274 Madison Co. LLC v Ramsundar
2016 NY Slip Op 30530(U)
March 30, 2016
Supreme Court, New York County
Docket Number: 153425/2012
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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274 MADISON COMPANY LLC,

Plaintiff,

-against-

SILVION RAMSUNDAR and MANHATTAN EGOSCUE, LLC,

Defendants.

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Index No.: 153425/2012

DECISION AND ORDER
Motion #003

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Plaintiff 274 Madison Company, LLC ("Plaintiff") brings this action against its former tenant, Defendant Manhattan Egoscue, LLC ("Egoscue") and Guarantor/Defendant Silvion Ramsundar ("Ramsundar"), alleging Egoscue's breach of a commercial lease and Ramsundar's personal liability under both a signed Guaranty and several theories including improper dissolution and fraud. Plaintiff now moves for summary judgment for $85,728.64 plus interest, costs, and disbursements (first and third causes of action);[1] legal fees, and referral of same to a referee for a calculation (second cause of action); judgment pursuant to Business Corporation Law (BCL) § 1006(b) holding Ramsundar liable for Egoscue's debts and to turn over assets to Plaintiff sufficient to satisfy Egoscue's debt;[2] and sanctions for destruction of discovery.

Background Facts

In December 2005, Plaintiff, as the owner, entered into a lease (the "Lease") with Egoscue for certain commercial space located at 274 Madison Avenue, New York, New York

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1 Plaintiff does not specifically name the causes of action in its motion.

2 Although the BCL claim does not appear in Plaintiff's Second Amended Complaint, summary judgment may be awarded on an unpleaded cause of action if proof supports such cause, and if the opposing party has not been misled to its prejudice (*Weinstock v. Handler*, 254 AD2d 165, 679 NYS2d 48 [1st Dept 1998]). Defendants did not object to Plaintiff's BCL argument.

(the "Premises"). Ramsundar executed a limited guaranty (the "Guaranty") in connection with the Lease. Although the Lease was to expire on December 31, 2010, it is undisputed that Egoscue vacated the premises on May 29, 2008. Plaintiff re-let the premises on July 16, 2009.

Thereafter, Ramsundar voluntarily dissolved Egoscue on December 10, 2010, and allegedly failed to properly wind up Egoscue's affairs and left Egoscue insolvent by transferring Egoscue's assets to himself.

Consequently, this action to recover rent and additional rent ensued.[3]

In support of its instant motion, Plaintiff argues that Egoscue owes $85,728.64 in rent and additional rent,[4] and that Ramsundar is personally liable under the Guaranty, which set forth specific requirements for the surrender of the Premises. According to Plaintiff, although the Guaranty was limited when three criteria were satisfied, Ramsundar remains liable under the Guaranty, without limitation, given that Lease and Guaranty were not complied with.

Plaintiff further argues that Ramsundar's improper transfer of Egoscue's assets to himself, in violation of the New York Limited Liability Company Law ("LLC") and Debtor and Creditor Law ("DCL") laws, rendered Egoscue insolvent, and Defendants failed to properly preserve certain Egoscue records highly pertinent to Plaintiff's remaining improper wind-up and fraudulent conveyance claims brought thereunder. Based on those arguments, Plaintiffs ask the Court to exercise its broad discretion under CPLR 3126 to adjudge Ramsundar liable pursuant to

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[3] Plaintiff initially sued Ramsundar only, based on the Guaranty. Ramsundar moved for, inter alia, to dismiss Plaintiff's second and third causes of action, and Plaintiff cross-moved to add Egoscue as a defendant and to add claims against Ramsundar. The Court, *inter alia*, granted Plaintiff leave to amend its Complaint.

[4] This amount consists of 15 months of base rent of $5,103.00 from May 1, 2008 through July 16, 2009 when the new tenant arrived, additional rents of $596.41 in real estate taxes, $697.85 in electric charges, and $7,889.38 in cost of living rent adjustments.

BCL §1006(b) for Egoscue's debt, and direct that he turn over assets sufficient to satisfy such debt. In the alternative, Plaintiff requests that the Court either preclude evidence, or direct an adverse inference charge concerning these claims.

Finally, Plaintiff requests attorneys' fees pursuant to the Lease.

In opposition, Defendants argue that Plaintiff has not met its summary judgment burden because issues of fact exist as to the specific amounts of rent and additional rent. Specifically, Defendants argue that Plaintiff has failed to demonstrate how the amounts of additional rent (taxes, electrical, and cost of living increases) were calculated, or that Egoscue was properly informed of those amounts as required under the Lease.

Defendants also argue that Ramsundar complied with the conditions under the Guaranty to limit his personal liability thereunder, *i.e.*, Egoscue vacated the premises, gave notice to Plaintiff, and properly surrendered the keys to the Premises' superintendent, who is an agent of the building owner. Defendants further contend that the June and December 2008 letters from Plaintiff's counsel acknowledge surrender of the Premises.

Based on its argument that surrender had occurred years before, Defendants therefore contend that BCL § 1006(b) does not apply, as no claims arose against Egoscue before its dissolution. Further, Defendants argue that Ramsundar should not be held liable under BCL § 1006(b), DCL §§ 273-275, or the LLC law in light of Plaintiff's conclusory claims based upon information and belief and Plaintiff's failure to submit any evidence of a materially improper transfer of assets between Egoscue and Ramsundar prior to the dissolution. Furthermore, those assets, according to Defendants, were of negligible value: a desk, computer, and fax machine purchased in 2005. Defendants contend that Egoscue was rendered insolvent solely because it

lost its sole licensed therapist, and consequently, its license to operate an Egoscue franchise.

Finally, Defendants argue that Plaintiff failed to allege or even establish that Ramsundar had a duty to preserve the records requested by Plaintiff. In any event, Defendants contend that the records were maintained at Ramsundar's home, but destroyed by Hurricane Sandy years after Egoscue's dissolution. Any prejudice, according to Defendants, prejudices both parties equally.

Plaintiff's reply

In reply, Plaintiff asserts that the Guaranty's third condition, surrender of the property, was not met because the superintendent was not a person authorized under the Lease to accept the keys. Additionally, to the extent that Plaintiff counsel's June 10 and November 3, 2008 letters to Ramsundar can be deemed "settlement offers", Plaintiff preemptively argues that the offers were either made in good faith, or rejected by Defendants.

Plaintiff also adds that as to spoliation, Defendants' inclusion with their opposition of written correspondence between the parties, and first mention of an Egoscue franchise agreement, are evidence that Defendants did not comply with their discovery obligations or truly undertake a good faith search as set forth in Ramsundar's Jackson affidavit. Plaintiff also argues that Ramsundar's admitted possession of the Egoscue computer and fax machine justifies sanctions because it implies that electronic discovery present on either device was not provided.

Discussion

As the proponent of the motion for summary judgment, Plaintiff must establish its cause of action sufficiently to warrant the court directing judgment in its favor as a matter of law (CPLR 3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC,* 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]; *Ryan v Trustees of Columbia University in City of*

New York, Inc., 96 AD3d 551, 947 NYS2d 85 [1st Dept 2012]). To do so, Plaintiff must advance sufficient "evidentiary proof in admissible form," such as an affidavit and depositions (CPLR 3212 [b]), to demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]).

Once Plaintiff makes its *prima facie* showing, the burden shifts to Defendants to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Wing Wong Realty Corp. v Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986]; *Ostrov v Rozbruch*, 91 AD3d 147, 936 NYS2d 31 [1st Dept 2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]). Defendants "must assemble and lay bare their affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *aff'd* 62 NY2d 686 [1984]; *see Machado v Henry*, 96 AD3d 437, 945 NYS2d 552 [1st Dept 2012]; *Garber v Stevens*, 94 AD3d 426, 941 NYS2d 127 [1st Dept 2012], *citing Pippo v City of New York*, 43 AD3d 303, 304, 842 NYS2d 367 [1st Dept 2007]).

Egoscue's Liability

Plaintiff presented sufficient evidence to demonstrate that there was a binding Lease between the parties; that Egoscue, as tenant, breached the Lease by vacating the Premises prior to the expiration of the Lease; that rent and additional rent (noted above), as well as reasonable

attorneys' fees and expenses pursuant to the Lease (¶19), are due for the amounts not covered by the security deposit[5]; and that the Tenant failed to pay such amounts[6] (*see J.A.B. Madison Holdings LLC v Levy & Boonshoft, P.C.*, 22 Misc 3d 1138(A), 880 NYS2d 873 (Table) [Supreme Court, NY County]).

Egoscue's claim that an issue of fact exists as to the amounts of rent and additional rent owed is insufficient to raise an issue of fact as to its *liability* under the Lease. So, too, is the absence of a copy of Plaintiff's lease with the new tenant (*J.A.B. Madison Holdings LLC, supra* [evidence regarding the terms of the lease with new tenant are irrelevant since, under New York law, the Landlord is not required to mitigate its damages]; *see also Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130,133 [1995] [no obligation to re-let the premises to mitigate its damages]).

However, while the base rent is established, the absence of statements and/or bills demonstrating the "additional rent" necessitate a hearing on the issue of damages.

Therefore, plaintiff's request for summary judgment against Egoscue is granted on the issue of liability.

Ramsundar's Liability Under the Guaranty

On a motion for summary judgment to enforce a written guaranty, "the creditor needs to prove an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to

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[5] Contrary to Defendants' contention, Plaintiff's counsel's June and November 2008 letter offers to release claims against Ramsundar upon payment of $5,288.15 do not establish *Egoscue's* freedom from *further* liability under the Lease through July 2009 due to the security deposit.

[6] As to attorneys' fees, as Plaintiff "acknowledges, summary judgment is warranted as to liability only, since a hearing is required regarding the reasonable value of the services rendered (*J.A.B. Madison Holdings LLC, supra, citing Matter of First National Bank of East Islip v. Brower*, 42 N.Y.2d 471 [1977]).

perform under the guaranty (*Davimos v Halle*, 35 AD3d 270, 826 NYS2d 61 [1st Dept 2006], *citing City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 681 NYS2d 251 [1st Dept 1998]). Here, Plaintiff established that Ramsundar executed an absolute and unconditional guaranty, in which Ramsundar irrevocably guaranteed to plaintiff the "full performance and observance of all the covenants, conditions and agreements," in the Lease, without requiring any notice of nonpayment, non-performance, or non-observance . . . "(*see Continental Industrial Capital, LLC v Lightwave Enterprises, Inc.*, 85 AD3d 1639, 925 NYS2d 301 [4th Dept 2011] [in an action to enforce a limited guaranty, finding that the guaranty "unequivocally and without reservation limits" defendant's liability to $50,000, [and that] plaintiff is not entitled to recover attorneys' fees that would expand his liability in excess of that amount" because of unconditional language in guaranty]). Plaintiff also established the underlying debt obligation, and that Ramsundar failed to perform under the Guaranty by failing to pay his debt obligation.

In opposition, Defendants failed to establish that Ramsundar's liability was limited pursuant to the express terms of the Guaranty. "A guaranty is a promise to fulfill the obligations of another party, and is subject "to the ordinary principles of contract construction" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 36 NE3d 80, 15 NYS3d 277 [2015] *citing Compagnie Financiere de CIC et de L'Union Europeenne v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 188 F3d 31, 34 [2d Cir 1999]). Under those principles, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Cooperatieve, supra, citing Greenfield v Philles Records*, 98 NY2d 562, 569, 750 NYS2d 565 [2002]).

The Guaranty limited Ramsundar's personal liability under the following circumstances:

> "[u]pon Tenant's (a) having vacated and surrendered the demised premises to Owner free of all subleases or licenses and in broom clean condition *and as otherwise required by this Lease* and (b) having notified Owner or Managing Agent in writing and (c) *delivered the keys to the demised premises to the Owner or its Managing Agent*, Guarantor shall not be liable under the guarantee to pay rent, additional rent or other charges or payments accruing under the lease after the date of said *surrender*" (emphases added).

It is undisputed that Egoscue notified the Managing Agent in writing that it would vacate the Premises on May 31, 2008, and that Egoscue did just that.[7] The letter also indicated an intent to "return the keys to John the super of the building" and that the keys were returned to "John."

However, and as relevant herein, Defendants failed to establish that Egoscue's delivery of the keys to "John the super of the building" constituted, as a matter of law, a delivery of the keys to "the Owner or its Managing Agent" sufficient to limit Ramsundar's liability under the Guaranty.

Defendants submit no evidence that proves that "John" the superintendent is either the Owner or Owner's Managing Agent.[8] To the contrary, according to Ramsundar's own affidavit, the May 29, 2008 letter on which Defendants rely identifies "Billie Jean Hamil" as the Managing Agent. Furthermore, the case law Defendants cite to support their proposition that the superintendent is an "agent" under the Guaranty is distinguishable, given that the Guaranty herein specifically required the delivery of keys to the Owner or Managing Agent (*cf. Aderans & Alfieri, Inc. v Rudes*, 136 AD2d 519 [1st Dept 1988] [permitting termination of lease generally

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[7] Plaintiff does not contend that Escogue failed to vacate the Premises "free of all subleases or licenses and in broom clean condition" and provide written notice of same.

[8] It is also noted that paragraph 25 of the Lease specifically states that no employee of the Owner or Owner's Agent has authority to accept keys prior to the termination of the Lease, and delivery of keys to such person does not operate as a surrender (*infra.* P. 11)

upon the date the keys "are surrendered" and finding sufficient the delivery of keys to guard, whose authority to accept same was denied by landlord]; *Pantekas v Westyard Corp.*, 44 AD2d 789, 789 [1st Dept 1974] [finding that the superintendent was an agent of the contractor and hence of the landlord, both of whom were chargeable with notice of disrepair]; *1700 York Assoc. v Kaskel*, 182 Misc 2d 586 [Civ Ct 1999] [finding that under the circumstances, superintendent's knowledge of a pet was attributable to the landlord for the purpose of waiver of pet violation lease clause]; *1725 York Venture v Block*, 64 AD3d 495, 496 [1st Dept 2009] [where there was no evidence that doorman refused to communicate with landlord, doorman's knowledge of dog constitutes waiver by landlord of no pet clause]).

Further, Defendants' reliance on plaintiff's counsel's June 10, 2008 letter for the proposition that Plaintiff's counsel admitted that Egoscue surrendered as of May 31, 2008 is misplaced.[9] The Lease explicitly states that

> *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 the demised premises, *and no agreement to accept such surrender shall be valid unless in writing signed by Owner. No employee of Owner or owners' agent shall have any power to accept the keys to said premises prior to termination of the lease, and delivery of keys to any such agent or employee shall not operate as a termination of the lease or a surrender of the demised premises* (¶ 25 [emphases added]).

Therefore, any statement by counsel as to Egoscue's vacatur does not constitute a "surrender" under the Lease (*see Connaught Tower Corp. v Nagar*, 59 AD3d 218, 218 [1st Dept 2009] [agent's written acceptance of the keys on behalf of landlord could not operate as a

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[9] Counsel's letter states that $5,288.15 "represents the corporate obligations of the tenant-of-record through the date of surrender."

surrender of the premises where the lease specified that the delivery of keys to any agent could not operate as a termination of the lease or surrender of the premises]; *99 Realty Co. v Eikenberry*, 242 AD2d 215, 216 [1st Dept 1997]; *47 W. 14th St. Corp. v New York Wigs & Plus, Inc.*, 106 AD3d 527 [1st Dept 2013] [where the parties' lease required modification or discharge in signed writing, surrender agreement not signed by landlord had no binding effect]). At most, the letters were evidence of a settlement offer that was never, according to the record, accepted by Defendants.

Thus, based on the clear and unambiguous terms of the Guaranty, Plaintiff is entitled to summary judgment against Ramsundar for Egoscue's liability under the Lease.

Ramsundar's Liability Pursuant to BCL

BCL § 1006(b) provides:

> The dissolution of a corporation shall not affect any remedy available to or *against such corporation, its directors, officers or shareholders* for any right or claim existing or any liability incurred before such dissolution . . . (BCL § 1006[b] [emphasis added]).

Therefore, a "corporation undergoing dissolution continues to exist for the purpose of and for as long as is necessary to satisfy and provide for its debts and obligations and it may sue or be sued on these obligations until its affairs are fully adjusted" (*Rodgers v Logan*, 121 AD2d 250, 253 [1st Dept 1986]; *see also Pennsylvania Bldg. Co. v. Schaub*, 14 AD3d 365, 789 NYS2d 112 [1st Dept 2005] [defendant "personally liable for the rent due under the subject lease, since he admits having signed it as president of a corporation that had been previously dissolved pursuant to the Tax Law, and fails to show that entering into the lease was necessary to the winding up of the corporation's affairs"]). "After dissolution, the shareholders to whom are distributed the

remaining assets of the corporation are said to 'hold the assets which they received in trust for the benefit of creditors'" (*Rodgers*, 121 AD2d at 253 [citation omitted]). "As a result, the shareholders remain jointly and severally liable to existing creditors of the corporation" (*id.*). "A corporation can informally dissolve by transferring all of its assets without giving notice to creditors; however, . . . directors cannot shield themselves against corporate creditor liability, and directors who undertake to divest a corporation of all its property without taking the proceedings for a voluntary dissolution do so at their peril" (*Parent v Amity Autoworld, Ltd.*, 15 Misc3d 633, 832 NYS2d 775 [District Court of Suffolk County 2007]).

Ramsundar's mere claim that neither he nor Egoscue can be held liable to Plaintiff because Egoscue was dissolved is refuted by the language of BCL §1006. BCL 1006 explicitly provides an avenue for finding a corporation or individual's liability notwithstanding that the corporation no longer technically exists (BCL 1006[a][4]). A holding to the contrary would not only frustrate the plainly-expressed intent of the Legislature, but incentivize all manner of untoward behavior by corporations, or their officers, that could provide shelter through dissolution. Therefore, plaintiff's request to hold Ramsundar liable for Egosue's debts is granted. However, for the reasons stated below, plaintiff's request that Ramsudar turn over assets to Plaintiff sufficient to satisfy the debt owed by Egoscue is denied, at this juncture (*see infra*, p. 12).

Ramsundar's Liability Pursuant to DCL

Plaintiff is correct that conveyances from Egoscue to Ramsundar would be fraudulent, without regard to actual intent, if they were made without fair consideration and/or rendered Egoscue insolvent (*see* DCL §§ 273-276; *CIT Group/Commercial Services, Inc. v 160-09*

Jamaica Ave. Ltd. Partnership, 25 AD3d 301, 302 [1st Dept 2006]). However, Plaintiff's arguments under the DCL fail because factual disputes remain as to which assets were transferred from Egoscue to Ramsundar. Although Ramsundar admits to possessing a desk, computer, and fax machine purchased in 2005, there is no evidence in the record to indicate that these items were ever solely Egoscue's assets. In any event, Ramsundar has twice sworn – and Plaintiff does not dispute – that the items are over ten years old. A determination of the items' value, and therefore whether they were transferred for "fair consideration" in the context of potential fraud, is a fact-sensitive determination (*In re Actrade Fin. Tech. Ltd.*, 337 BR 791, 804 [Bankr SDNY 2005] [*citing Rubin v Manufacturers Hanover Trust Co.*, 661 F2d 979, 993 [2d Cir 1981]). Thus, Plaintiff's request for summary judgment under DCL §§ 273-276 is unwarranted.

Sanctions for Spoliation of Discovery

"CPLR 3126 provides a court with a broad range of options in addressing a party's discovery abuses. In making its determination of the appropriate sanction, the court must consider the degree to which the contumacious conduct or destruction of evidence prejudiced the other party" (*Melcher v. Apollo Medical Fund Management L.L.C.*, 105 A.D.3d 159, 59 N.Y.S.2d 133 [2013]).

Courts also have broad discretion to fashion a remedy for spoliation in the interest of justice (*Ortega v City of New York*, 9 NY3d 69 [2007]), generally finding that sanctions are warranted when prejudice is severe (*see e.g., Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 175 [1st Dept 1997]; *Squitieri v City of New York*, 248 AD2d 201, 204 [1st Dept 1998]). Courts have defined spoliation as the intentional or negligent destruction of "key" or "crucial" evidence, and have held that sanctions are warranted when "crucial items of evidence" are

destroyed (*Kirkland*, 236 AD2d at 173 [1st Dept 1997]; *see also Atlantic Mutual Insurance Co. v Sea Transfer Trucking Corp.*, 264 AD2d 659, 660 [1999]; *see DeKenipp v Rockefeller Center, Inc.*, 856 NYS2d 23, 23 [Sup Ct NY Cty 2007] [holding that "[s]poliation is the loss, destruction, or alteration of key evidence to a lawsuit"]; *Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Condition Corp.*, 221 AD2d 243 [1st Dept 1995]).

Plaintiff failed to demonstrate that Ramsundar's actions constitute negligent spoliation of the Egoscue documents. The record indicates that documents sought were, as sworn to by Ramsundar, maintained at Ramsundar's home until their destruction by Hurricane Sandy. Any sanction levied by a court must be proportionate to the conduct at issue (*see, e.g., Young v City of N.Y.*, 104 AD3d 452, 454 [1st Dept 2013] [delay of several years justifies a sanction of $5,000, not preclusion/dismissal]), and sanctions are not appropriate where records are destroyed for reasons of natural disaster (*Whitfield v Moriello*, 71 AD3d 415, 416 [1st Dept 2010] [contempt for non-production inappropriate where records unavailable due to flood]).

Moreover, Plaintiff has not demonstrated that it has been deprived of his ability to prove his 4th through 7th causes of action (*see Palomo v 175th St. Realty Corp.*, 101 AD3d 579, 581, 957 NYS2d 49 [2012]). Although financial statements and incorporation documents, salary related documents, and records of any asset transfer of Egoscue are unavailable, Plaintiff failed to demonstrate that the substance of such information could not have been obtained through the use of depositions and subpoenas. Further, Plaintiff's assertion that Ramsundar should have disclosed Defendants' franchisee obligations is similarly insufficieint, as Plaintiff does not cite to any rule or other support to demonstrate Defendants' duty to provide, or dereliction in providing, relevant franchise information, or that such information could not be obtained from other

sources. Indeed, *In re Steam Pipe Explosion at 41st St. and Lexington Ave.*, 43 Misc 3d 1231(A) [Sup Ct NY Cty 2014], the case cited by Plaintiff, is not only non-binding, but distinguishable because it relates to a non-party's obligation to comply with a subpoena. Here, nothing precluded Plaintiff from seeking a subpoena of the Egoscue franchisor, whose contact information was evident on a letter available to Plaintiff (*Def Exh C*).

Contrary to Plaintiff's contention, Defendants' production of the June and December 2008 letters from Plaintiff's counsel purportedly acknowledging surrender of the Premises does not contradict Ramsundar's Jackson Affidavit or demonstrate that Defendants withheld evidence. Ramsundar's Jackson Affidavit addresses bank statements, proof of payment from Egoscue to Ramsundar, Egoscue's operating agreement, articles of incorporation, bi-annual statements and certificate of dissolution, transfer of asset or receivables, office equipment and Egoscue's furnishing, Ramsundar's salary information, and proof of mailing or delivery of tenant's vacatur. The June and December 2008 letters do not fall under any of these categories, and the Affidavit provides information of names and addresses of Egoscue's members.

Plaintiff's request for sanctions against Defendants for failure to provide electronic discovery is raised for the first time in Plaintiff's reply, and is therefore not properly before the Court (*Bd. of Managers of One Strivers Row Condominium v Giwa*, 134 AD3d 514 [1st Dept 2015]; *Dannasch v. Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] ("the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion")). There is little excuse for Plaintiff's delayed argument, given that the existence of the computer was revealed, if not earlier, then certainly in Ramsundar's April 15, 2015 Jackson Affidavit (¶ 7).

Therefore, plaintiff's request for sanctions based on spoliation of evidence is denied, without prejudice, at this juncture.

Damages and attorneys' fees

Summary judgment having been granted in favor of Plaintiff on the issue of liability, the only remaining issues are Plaintiff's request for damages in the amount of $85,728.64, plus interest, cost, and disbursements. CPLR 3212(c) directs immediate trial before a court or referee if the only remaining triable issues of fact relate to damages.

As to Plaintiff's request for attorneys' fees, the Lease states:

> If Owner, . . . *in connection with any default by Tenant 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 attorneys' fees*, in instituting, prosecuting or defending any action or proceeding, and prevails in any such action or proceeding, then Tenant will reimburse Owner for such sums so paid, or obligations incurred, with interest and costs. . . . If Tenant's lease term shall have expired at the time of making such expenditures or incurring of such obligations, such sums shall be recoverable by Owner, as damages (¶ 19 [emphases added]).

Further, inasmuch as Ramsundar guaranteed the "full performance and observance of all the covenants, conditions and agreements," in the Lease, and the conditions to limiting his liability under the Guaranty for "rent, additional rent or other charges or payments accruing under the lease after the date of said surrender" have not been satisfied, Ramsundar is liable to plaintiff for reasonable attorneys' fees.

Therefore, the issue of the amount of rent and additional rent, including attorneys' fees is referred to a Referee.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion for summary judgment pursuant to CPLR 3212 is granted against Defendants Egoscue and Ramsundar, jointly and severally, on the first, second, and third causes of action on the issue of liability; and it is further

ORDERED that the branch of plaintiff's motion for judgment pursuant to Business Corporation Law (BCL) § 1006(b) holding Ramsundar liable for Egosue's debts and to turn over assets to Plaintiff sufficient to satisfy the debt owed by Egoscue is granted solely to extent that Ramsundar is liable for Egosue's debts; and it is further

ORDERED that the branch of plaintiff's motion for sanctions for destruction of discovery is denied, at this juncture; and it is further

ORDERED that issue of the amount of rent and additional rent and reasonable attorneys' fees due plaintiff is hereby referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

This constitutes the decision and order of the Court.

Dated: March 30, 2016

Hon. Carol R. Edmead, J.S.C.