To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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DOMINICK EUGENE, as Executor of the ESTATE OF MARCO EUGENE,

Plaintiff,

-against-

WORLDWIDE AUTO SUPPLY, INC., DAVID BARBAG and ERIC ROMAN, SR.,

Defendants.

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Index No. 63148/2015
Motion Seq. # 001, 002
Motion Date: June 3, 2016

DECISION & ORDER

Scheinkman, J:

Plaintiff Dominick Eugene as Executor of the Estate of Marco Eugene ("Plaintiff") moves for an order: (a) pursuant to CPLR 3215 awarding Plaintiff a default judgment against Defendants Worldwide Auto Supply, Inc. ("Worldwide") and David Barbag ("Barbag"); and (b) pursuant to CPLR 3212 awarding Plaintiff summary judgment against Defendant Eric Roman, Sr. ("Roman") (Seq. No. 001). Worldwide and Barbag have furnished no opposition to the motion, despite an affidavit of service having been received by the Court. Roman opposes the branch of Plaintiff's motion seeking summary judgment against him.

Roman separately moves pursuant to CPLR 3212 for an award of summary judgment dismissing Plaintiff's Verified Complaint as a matter of law (Seq. No. 002). Plaintiff opposes the motion. The motions are consolidated for purposes of deliberation and disposition.

FACTUAL AND PROCEDURAL BACKGROUND

This action was initiated by Plaintiff's filing of his Summons and Verified Complaint on August 12, 2015. The action arises out of Plaintiff's claim that Defendants breached a commercial lease by failing to pay rents owed and by damaging the premises.

The Verified Complaint alleges that on June 1, 2014, Plaintiff as landlord entered into a commercial lease (the "Lease") with Worldwide as tenant for premises located at 1235 Zerega Avenue, Bronx, New York (the "Premises") (Complaint at ¶ 3). The Lease had an

initial term of three years with an initial annual rate of $192,000 payable in monthly installments, and included annual rent increases and two additional three year options (*id.*). According to the Verified Complaint, the Lease was personally and unconditionally guaranteed in a Guaranty (the "Guaranty") executed by Barbag and Roman (collectively, the "Guarantors") (*id.*).

The Verified Complaint further alleges that on November 1, 2014, Worldwide defaulted on its payment of the November 2014 rent installment (*id.* at ¶ 4). Plaintiff, Worldwide, and the Guarantors agreed to immediately release the $32,000 security deposit to Plaintiff and apply it towards the November and December 2014 rent installments; and Worldwide agreed to replenish the security deposit within 60 days (*id.*).

The Verified Complaint alleges that Worldwide failed to replenish the security deposit, and defaulted in the payment of subsequent rent installments (*id.* at ¶ 5). On July 14, 2015, Roman notified Plaintiff of Worldwide's intent to vacate the Premises and relinquish possession to Plaintiff (*id.*). Plaintiff further alleges that as of the filing of the Verified Complaint, Worldwide had failed to remit rent installments for February through August 2015, for a total outstanding rent of $112,000.00 (*id.*). Pursuant to the Lease, Worldwide further owes $10,500 in late fees; $62,000 for damages Worldwide caused to the building, including building illegal structures and offices without proper permission or permits, and making unauthorized alterations; for a total outstanding debt of $184,500.00 (*id.*). The Verified Complaint alleges that the Guarantors are liable for all of these amounts as unconditional guarantors under the Guaranty (*id.*). It further alleges that Plaintiff is entitled to reasonable attorneys' fees incurred in collecting all sums due pursuant to the Lease (*id.* at ¶ 6).

The Verified Complaint asserts a First Cause of Action for breach of contract against all Defendants, alleging that Worldwide breached the Lease and the Guarantors breached the Guarantee, and that Plaintiff suffered at least $184,500.000 in resulting damages (*id.* at ¶¶ 7-9). It asserts a Second Cause of Action for quantum meruit, alleging that Defendants occupied the Premises without paying rent and prevented Plaintiff from re-letting the Premises to another suitable tenant (*id.* at ¶¶ 10-12). Plaintiff also asserts a Third Cause of Action for unjust enrichment, alleging that Defendants have retained sums owed under the Lease that rightfully should be in Plaintiff's possession (*id.* at ¶¶ 13-15). The Verified Complaint raises a Fourth Cause of Action for piercing the corporate veil, alleging that the Guarantors exercised complete domination and control over Worldwide and transferred corporate assets to themselves so as to avoid debts rightfully due to Plaintiff under the Lease (*id.* at ¶¶ 16-18). Plaintiff seeks total damages in the amount of $184,500.00 against all Defendants, plus interest, reasonable attorneys' fees and the costs and disbursements of this action.

On October 15, 2015, Roman filed a Verified Answer in which he denied the material allegations of the Verified Complaint, and asserted 13 affirmative defenses. Despite affidavits of service from Plaintiff reflecting that Worldwide and Barbag were duly served with the Summons and Verified Complaint, they have failed to answer or otherwise respond to the Verified Complaint and have not appeared in this action.

A Preliminary Conference was held on November 5, 2015, at which the Court

directed that all discovery be completed prior to a Trial Readiness Conference scheduled for February 19, 2016. At the Preliminary Conference, Plaintiff's counsel requested leave to move for a default judgment against Worldwide and Barbag, which the Court granted. Plaintiff's counsel also stated that Plaintiff intended to move for summary judgment against Roman. The Court suggested that Plaintiff wait until the conclusion of discovery to simultaneously make both motions.

After a brief adjournment, the Trial Readiness Conference was held on February 24, 2016, at which counsel reported that all discovery was complete, and the Court issued a Trial Readiness Order certifying the completion of discovery. Plaintiff's counsel confirmed that as per the Court's suggestion, Plaintiff would simultaneously move for a default judgment against Worldwide and Barbag, and for summary judgment against Roman. Roman's counsel stated that Roman also intended to move for summary judgment.

By notice of motion dated April 15, 2016, Plaintiff moved for a default judgment against Worldwide and Barbag, and for summary judgment against Roman. Worldwide and Barbag failed to oppose the motion; Roman opposed the branch of Plaintiff's motion seeking summary judgment against him; and Plaintiff furnished reply papers in further support of his motion, which was deemed to be fully submitted as of June 3, 2016.

By notice of motion dated April 18, 2016, Roman moved for summary judgment dismissing Plaintiff's Verified Complaint as a matter of law. Plaintiff opposed the motion; Roman submitted reply papers; and the motion was deemed to be fully submitted as of June 3, 2016.

CONTENTIONS REGARDING PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT AND SUMMARY JUDGMENT

A. Plaintiff's Contentions in Support of His Motion

In support of Plaintiff's motion for a default judgment and for summary judgment, he submits an affidavit from Plaintiff sworn to April 12, 2016 ("Plaintiff Aff."); an affirmation from Plaintiff's counsel, Daniel Graber, Esq., dated April 18, 2016 ("Graber Aff."); a Rule 19-a Statement of Undisputed Facts; and a memorandum of law.

Plaintiff avers that he is the Executor of the Estate of Marco Eugene, and as such has personal knowledge of the facts set forth in his affidavit (Plaintiff Aff. at ¶¶ 1-2). He avers that pursuant to the Lease, which was personally guaranteed by Barbag and Roman under the Guaranty executed with the Lease, Worldwide rented the Premises from Plaintiff (*id.* at ¶ 3; Graber Aff., Ex. G). Plaintiff avers that for the period between June 1, 2014 and May 31, 2015, the monthly rent installment was $16,000; and it was $16,480 from June 1, 2015 through May 31, 2016 (*id.*).

Plaintiff further avers that pursuant to the Lease, the Guarantors remained personally liable for all rent payments as they became due until they provided 30 days' notice of their intention to surrender the Premises and returned possession to Plaintiff (*id.* at ¶ 4). He avers that Worldwide failed to pay the monthly rent installment for March 2015, and never

made any rent payments thereafter (*id.* at ¶ 5). He also avers that by letter dated July 14, 2015 (the "Surrender Letter"), Plaintiff received written notice of Worldwide's surrender of the Premises (*id.*; Graber Aff., Ex. H). The Surrender Letter is addressed to Plaintiff and is executed by Roman on behalf of Worldwide, and states: "[i]n regard to Worldwide Auto Supply on 1235 Zerega Ave, I, Eric Roman, hereby turn over possession of 1235 Zerega Ave" (*id.* at Ex. H). As such, Plaintiff avers that the Guarantors are liable for a total unpaid rent of $97,440.00 for the months of March 2015 through August 2015 (*id.* at ¶¶ 5-6).

Mr. Graber in his affirmation avers that as counsel for Plaintiff he has personal knowledge of the facts concerning Plaintiff's motion for a default judgment against Worldwide and Barbag (Graber Aff. at ¶¶ 1-2). He attaches to his affirmation a copy of the Verified Complaint and Roman's Verified Answer, and avers that the Verified Complaint was duly served on Worldwide and Barbag but they failed to appear and are in default (*id.* at ¶¶ 3-4 and Exs. A-C).

Specifically, Graber avers that Worldwide was served on August 17, 2015 pursuant to NY BCL § 306 via the New York Secretary of State; and Barbag was served on that same date by substitute service upon a person of suitable age and discretion at his residence (*id.* at ¶ 4 and Ex. C). As both affidavits of service were filed with the Court on August 20, 2015, Graber avers that the time for Worldwide and Barbag to respond to the Verified Complaint expired on September 29, 2015 (*id.* at ¶ 4). Graber avers that as of the date of his affirmation, no answer has been interposed by Worldwide or Barbag; and they are in default in appearing and responding to the Verified Complaint (*id.*).

Graber further avers that pursuant to CPLR 3215(g)(3), on August 24, 2015 Plaintiff gave additional notice and mailed a copy of the Summons and Verified Complaint by first class mail to Barbag at his residence in an envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt (*id.* at ¶ 5). Graber avers that pursuant to CPLR 3215(g)(4), on August 24, 2015 Plaintiff made an additional service of the Summons and Verified Complaint by first class mail upon Worldwide at its last known address (*id.* at ¶ 5 and Ex. D). He avers that more than twenty days have elapsed since those mailings, and they were not returned by the post office as undeliverable (*id.* at ¶ 5).

Graber avers that on the date Barbag was served, the process server inquired as to whether Barbag was in active military service and was advised that Barbag was not (*id.* at ¶ 6 and Ex. C). Additionally, on April 12, 2016, Graber requested that another military-status investigation be conducted through the United States Department of Defense, which investigation confirmed that Barbag was not in active military service (*id.* at ¶ 6 and Ex. E).

Mr. Graber attaches to his affirmation copies of the Lease and Guaranty; the Surrender Letter dated July 14, 2015; and relevant excerpts from Plaintiff's deposition transcript (*id.* at Exs. F, G, H).

As Plaintiff's legal argument set forth in his memorandum of law, he argues that a default judgment should be entered against Worldwide and Barbag. Despite the Summons and Verified Complaint being duly served on both of Worldwide and Barbag, as evidenced by affidavits of service annexed to counsel's affirmation, they have failed to respond to the

Verified Complaint and have not appeared in this action. Plaintiff argues that he has demonstrated Worldwide's failure to pay rent pursuant to the Lease for March 2015 through August 2015, for a total unpaid rent of $97,440. Moreover, in the Lease the Guarantors "unconditionally, absolutely and irrevocably" guaranteed payment of rent and "all other sums due in connection with or under the Lease" until Worldwide furnished its July 14, 2015 Surrender Letter providing thirty days' written notice of its intention to surrender the Premises and return possession to Plaintiff. Accordingly, Plaintiff asserts that a default judgment in the sum certain of $97,440 in unpaid rent should be entered against Worldwide and Barbag.

Plaintiff further contends that he is entitled to recover for damages to the building based upon Worldwide's breaches of its obligations to: (a) keep the Premises in good repair and damage free under Lease Articles 6 and 15; and (b) obtain Plaintiff's consent and all necessary government permits and approval before altering the Premises under Lease Article 10. Plaintiff argues that after Worldwide vacated the Premises, Plaintiff learned that Worldwide had performed extensive construction work without proper permits, which work has resulted in a violation against the Premises preventing it from being re-rented or from obtaining a certificate of occupancy. Additionally, Defendants vandalized the Premises by "tearing up" the office and removing air conditioners. As such, Plaintiff seeks an inquest to determine the amount of damages for Defendants' improper alterations and vandalism of the Premises.

Plaintiff also argues that, pursuant to Lease Article 33, he is entitled to recover the reasonable attorneys' fees and disbursements incurred as a result of Defendants' default. Article 33 of the Lease states:

> If either party shall at any time be in default hereunder, and if the other party, as the case may be, shall institute an action or summary proceeding against the defaulting party based upon such default, or if Landlord shall cure such default or defaults for the act of Tenant, the defaulting party will reimburse the compliant party for the expense of reasonable attorneys' fees and disbursements hereby incurred by the compliant party (Graber Aff., Ex. G).

Plaintiff contends that an inquest is necessary to determine the amount of reasonable attorneys' fees and disbursements owed to Plaintiff.

With respect to Plaintiff's motion for summary judgment against Roman, Plaintiff asserts that the evidence is undisputed that Worldwide owes $97,440 in unpaid rent as well as a yet to be determined amount in damages for improper alterations and vandalism of the Premises, and Plaintiff's reasonable attorneys' fees and disbursements. Plaintiff contends that Roman, as one of the Guarantors, "unconditionally, absolutely and irrevocably" guaranteed Worldwide's payment of rent and "all other sums due in connection with or under the Lease." As Roman is jointly and severally liable for these sums, Plaintiff argues that he is entitled to an award of summary judgment against Roman for $97,440, and that an inquest should be held to determine damages for Defendants' improper alterations and vandalism of the Premises as well as the amount of reasonable attorneys' fees and disbursements owed to Plaintiff.

B. Roman's Contentions in Opposition

In opposition, Roman submits his affidavit sworn to May 17, 2016 ("Roman Opp. Aff."); an affirmation from his counsel, William A. Garcia, Esq. dated May 18, 2016 ("Garcia Aff."); and a Rule 19-a Counter Statement of Material Facts.

Roman avers that he is a Defendant in this action (Roman Opp. Aff. at ¶ 1).[1] He avers that, as stated in his April 16, 2016 affidavit in support of his motion for summary judgment ("Roman Moving Aff."), which he incorporates by reference, Roman acknowledges the Lease and that he executed the Guaranty along with Barbag on June 6, 2014 (*id.* at ¶ 5).[2] However, Roman avers that he was discharged and released from his obligations under the Lease and Guaranty pursuant to an oral agreement between Roman and Plaintiff (*id.* at ¶ 6). Specifically, he avers that Plaintiff asked Roman to surrender the Premises and to sign the Surrender Letter drafted by Plaintiff, and stated that if Roman complied with those obligations, Plaintiff would not sue Roman for unpaid rent (*id.*). Roman avers that he performed his end of this bargain, and substantially and significantly relied upon Plaintiff's representations in doing so (*id.*). Accordingly, Roman avers as to the legal conclusion that there are material issues of fact as to whether the Lease and Guaranty survived this oral agreement modifying Roman's obligations thereunder.[3]

Roman further avers that as a result of the oral modification of the Lease and Guaranty, he is not personally liable for the $97,400 in unpaid rent that is alleged in the Verified Complaint and in Plaintiff's affidavit (*id.* at ¶¶ 8-9). Roman further avers that he disputes the deposition testimony of Plaintiff that is annexed to Plaintiff's moving papers, in which Plaintiff testified that the work performed at the Premises did not comply with New York City Code (*id.* at ¶¶ 10-12). Roman avers that Plaintiff's statements alone are insufficient to show that the work was in fact not done in compliance with applicable laws and regulations (*id.* at ¶ 13). In response to Plaintiff's allegations that Worldwide vandalized the Premises, tore up the office, and removed air conditioners, Roman avers that neither he nor anyone acting on his behalf ever returned to the Premises after the July 14, 2015 surrender thereof, and that Plaintiff has furnished no proof of such damages (*id.* at ¶¶ 14-15).

Mr. Garcia in his affirmation avers that he is Roman's attorney and as such that

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[1] Roman does not aver that he has personal knowledge of the relevant facts as is required by CPLR 3212(b). However, as he is a Defendant in this action, the Court can infer that he has personal knowledge of the matters that he personally participated in as set forth in his affidavit.

[2] The Roman Moving Affidavit is described in detail below in connection with the Court's recitation of the parties' contentions regarding Roman's motion for summary judgment (Seq. No. 002). Because that affidavit is annexed to Roman's opposition papers, the Court will also consider that affidavit in its determination of Plaintiff's motion for summary judgment as against Roman (Seq. No. 001).

[3] Legal conclusions and/or arguments are appropriately set forth in a memorandum of law, as the affiant is not in a position to aver as to having personal knowledge of such legal arguments or conclusions.

he is personally familiar with the facts underlying this matter (Garcia Aff. at ¶ 1).[4] Mr. Garcia avers that Plaintiff in his moving papers sets forth an argument regarding the First Cause of Action for breach of the Lease and Guaranty, but makes no arguments in support of the remaining three causes of action (*id.* at ¶ 4). Mr. Garcia avers that although Plaintiff establishes damages for unpaid rent through Plaintiff's affidavit, no evidence was presented concerning the amount claimed for damages to the Premises (*id.*).

Mr. Garcia avers that Plaintiff's summary judgment motion should be denied because Roman was discharged and released from his obligations under the Lease and Guaranty pursuant to an oral agreement between Roman and Plaintiff; and that material issues of fact therefore preclude an award of summary judgment (*id.* at ¶¶ 6-10). Mr. Garcia further avers that Plaintiff is not entitled to recover the alleged $97,400 in unpaid rent from Roman as a result of this oral modification agreement. Moreover, Mr. Garcia avers that in light of Plaintiff's deposition testimony that the Premises were surrendered on July 14, 2015 via the Surrender Letter, Plaintiff can only claim to be owed a pro-rated amount of $7,442.58 in unpaid rent for July 2015, and cannot claim any unpaid rent for August 2015 (*id.* at ¶¶ 11-15).

Mr. Garcia further avers that Plaintiff in his moving papers has not furnished proof that the construction work at the Premises was in violation of New York City Code, as Plaintiff's own self-serving statements constitute insufficient proof thereof (*id.* at ¶¶ 19-20). Mr. Garcia attaches to his affirmation copies of New York City Department of Buildings ("DOB") records reflecting that there were no outstanding violations for the Premises during Worldwide's tenancy from June 1, 2014 to July 14, 2015 (*id.* at ¶ 21; Exs. 3-9). Specifically, Mr. Garcia avers that DOB records reflect that all alleged violations against the Premises either pre-date or post-date Worldwide's tenancy (*id.* at ¶¶ 24-30; Exs. 3-9). He also avers that DOB records demonstrate that the most recent certificate of occupancy was issued for the Premises for the period of November 1, 2006 through January 30, 2007; and as such Mr. Garcia concludes that Plaintiff must have leased the Premises to Worldwide in 2014 without a valid certificate of occupancy (*id.* at ¶ 31). Mr. Garcia also cites to Plaintiff's deposition testimony, and avers that Plaintiff acknowledged that the building lacked a valid certificate of occupancy and was not up to code prior to Worldwide's tenancy (*id.* at ¶¶ 32-34; Ex. 10).

Mr. Garcia further avers that Plaintiff has not furnished proof that Defendants vandalized the Premises or removed air conditioners; and that in light of Roman's denial of same, material issues of fact preclude summary judgment against Roman (*id.* at ¶¶ 35-42). Mr. Garcia avers that Plaintiff had legal possession of the Premises on July 14, 2015 and commenced this action on August 12, 2015; but Plaintiff admitted in his deposition testimony that he did not visit the Premises and discover the alleged vandalism and missing air conditioners until August 24, 2015 (*id.* at ¶¶ 35-42; Ex. 10). Mr. Garcia also cites to Plaintiff's

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[4] The Court will consider Mr. Garcia's averments to the extent that they involve procedural issues in this litigation, or to the extent that they refer to excerpted witness testimony or documents exchanged during the discovery process. However, it is improper procedure for Roman's legal arguments to be set forth in Mr. Garcia's affirmation, as this puts Mr. Garcia in the position of having to aver as to the truth of such legal arguments. The appropriate practice is for counsel to submit an accompanying memorandum of law and to set forth all legal arguments therein.

deposition testimony in which he purportedly admitted that other than removed air conditioners, nothing else was specifically destroyed or damaged at the Premises (*id.* at ¶ 42; Ex. 10). Mr. Garcia also avers that even if Plaintiff had proven damages to the Premises, Plaintiff has not proven that Roman would be liable for same, as there are issues of fact concerning the oral agreement discharging Roman from his obligations under the Lease and Guaranty (*id.* at ¶¶ 43-45).

C. *Plaintiff's Reply*

In further support of Plaintiff's motion, he submits a Rule 19-a Counter-Statement of Undisputed Facts and a reply memorandum of law. In his reply memorandum of law, Plaintiff argues that because the branch of his motion for a default judgment was entirely unopposed - including in Roman's opposition papers - the Court should award Plaintiff a default judgment of $97,440 against Worldwide and Barbag; and an inquest should be held to determine the amount of damages for Defendants' improper alterations and vandalism of the Premises, as well as the amount of reasonable attorneys' fees and disbursements owed to Plaintiff.

With respect to the branch of Plaintiff's motion for summary judgment, Plaintiff argues that Roman has not contested Plaintiff's *prima facie* showing of entitlement to relief for breaches of the Lease and Guaranty. Plaintiff argues that Roman's contention of an alleged oral modification is adamantly denied by Plaintiff, and in any event does not create an issue of fact, as any alleged modification is invalid because there is no new consideration to support it. Moreover, Roman's claim of an alleged oral modification is fatally undercut by Article 36(1) of the Lease, which unambiguously provides that:

> This Lease represents the entire understanding of the parties and supersedes all prior understandings or agreements on the subject matter hereof. This Agreement may be modified only by a further writing that is duly executed by both parties (Graber Aff., Ex. G).

The Guaranty similarly contains a provision barring oral modifications. Paragraph "f" thereof states in relevant part:

> No amendment or waiver of any provision of this Guaranty nor consent to any departure by Guarantor therefrom shall in any event be effective unless the same shall be in writing and signed by Landlord, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given . . . (*id.*).

Because the Lease and the Guaranty both explicitly bar oral modifications, Roman's attempt to cite an alleged oral modification to defeat summary judgment is without merit.

Plaintiff also argues that he is properly owed $97,440 in unpaid rent. Although Plaintiff received a 30 days' written notice of surrender in the Surrender Letter on July 14, 2015, the Guaranty provides that Guarantors are responsible for all obligations that continued to accrue or become due until 30 days after Plaintiff's receipt of written notice of surrender.

Specifically, paragraph "b" of the Guaranty provides in relevant part:

> Provided that Landlord has received no less than thirty (30) days prior written notice specifying the Surrender Date . . . then Guarantor shall be released from all individual liability with respect to any Obligations arising or accruing after the Surrender Date, but Guarantor shall continue to remain liable for (i) all Obligations which arose or accrued on or prior to the Surrender Date, (ii) all reasonable expenses (including, without limitation, counsel fees and disbursements) incurred by Landlord in enforcing any rights under this Guaranty or the Obligations, and (iii) all breaches of warranties and representations in the Surrender Declaration. Tenant's obligations under the Lease shall not be affected by the Surrender Declaration (Graber Aff., Ex. G).

As such, Plaintiff contends that the Guarantors are responsible for all monthly installments of rent that became due prior to August 13, 2015, which includes rent for the entire months of July and August of 2015. Roman's argument that Plaintiff is only entitled to a pro-rated amount of unpaid rent for July 2015, and no unpaid rent for August 2015, is belied by the plain terms of the Guaranty.

Plaintiff further contends that the nature and extent of any damages to the Premises are not at issue in his motion. He asserts that pursuant to CPLR 3212(c), he is entitled to summary judgment on liability, and an inquest should be held to determine the amount of damages for Defendants' improper alterations and vandalism, as well as the amount of reasonable attorneys' fees and disbursements owed to Plaintiff.

CONTENTIONS REGARDING ROMAN'S MOTION FOR SUMMARY JUDGMENT

A. Roman's Contentions in Support of His Motion

In support of Roman's motion for summary judgment dismissing the Verified Complaint against him as a matter of law, he submits an affidavit from Roman sworn to April 18, 2016 ("Roman Moving Aff."); an affirmation from his counsel, William A. Garcia, Esq., dated April 18, 2016 ("Garcia Moving Aff."); and a Rule 19-a Statement of Material Facts.

Roman avers that he is a Defendant in this action (Roman Moving Aff. at ¶ 1).[5] He avers that he executed the Guaranty for the Lease on June 6, 2014, but states that between May and June of 2015, Plaintiff and Roman orally modified the Lease and the Guaranty such that if Roman surrendered the Premises to Plaintiff, Plaintiff agreed that he would not sue Roman for unpaid rent (*id.* at ¶¶ 2-3). Roman further avers that in June of

[5] Roman does not aver that he has personal knowledge of the relevant facts as is required by CPLR 3212(b). However, as he is a Defendant in this action, the Court can infer that he has personal knowledge of the matters that he personally participated in as set forth in his affidavit.

2015, he surrendered the Premises to Plaintiff and in July of 2015, he signed the Surrender Letter dated July 14, 2015 given to him by Plaintiff, which stated that Roman turned over the Premises to Plaintiff (*id.* at ¶¶ 3-4 and Ex. H). Roman avers that after he signed the Surrender Letter, he never returned to the Premises and left the furniture, improvements and air conditioners intact as promised (*id.* at ¶ 4). Roman further avers that on August 24, 2015 he received a voice mail message from Plaintiff stating that someone had torn up the office and taken the air conditioners from the Premises, and that Plaintiff was going to sue Roman (*id.* at ¶ 6). However, Roman states that this lawsuit had already been filed as of August 12, 2015 (*id.* at ¶ 7).

By way of further background, Roman avers that he has been involved in the automobile parts retail business for approximately 30 years, and met Barbag in this context, as both men work in this industry (*id.* at ¶¶ 8-10). He avers that in late 2013 Barbag approached Roman and offered him the opportunity to become a partner in a new auto parts wholesale business, which Roman accepted (*id.* at ¶¶ 11-12). Roman avers that in order to operate the business, Barbag formed Worldwide, and Roman became both a shareholder and an officer of Worldwide (*id.* at ¶ 13). Roman avers that Barbag negotiated the Lease with Plaintiff, and avers that the signature above Roman's typewritten name is not his own, as Roman did not sign the Lease (*id.* at ¶ 14). However, Roman concedes that he executed the Guaranty on June 6, 2014 (*id.* at ¶ 15).

Roman further avers that he and Barbag purchased equipment and invested substantial sums in setting up the Premises for their business, and had over $1 million in inventory in or around October of 2014 (*id.* at ¶¶ 16-20). However, Roman avers that Worldwide was not generating the anticipated volume of sales, and Barbag told Roman in late 2014 that they needed to borrow money to fund Worldwide's expenses (*id.* at ¶ 20). At that time and upon Barbag's request, Roman signed an agreement dated "November __, 2014" with Plaintiff, which allowed Plaintiff to use the security deposit for the Premises toward unpaid rent (the "November 2014 Agreement") (*id.* at ¶ 20; Ex. G). The November 2014 Agreement was executed by Plaintiff as well as by Roman and Barbag individually as Guarantors, and by Barbag on behalf of Worldwide. Articles 1 and 2 thereof provide in relevant part:

> Tenant hereby authorizes the Escrow Agent to immediately release thirty-two thousand dollars ($32,000.00) from the escrow account to Landlord to be used for November 2014 and December 2014 rental payments, which are each sixteen thousand dollars ($16,000.00) . . . Tenant agrees to replenish the security deposit in full within sixty (60) days of the date of this Agreement. Failure to do so shall constitute a default under the Lease (*id.* at Ex. G).

Roman avers that in early 2015, Barbag began negotiating a possible assignment of the Lease with Plaintiff, and after this transaction failed to be consummated, Barbag abandoned the Premises and left Roman alone to deal with Plaintiff (*id.* at ¶¶ 21-24). Roman avers that in May of 2015 Plaintiff and Roman agreed that Roman would surrender the Premises so that Plaintiff could lease it to another tenant, on the condition that Plaintiff would not sue Roman for unpaid rent (*id.* at ¶¶ 25-30). Based upon this agreement, Roman avers that he executed the July 14, 2015 Surrender Letter that had been sent to Roman by Plaintiff's assistant (*id.* at ¶¶ 30-31). Roman avers that Plaintiff at that time saw that Roman had left the

furniture, fixtures and air conditioners intact at the Premises, and Plaintiff did not complain about the Premises' condition (*id.* at ¶ 33). Roman avers that the value of improvements on the Premises at the time of the surrender was approximately $170,000.00 based upon Defendants' investments therein (*id.* at ¶ 36). Roman further avers that he received an August 24, 2015 voice mail message from Plaintiff in which Plaintiff stated that Roman had been inside the Premises, and that someone tore it up and removed valuable equipment, and that Plaintiff intended to sue Roman (*id.* at ¶ 37). Roman avers that neither he, nor anyone acting on his behalf, entered the Premises after the July 2015 surrender to Plaintiff and nor did they tear up the office or remove air conditioners or other fixtures (*id.* at ¶¶ 38-39). Roman further avers that he has reviewed the DOB records for the Premises, and no violations or complaints were filed against the Premises after the execution of the Lease (*id.* at ¶¶ 41-42; Ex. I).

Roman avers that the Lease and Guaranty were orally modified and that he performed his obligations under that oral modification, all to the benefit of Plaintiff and to Roman's detriment (*id.* at ¶ 43). As such, Roman requests that the Court award him summary judgment dismissing all causes of action in the Verified Complaint (*id.* at ¶ 45).

In counsel's affirmation, Mr. Garcia attaches copies of the pleadings, excerpts from deposition testimony and documents exchanged during discovery, and he recites the underlying facts of the case as set forth in detail in Roman's affidavit (Garcia Moving Aff. at ¶¶ 1-40; Exs. A-J).[6]

Mr. Garcia further avers as to Roman's various legal arguments in support of Roman's motion for summary judgment (*id.* at ¶¶ 40-109).[7] With respect to the First Cause of Action for breach of contract, Mr. Garcia avers that there was a valid Lease and Guaranty, as Roman admits that he executed the Guaranty and that - although Roman did not sign the Lease - the Lease was properly executed by Barbag on behalf of Worldwide (*id.* at ¶¶ 44-46). Mr. Garcia concedes that Article 36(1) of the Lease is a merger clause that only permits modifications that are in writing and duly signed by the parties; and that paragraph "f" of the Guaranty similarly prohibited any amendments or waivers unless the same was in writing and signed by Plaintiff (*id.* at ¶¶ 47-49). However, Mr. Garcia avers that the Court should find an exception to the strict enforcement of these provisions because: (a) Roman performed his obligations under the alleged oral modification; and (b) Plaintiff should be equitably estopped from enforcing those provisions because he induced Roman's significant and substantial reliance upon the oral modification (*id.* at ¶¶ 47-88).

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[6] As with Mr. Garcia's affirmation in opposition to Plaintiff's summary judgment motion, the Court will consider Mr. Garcia's averments to the extent that they involve procedural issues in this litigation, or to the extent that they refer to excerpted witness testimony or documents exchanged during the discovery process.

[7] As the Court noted with respect to Mr. Garcia's affirmation in opposition to Plaintiff's summary judgment motion, it is improper procedure for Roman's legal arguments to be set forth in Mr. Garcia's affirmation, as this puts Mr. Garcia in the position of having to aver as to the truth of such legal arguments. The appropriate practice is for counsel to submit an accompanying memorandum of law and to set forth all legal arguments therein.

Mr. Garcia further avers that the Second Cause of Action for quantum meruit and the Third Cause of Action for unjust enrichment should be dismissed as a matter of law against Roman, because Plaintiff cannot recover upon quasi-contractual theories when there is no dispute that the Lease and Guaranty cover the parties' dispute (*id.* at ¶¶ 89-99).

With respect to the Fourth Cause of Action for piercing the corporate veil, Mr. Garcia avers that this is not a cause of action but is a form of relief. Moreover, Mr. Garcia avers that there is no need to pierce the corporate veil of Worldwide in this circumstance, because Worldwide's obligations have been imposed personally upon its owners, Roman and Barbag, by way of their execution of the Guaranty, and Plaintiff is seeking the very same relief against all three Defendants. Mr. Garcia further avers, however, that the oral modification agreement entered into by Plaintiff and Roman discharged Roman's obligations under the Guaranty with respect to any damages for unpaid rent, and waived Plaintiff's rights to sue Roman for same (*id.* at ¶¶ 100-109).

B. Plaintiff's Contentions in Opposition

In opposition to Roman's motion, Plaintiff submits a memorandum of law and incorporates by reference the aforementioned affidavit from Plaintiff, the affirmation from Plaintiff's counsel, and the Rule 19-a Statement of Undisputed Facts that were submitted in support of Plaintiff's motion for a default judgment and for summary judgment.[8]

As his legal argument set forth in his memorandum of law, Plaintiff argues that Roman's motion for summary judgment should be denied because Roman does not deny - and in fact concedes - the central allegations of the Verified Complaint. Indeed, Roman concedes that Worldwide entered into the Lease with Plaintiff, and that Roman personally guaranteed the Lease in the Guaranty. Roman does not deny that Worldwide defaulted in its payment of rent, or that the Premises were damaged. Instead, Roman merely states that he did not personally damage the Premises or direct anyone else to do so, but Roman does not dispute Plaintiff's claim that the Premises were damaged.

Plaintiff asserts that Roman's sole defense is based upon the vague and unsupported notion that the parties agreed to orally modify the Lease and Guaranty such that Plaintiff would not sue Roman if Roman surrendered the Premises. Plaintiff denies that any such oral modification ever occurred, and contends that no document whatsoever makes any mention of this agreement, including the Surrender Letter executed by Roman. In any event, Plaintiff argues that any such alleged oral modification would be invalid because it is explicitly barred by Article 36(1) of the Lease and paragraph "f" of the Guaranty, and there is no basis to undermine or invalidate those duly negotiated provisions based upon Roman's self-serving and unsubstantiated allegations of an oral modification agreement. Furthermore, such an oral agreement would nonetheless be invalid because there was no supporting consideration.

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[8] For purposes of brevity, the Court will not repeat its summary of the averments furnished by Plaintiff and his counsel in support of Plaintiff's summary judgment motion, but it will consider those submissions in connection with Plaintiff's opposition to Roman's motion for summary judgment.

Accordingly, Plaintiff asserts that Roman's motion for summary judgment should be denied.[9]

C. Roman's Reply

In further support of Roman's motion, he submits the Reply Affirmation of William A. Garcia, Esq., dated May 26, 2016 ("Garcia Reply Aff."), which sets forth Roman's legal arguments.

Mr. Garcia avers that there is evidence of an oral modification agreement to the Lease and Guaranty, as Roman has testified as to Plaintiff's statements that Plaintiff would not sue Roman if Roman surrendered the Premises (Garcia Reply Aff. at ¶¶ 5-8). Mr. Garcia further avers that there are no issues of fact as to whether there was an oral agreement modifying the Lease and Guaranty, and that in any event it is the conduct of the party advocating for an oral agreement, *i.e.*, Roman, that is determinative (*id.* at ¶ 9).

Mr. Garcia also avers that there was consideration for the oral modification agreement, as neither Worldwide nor Roman was obligated to surrender the Premises prior to the termination of the Lease, and they nonetheless surrendered the Premises early in exchange for Plaintiff's agreement to not sue Roman for unpaid rent (*id.* at ¶¶ 10-11). He also avers that the oral modification agreement was performed, as Roman surrendered the Premises, and Plaintiff promised not to sue him (*id.* at ¶¶ 14-15). That promise not to sue represented Plaintiff's performance of the oral modification agreement, and the fact that Plaintiff subsequently broke his promise and breached the oral agreement does not negate the fact that the parties had previously and fully performed their obligations thereunder (*id.*).

LEGAL ANALYSIS

PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT

Default judgments are not to be rubber-stamped once jurisdiction and failure to appear are shown. Proof must still be submitted to satisfy the Court, at least *prima facie*, as to the viability of the uncontested cause of action (*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; *see* CPLR 3215 [b], [f]). Even if there appears to be no opposition, the Court should not exercise its power, whether statutory or inherent, in a manner or under circumstances where it could work an injustice to litigants or to non-parties (*Rivera v Laporte*, 120 Misc 2d 733, 735 [Sup Ct NY County 1983] [Martin Evans, J.]).

A party in default only admits liability; defaulting does not admit to the damages alleged in the complaint (*see Paulson v Kotsilimbas*, 124 AD 2d 513 [1986]; *McClelland v*

[9] Plaintiff's opposition papers are silent regarding the branch of Roman's motion for summary judgment dismissing the Second, Third and Fourth causes of action as a matter of law. In light of Plaintiff's apparent tacit concession that these claims may be dismissed as duplicative and/or unnecessary, and because there appears to be no dispute that all relief sought by Plaintiff in this action is governed by the terms of the Lease and Guaranty, the Court will dismiss the Second, Third and Fourth Causes of Action as a matter of law.

Climax Hosiery Mills, 252 NY 347 [1930]). Moreover, courts may exercise wide discretion when assessing the merits of damages alleged in default judgments, in order to avoid excessive penalties (*see* CPLR 3215[b]; *Neuman v Greenblatt*, 260 AD 2d 616 [2d Dept 1999] ["'[i]t has long been held that courts have inherent power beyond that which is contained in the CPLR to open defaults and where the amount awarded on a default judgment has been perceived as excessive the courts have exercised their inherent power to modify or reduce the amount'"], *quoting Cervino v Konsker*, 91 AD 2d 249 [2d Dept 1983]). Furthermore, where a party has defaulted and the amount of damages to award is unclear, the court may order the parties to appear at an inquest to determine an amount (*see Boorman v Deutsch*, 152 AD 2d 48 [1st Dept 1989]; *Paulson v Kotsilimbas*, *supra*; *Cervino v Konsker*, *supra*). "An unwarranted and excessive award after inquest will not be sustained, as to do otherwise 'would be tantamount to granting the plaintiffs an "open season" at the expense of a defaulting defendant'" (*Neuman v Greenblatt*, *supra*, *quoting Brosnan v Behette*, 186 AD 2d 165).

Here, Plaintiff has demonstrated his *prima facie* entitlement to an order granting him a default judgment against Worldwide and Barbag on the First Cause of Action for breach of contract based upon a breach of the Lease and the Guaranty by owing unpaid rent of $97,440.00 for the months of March 2015 through August 2015 (*see, e.g.*, Plaintiff Aff. at ¶¶ 1-6; Graber Aff., Exs. A, F, G, H).[10]

Plaintiff has also demonstrated his *prima facie* entitlement to an order granting him a default judgment against Worldwide and Barbag based upon Worldwide's breaches of its obligations to: (a) keep the Premises in good repair and damage free under Lease Articles 6 and 15; and (b) obtain Plaintiff's consent and all necessary government permits and approval before altering the Premises under Lease Article 10 (*see id.*). However, Plaintiff does not provide support for any claimed amount of damages resulting from these breaches. "Where there has been a default in appearing or answering, or summary judgment has been granted on the issue of liability and an inquest directed, it is still necessary to present proof of damages" (*Paulson v Kotsilimbas*, *supra*). Indeed, Plaintiff expressly seeks an inquest to determine the amount of damages for Worldwide and Barbag's improper alterations and vandalism to the Premises.

Similarly, Plaintiff has demonstrated his *prima facie* entitlement to an award of the reasonable attorneys' fees and disbursements incurred as a result of Worldwide's default pursuant to Article 33 of the Lease, which states:

> If either party shall at any time be in default hereunder, and if the other party, as the case may be, shall institute an action or summary proceeding against the defaulting party based upon such default, or if Landlord shall cure such default or defaults for the act of Tenant, the defaulting party will reimburse the compliant party for the expense of reasonable attorneys' fees and disbursements

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[10] "The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Tudor Ins. Co. v Unithree Inv. Corp.*, 137 AD3d 1259 [2d Dept 2016]).

hereby incurred by the compliant party.

However, Plaintiff does not provide support for any claimed amount of reasonable attorneys' fees or disbursements owed to him, and requests an inquest to determine the amount owed.

As stated, Plaintiff has demonstrated his entitlement to an order granting him a default judgment against Worldwide and Barbag on the First Cause of Action in the Verified Complaint.[11] Plaintiff submitted proof of service of the Summons and Verified Complaint, the merits of the claims through the affidavit of Plaintiff and the affirmation of counsel, as well as evidence that Worldwide and Barbag failed to timely appear or otherwise respond to the Verified Complaint (*see* Graber Aff at ¶¶ 3-6 and Exs. A, C, D, E; *see also* CPLR 3215[f]). Indeed, Worldwide and Barbag have failed to respond or to produce *any* evidentiary proof in admissible form sufficient to require a trial of material questions of fact.

To avoid the entry of a default judgment, Worldwide and Barbag were required to demonstrate a reasonable excuse for the default and a meritorious defense to the action (*Grinage v City of New York*, 45 AD3d 739 [2d Dept 2007], *citing Giovanelli v Rivera*, 23 AD3d 616 [2d Dept 2005]; *Zino v Joab Taxi, Inc.*, 20 AD3d 521, 522 [2d Dept 2005]; *Pampalone v Giant Bldg. Maintenance, Inc.*, 17 AD3d 556 [2d Dept 2005]; *Ennis v Lema*, 305 AD2d 632, 633 [2d Dept 2003]). The determination of what constitutes a reasonable default lies within the sound discretion of the court (*id.* at 730, *citing Juseinoski v Board of Educ. of City of New York*, 15 AD3d 353, 356 [2d Dept 2005]; *Ennis*, *supra*, 305 AD2d at 633).

Here, Worldwide and Barbag failed to submit responsive papers to Plaintiff's motion, notwithstanding due service of the papers on them. Accordingly, Plaintiff's motion for a default judgment shall be granted, and Plaintiff is awarded a judgment against Worldwide and Barbag in the amount of $97,440.00 for unpaid rent for the months of March 2015 through August 2015. However, Plaintiff has not provided any basis for determining the amount of damages to be awarded for Worldwide and Barbag's improper alterations and vandalism to the Premises, or for the amount of reasonable attorneys' fees and disbursements to be awarded to Plaintiff as a result of Worldwide's default pursuant to Article 33 of the Lease. Hence, the Court will direct an inquest, at which Plaintiff may present evidence as to his actual damages suffered beyond the aforementioned $97,440.00 in unpaid rent, and for reasonable attorneys' fees and disbursements.

THE SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment "bears the initial burden of demonstrating its *prima facie* entitlement to the requested relief" (*Reyes v Arco Wentworth*, 83 AD3d 47 [2d Dept 2011]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraisers &*

[11] The Second through Fourth Causes of Action are addressed below in connection with the Court's determination of Roman's motion for summary judgment.

Auctioneers, Inc. v Rabizadeh, 22 NY3d 470 [2013]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Reyes*, *supra*, 83 AD3d at 47; *Jacobsen v New York City Health & Hosps. Corp.*, 18 NY3d 499 [2014]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions; rather the party must "affirmatively demonstrate the merit of its claim or defense" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2015]; *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD 2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega*, *supra,* 18 NY3d at 499).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695 [2d Dept 2015], *quoting Andre v Pomeroy*, 35 NY2d 361 [1974]; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Collado*, *supra*, *quoting Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010]). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion "if there is any doubt as to the existence of a triable issue" (*Herrin v Airborne Freight Corp.*, 301 AD 2d 500 [2d Dept 2003]; *see also Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In the First Cause of Action for breach of contract, Plaintiff alleges that Worldwide breached the Lease and the Guarantors (Roman and Barbag) breached the Guarantee based upon: (a) Worldwide's failure to pay $97,440.00 in owed rent for the months of March 2015 through August 2015; and (b) Defendants' improper alterations and vandalism to the Premises (Verified Complaint at ¶¶ 7-9). Plaintiff seeks monetary damages for these breaches, as well as an award of reasonable attorneys' fees and disbursements as a result of Worldwide's default pursuant to Article 33 of the Lease (*id.* at ¶¶ 6-9).

The threshold inquiry in a motion for summary judgment involving a contract dispute is whether the contract is free from ambiguity such that its provisions may be enforced without resort to extrinsic evidence. The interpretation of an unambiguous contract is a question of law for the court (*Kass v Kass,* 91 NY2d 554, 566 [1998]*; W.W.W. Assoc., Inc. v Giancontieri,* 77 NY2d 157 [1990]*; Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [2004], *lv denied* 4 NY3d 707 [2005]; *1550 Fifth Avenue Bay Shore, LLC v 1550 Fifth Avenue, LLC*, 297 AD2d 781, 783 [2002], *lv denied* 99 NY2d 505 [2003]). Contract terms are ambiguous if they are "'capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant

of the customs, practices, usages and terminology as generally understood in the particular trade or business'" (*Sayers v Rochester Tel. Corp. Supplemental Mgt. Pension Plan*, 7 F3d 1091, 1095 [2d Cir 1993], *quoting Walk-In Med. Ctr., Inc. v Breuer Cap. Corp.*, 818 F2d 260 [2d Cir 1987]; *see also Computer Assoc. Intl. Inc. v U.S. Balloon Mfg. Co.*, 10 AD3d 699, 699 [2d Dept 2004] ["[a] contract is unambiguous if the language it uses has a 'definite and precise meaning, unattended by danger of misconception in the purpose of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'"]). A court's task is "to determine whether such clauses are ambiguous when 'read in the context of the entire agreement' ... By examining the entire contract, [the Court] safeguard[s] against adopting an interpretation that would render any individual provision superfluous ... Parties to a contract may not create an ambiguity merely by urging conflicting interpretations of their agreement'" (*Sayers*, 7 F3d at 1095 [citations omitted]).

The Court of Appeals has emphasized that "'when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms'" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004], *quoting W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157 [1990]). "In interpreting a contract, the intent of the parties governs ... A contract should be construed so as to give full meaning and effect to all of its provisions ... Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment ... On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact and summary judgment should be denied" (*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1990], *lv denied* 77 NY2d 807 [1991]). "Where consideration of a contract as a whole resolves an ambiguity created by one clause, there is no occasion to consider extrinsic evidence of the parties' intent" (*Hudson-Port Ewen Assoc., L.P. v Kuo*, 78 NY2d 944, 945 [1991]).

"[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a 'realization of [their] reasonable expectations'" (*Brown Bros. Elec. Contr., Inc. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977]; *see also South Road Assoc., LLC v International Business Machines Corp.*, 2 AD3d 829, 833 [2003], *affd* 4 NY3d 272 [2005] ["[t]he language of a contract must be interpreted 'to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized'"]). Thus, "[t]he rules of construction of contracts require [the court] to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *see also Columbus Park Corp. v Department of Hous. Preserv. & Dev. of City of New York*, 80 NY2d 19, 31 [1992]; *Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]; *Singh v Atakhanian,* 31 AD3d 425, 427 [2d Dept 2006] ["A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect"]).

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Tudor Ins. Co., supra,* 137 AD3d at 1259).

Plaintiff has met his *prima facie* burden of demonstrating entitlement to summary

judgment as a matter of law on the First Cause of Action for breach of contract. Plaintiff has established that the Lease and the Guaranty constitute contracts; that Plaintiff performed his obligations thereunder; and that Worldwide breached the Lease and Roman breached the Guaranty by owing unpaid rent of $97,440.00 for the months of March 2015 through August 2015, for which Plaintiff suffered damages (*see, e.g.*, Plaintiff Aff. at ¶¶ 1-6; Graber Aff., Exs. A, F, G, H).

Plaintiff has also met his *prima facie* burden of demonstrating that Worldwide breached the Lease and Roman breached his obligations under the Guaranty based upon Worldwide's breaches of its obligations to: (a) keep the Premises in good repair and damage free under Lease Articles 6 and 15; and (b) obtain Plaintiff's consent and all necessary government permits and approval before altering the Premises under Lease Article 10 (*see id.*). However, Plaintiff does not provide support for any claimed amount of damages resulting from these breaches, and seeks an inquest to determine the precise amount of damages incurred.

Similarly, Plaintiff has met his *prima facie* burden of demonstrating entitlement to reasonable attorneys' fees and disbursements incurred as a result of Worldwide's default pursuant to Article 33 of the Lease; but requests an inquest to determine the amounts to which he is entitled.

Roman in his opposition has failed to produce sufficient evidence in admissible form to establish the existence of a triable issue of fact (*see Reyes, supra*, 83 AD3d at 47; *Jacobsen, supra,* 18 NY3d at 499). The Court does not merit Roman's primary argument that summary judgment is improper here because of Roman's allegation that he entered into an oral modification agreement with Plaintiff, by which Roman agreed to surrender the Premises in exchange for Plaintiff's promise to not sue Roman for unpaid rent. As noted above, both the Lease and the Guaranty have unambiguous provisions that require a writing signed by Plaintiff in order to modify the Lease or the Guaranty. Article 36(1) of the Lease provides that:

> This Lease represents the entire understanding of the parties and supersedes all prior understandings or agreements on the subject matter hereof. This Agreement may be modified only by a further writing that is duly executed by both parties (Graber Aff., Ex. G).

The Guaranty similarly contains a merger provision barring oral modifications. Paragraph "f" thereof states in relevant part:

> No amendment or waiver of any provision of this Guaranty nor consent to any departure by Guarantor therefrom shall in any event be effective unless the same shall be in writing and signed by Landlord, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given . . . (*id.*).

New York courts strictly enforce such merger clauses (*see, e.g., Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 [2001] ["the purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to

alter, vary or contradict the terms of the writing"]; *Daiichi Seihan USA v Infinity USA, Inc.*, 214 AD2d 487, 488 [1st Dept 1995] ["Any attempt by defendant to alter the plain meaning of the contract by alleged oral modifications fails as a result of the contract's integration clause"]; *see also Primex Intl. Corp. v Wal-Mart Stores, Inc.*, 89 NY2d 594, 600 [1997]). Evidence of prior negotiations that were not reduced to an executed written agreement are inadmissible for the purpose of varying or contradicting the terms of an agreement (*see, e.g., Bero Contr. & Dev. Corp. v Vierhile*, 19 AD3d 1160, 1161 [4th Dept 2005] [since language in agreement was clear and unambiguous and included a merger clause, parties could not introduce "parol evidence, including evidence of prior negotiations between the parties"]). Moreover, New York General Obligations Law ("GOL") § 15-301 provides a statutory mechanism for the enforcement of such provisions. It states:

> A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent (*see* NY GOL § 15-301(1)).

As conceded by Plaintiff, an exception is sometimes made where the oral modification has already "in fact been acted upon to completion" because in such instance there no longer exists a concern about false claims (*see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 (1977)]. However, by Roman's admission, there has not been full performance of the alleged oral modification agreement, as Plaintiff has not performed under his alleged promise not to sue Roman for unpaid rent. Where, as here, there has only been partial performance (*i.e.*, Roman's surrender of the Premises), and the claims of an oral modification are in dispute, contractual provisions such as those set forth in the Lease and the Guaranty are fully enforceable unless the partial performance is "unequivocally referable to the oral agreement to modify" (*Rose, supra*, 42 NY2d at 343-344; *Taylor v Blaylock & Partners*, L.P., 240 AD2d 289, 290 [1st Dept 1997]). In determining whether such conduct is "unequivocally referable" to the oral agreement or "otherwise" incompatible with the written agreement, the question is whether there has been an "indisputable . . . departure from the written agreement" (*id.*). Where, as here, the claimed conduct could be attributable to something else, the oral modification is ineffective (*see Eujoy Realty Corp. v. Van Wagner Communications, LLC*, 22 NY3d 413, 427 [2013]).

In this instance, Roman's conduct in surrendering the Premises early can certainly be attributable to something other than the alleged oral modification agreement. Indeed, because Roman is personally liable for unpaid rent and other Lease obligations pursuant to the unambiguous terms of the Guaranty, it served his own interest to end those obligations as soon as possible - and in fact a mere two days before he would have been liable for unpaid rent for September 2015. Accordingly, the Court finds that Article 36(1) of the Lease and paragraph "f" of the Guaranty are fully enforceable "because what plaintiff claims to have done under the oral agreement could very well have been done in his own self-interest in the performance of the original contract" (*Bakhshandeh v Am. Cyanamid Co.*, 8 AD2d 35, 38 [1st Dept 1959]).

As such, the Court sees no basis to invalidate these duly negotiated and

unambiguous provisions based upon the unsubstantiated averments of Roman concerning an alleged oral modification. Indeed, Roman has no documentary evidence of the purported oral modification agreement, and his argument for defeating summary judgment rests entirely on his own self-serving averments and testimony. Furthermore, the Surrender Letter, which was executed by Roman on or about July 14, 2015 - the precise time at which Roman alleges the oral modification was agreed upon - makes no reference to any such agreement. Rather, it simply states: "[i]n regard to Worldwide Auto Supply on 1235 Zerega Ave, I, Eric Roman, hereby turn over possession of 1235 Zerega Ave" (Graber Aff., Ex. H). Indeed, if, as Roman contends, his surrendering of the Premises and signing the Surrender Letter were to be sufficient to avoid a future suit for unpaid rent, it would have been easy enough for the Surrender Letter to so provide.

Accordingly, Roman's argument that Plaintiff is not entitled to summary judgment because of a purported oral modification agreement is not supported by the record and does not create a triable issue of fact precluding summary judgment.

Furthermore, the Court does not merit Roman's argument that because the Surrender Letter is dated July 14, 2015, Plaintiff is only entitled to a pro-rated amount of $7,442.58 in unpaid rent for July 1 through July 14, 2015, and is not entitled to any unpaid rent for August 2015 (*see Garcia Aff.* at ¶¶ 11-15). Although the Surrender Letter is dated July 14, 2015, the Guaranty unambiguously provides that Roman and Barbag as Guarantors are responsible for all obligations that continued to accrue or become due until 30 days *after* Plaintiff's receipt of written notice of surrender. Specifically, paragraph "b" of the Guaranty provides in relevant part:

> Provided that Landlord has received no less than thirty (30) days prior written notice specifying the Surrender Date . . . then Guarantor shall be released from all individual liability with respect to any Obligations arising or accruing after the Surrender Date, but Guarantor shall continue to remain liable for (i) all Obligations which arose or accrued on or prior to the Surrender Date, (ii) all reasonable expenses (including, without limitation, counsel fees and disbursements) incurred by Landlord in enforcing any rights under this Guaranty or the Obligations, and (iii) all breaches of warranties and representations in the Surrender Declaration. Tenant's obligations under the Lease shall not be affected by the Surrender Declaration (Graber Aff., Ex. G).

As such, Roman and Barbag as Guarantors are responsible for all monthly installments of rent that became due prior to 30 days after the date of the July 14, 2015 Surrender Letter, *i.e.*, August 13, 2015.

Article 4(1)(b) of the Lease provides that "[b]ase rent for the lease term shall be paid in equal monthly installments on the 15th day of each month in advance." As such, the rent for July 2015 became due on June 15, 2015; and the rent for August 2015 became due on July 15, 2015. Accordingly, because Roman's argument is belied by the unambiguous terms of both the Guaranty and the Lease, Plaintiff is entitled to a total unpaid rent of $97,440.00 for the months of March 2015 through August 2015.

The Court also does not merit Roman's argument that he is not liable for any vandalism and/or other damage to the Premises because Plaintiff has not proved that Roman himself caused such damage. The unambiguous terms of paragraph "a" of the Guaranty provide that Roman and Barbag as Guarantors are broadly responsible for the prompt payment of rent "and all other sums due in connection with or under the Lease, and to pay on demand any and all expenses (including, without limitation, counsel fees and disbursements) incurred by Landlord in enforcing any rights under this Guaranty . . . The Guaranty is an absolute and unconditional guaranty of payment . . ." (Graber Aff., Ex. G). Moreover, paragraph "b" of the Guaranty unambiguously states that even after the August 13, 2015 "Surrender Date," the Guarantors "shall continue to remain liable for (i) all Obligations which arose or accrued on or prior to the Surrender Date, (ii) all reasonable expenses (including, without limitation, counsel fees and disbursements) incurred by Landlord in enforcing any rights under this Guaranty or the Obligations . . ." (*id.*). Therefore, although Plaintiff must demonstrate at an inquest the amount of damages that he incurred due to purported vandalism and/or other damage to the Premises, Roman and Barbag as Guarantors are liable for such damages, regardless of whether Plaintiff proves that Roman personally caused the damages himself.

For the reasons set forth above, Plaintiff is awarded summary judgment against Roman on the First Cause of Action for breach of contract. Plaintiff is entitled to monetary damages in the amount of $97,440.00 for unpaid rent for the months of March 2015 through August 2015. The Court will also direct an inquest, at which Plaintiff may present evidence as to his actual damages suffered beyond the aforementioned $97,440.00 in unpaid rent, and for reasonable attorneys' fees and disbursements.

ROMAN'S MOTION FOR SUMMARY JUDGMENT

A. The First Cause of Action

For the reasons set forth above in connection with the Court's analysis of Plaintiff's motion for summary judgment, Plaintiff is entitled to summary judgment on his First Cause of Action for breach of contract. Roman's motion, which sought summary judgment dismissing this claim as a matter of law, is hereby denied.

B. The Second and Third Causes of Action

Roman in his moving papers asserts that he is entitled to summary judgment dismissing the Second Cause of Action for quantum meruit and the Third Cause of Action for unjust enrichment as a matter of law, because Plaintiff cannot recover upon quasi-contractual theories when there is no dispute that the Lease and Guaranty cover the parties' dispute (Garcia Aff. at ¶¶ 89-99). It is well settled that the existence of a valid and enforceable written contract governing a particular subject matter precludes quasi contract recovery on events arising out of the same subject matter (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]). Thus, it is only in cases where there is a *bona fide* dispute as to the existence of a contract that plaintiff may plead alternative theories of recovery (contract and quasi contract) such as unjust enrichment or promissory estoppel (*see Hochman v LaRea*, 14 AD3d 653 [2d Dept 2005]; *Zuccarini v Ziff-Davis Media, Inc.*, 306 AD2d 404 [2d Dept 2003]).

In any event, Plaintiff in his opposition appears to have abandoned both of these claims, as he asserts no objection or response to Roman's contention that the Second and Third Causes of Action should be dismissed as a matter of law. Accordingly, Roman is hereby awarded summary judgment dismissing the Second and Third Causes of Action.

C. The Fourth Cause of Action

With respect to the Fourth Cause of Action for piercing the corporate veil, Roman argues that this is not a cause of action but is a form of relief (*see Morris v NYS Dept of Taxation & Fin.*, 82 NY2d 135, 140-141 [1993]). Moreover, he asserts that there is no need to pierce the corporate veil of Worldwide in this circumstance, because Worldwide's obligations have been imposed personally upon its owners, Roman and Barbag, by way of their execution of the Guaranty, and Plaintiff is seeking the very same relief against all three Defendants (*see* Garcia Aff. at ¶¶ 100-109).

Plaintiff in his opposition appears to have abandoned this claim, as he asserts no objection or response to Roman's contention that the Fourth Cause of Action should be dismissed as a matter of law. Accordingly, Roman is hereby awarded summary judgment dismissing the Fourth Cause of Action.

CONCLUSION

The Court has considered the following papers in connection with this motion:

1) Notice of Motion dated April 15, 2016; Affirmation of Daniel Graber, Esq., dated April 18, 2016, together with the exhibits annexed thereto; Affidavit of Dominick Eugene, sworn to April 12, 2016;

2) Memorandum of Law in Support of Plaintiff's Motion for Default and Summary Judgment dated April 15, 2016;

3) Plaintiff's Rule 19-a Statement of Undisputed Facts dated April 15, 2016;

4) Affirmation of William A. Garcia, Esq. in opposition to Plaintiff's Motion for Summary Judgment dated May 18, 2016, together with the exhibits annexed thereto; Affidavit of Eric Roman, Sr., sworn to May 17, 2016;

5) Defendant Eric Roman, Sr.'s Rule 19-a Counter Statement of Material Facts dated May 18, 2016;

6) Plaintiff's Rule 19-a Counter-Statement of Undisputed Facts dated May 23, 2016;

7) Reply Memorandum of Law in Further Support of Plaintiff's Motion for Default and Summary Judgment dated May 23, 2016;

8) Notice of Motion dated April 18, 2016; Affirmation of William A. Garcia,

Esq., dated April 18, 2016, together with the exhibits annexed thereto; Affidavit of Eric Roman, Sr., sworn to April 18, 2016, together with the exhibits annexed thereto;

9) Rule 19-a Statement of Material Facts dated April 18, 2016;

10) Memorandum of Law in Opposition to Defendant Eric Roman, Sr.'s Motion for Summary Judgment dated May 11, 2016; and

11) Reply Affirmation of William A. Garcia, Esq., dated May 26, 2016.

Based on the foregoing papers and for the reasons stated, it is hereby

ORDERED that the branch of the motion by Plaintiff Dominick Eugene as Executor of the Estate of Marco Eugene seeking a default judgment against Defendants Worldwide Auto Supply, Inc. and David Barbag (Seq. No. 001) is granted as to liability and in part as to damages, such that Plaintiff is awarded a default judgment against Worldwide Auto Supply, Inc. and David Barbag in the amount of $97,440.00, with additional damages to be assessed at the inquest scheduled herein; and it is further

ORDERED that the branch of the motion by Plaintiff Dominick Eugene as Executor of the Estate of Marco Eugene for an award of summary judgment against Defendant Eric Roman, Sr. on the First Cause of Action in the Verified Complaint (Seq. No. 001) is granted as to liability and in part as to damages, such that Plaintiff is awarded a judgment against Eric Roman, Sr. in the amount of $97,440.00, with additional damages to be assessed at the inquest scheduled herein; and it is further

ORDERED that the motion by Defendant Eric Roman, Sr. for summary judgment dismissing the Verified Complaint (Seq. No. 002) is granted in part and denied in part; and it is further

ORDERED that the branch of the motion by Defendant Eric Roman, Sr. for summary judgment dismissing the Verified Complaint (Seq. No. 002) is granted with respect to the Second, Third and Fourth Causes of Action in the Verified Complaint, which are dismissed as a matter of law; and it is further

ORDERED that the branch of the motion by Defendant Eric Roman, Sr. for summary judgment dismissing the Verified Complaint (Seq. No. 002) is denied with respect to the First Cause of Action in the Verified Complaint; and it is further

ORDERED that counsel for Plaintiff shall serve and file a proposed judgment, with the amount to be awarded as damages to Plaintiff left blank together with a bill of costs and an affirmation of legal services, which proposed judgment shall be noticed for settlement before the undersigned on September 30, 2016 at 2 p.m. (appearances required); and it is further

ORDERED that Defendants, at the time that their responses are due to the

proposed judgment, may submit opposition to the damages and legal fees and costs sought by Plaintiff; and it is further

ORDERED that counsel for Plaintiff shall (1) serve and file a Note of Inquest, together with the proposed judgment, with service to be made by personal delivery so as to be received by all Defendants on or before August 26, 2016; (2) serve a copy of this Decision and Order upon Defendants, with notice of entry, with service to be made by personal delivery so as to be received by Defendants on or before August 26, 2016; and (3) pay any and all required fees with the filing of the Note of Inquest; and it is further

ORDERED that Plaintiff and Defendants shall appear before the Court for an inquest to determine the amount of Plaintiff's damages and attorneys fees, disbursements and costs on September 30, 2016 at 2 p.m., which inquest may not be adjourned except upon the prior order of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 17, 2016

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court

APPEARANCES:

GRABER PLLC
By: Daniel Graber, Esq.
Attorneys for Plaintiff
360 Lexington Avenue, Suite 1502
New York, New York 10017

GARCIA & KALICHARAN, P.C.
By: William A. Garcia, Esq.
Attorneys for Defendant Eric Roman, Sr.
710 West 190th Street, Suite D
New York, New York 10040

DAVID BARBAG
49 Stornowaye
Chappaqua, New York 10514

WORLDWIDE AUTO SUPPLY INC.
c/o David Barbag
49 Stornowaye
Chappaqua, New York 10514