to the extent that a hearing is directed, and it is further,

ORDERED that the plaintiff shall appear for a hearing on damages and attorney's fees on January 14, 2015, at 2:30 p.m. at 111 Centre Street, New York, N.Y., room 1127A .

This constitutes the Decision and Order of the court.

Dated: October 16, 2014

, JSC

HON. NANCY M. BANNON
J.S.C.