SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 650103/2017
ARTISANAL 2015, LLC
vs.
387 PARK SOUTH L.L.C.
SEQUENCE NUMBER : 006
DISMISSAL

INDEX NO. _____
MOTION DATE 4/16/18
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 210-256, 268-269
Answering Affidavits — Exhibits _____ | No(s). 258-260, 270-274
Replying Affidavits _____ | No(s). 261

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 4/27/18

SHIRLEY WERNER KORNREICH J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ARTISANAL 2015, LLC,

Plaintiff,

-against-

387 PARK SOUTH L.L.C.,

Defendant.

Index No.: 650103/2017
(Action No. 1)

DECISION & ORDER

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ARTISANAL 2015, LLC,

Plaintiff,

-against-

387 PARK SOUTH L.L.C.,

Defendant.

Index No. 653238/2017
(Action No. 2)

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence number 006 in Action No. 1 and motion sequence number 004 in Action No. 2 are consolidated for disposition.

In the above captioned *Yellowstone* actions, defendant 387 Park South L.L.C. (Landlord) moves for dismissal of the complaints and seeks default judgments on its counterclaims against plaintiff Artisanal 2015, LLC (Tenant). Tenant opposes (albeit, as discussed herein, after the deadlines to retain new counsel and submit opposition had expired). For the reasons that follow, Landlord's motions are granted.

These cases concern Tenant's alleged breach of its commercial lease, dated October 5, 2015, as amended September 9, 2016, for portions of the ground floor and basement of a building located at 387 Park Avenue South (the Building), where Tenant was to build out and

operate an upscale French bistro and lounge. *See* Action No. 1, Dkts. 238 (the Original Lease) & 239 (the Amendment) (collectively, the Lease).[1] Tenant is an LLC; its sole asset was the Lease.

On January 6, 2017, Tenant commenced Action No. 1 after receiving a Notice to Cure from Landlord dated December 21, 2016, which alleged myriad breaches of the Lease, such as unpaid rent and additional rent. *See* Action No. 1, Dkt. 217 (the December 2016 Notice). The court issued a *Yellowstone* injunction by order dated February 8, 2017, which was conditioned, *inter alia*, on the payment of use and occupancy (U&O). *See* Action No. 1, Dkt. 48 (the First *Yellowstone* Injunction). It is undisputed that Tenant did not timely pay U&O.

On February 17, 2017, Tenant's initial counsel, Greenberg Traurig, LLP, moved to be relieved. By order dated February 21, 2017, the court granted the motion and required Tenant to appear by new counsel for a preliminary conference on March 23, 2017. *See* Action No. 1, Dkt. 61. Instead, on March 9, 2017, Tenant filed a chapter 11 bankruptcy petition in the Southern District of New York (resulting in an automatic stay),[2] which was voluntarily dismissed on March 24, 2017. *See* Action No. 1, Dkt. 226. Upon remand, a discovery schedule was set at an April 13, 2017 preliminary conference, at which Tenant was represented by David Rozenholc & Associates (DRA). *See* Action No. 1, Dkt. 69. On April 21, 2017, Landlord filed an answer in which it asserted eight counterclaims, including declaratory judgments regarding Tenant's breaches of the Lease set forth in the December 2016 Notice, rescission, and a claim for attorneys' fees under the Lease's prevailing party clause, section 17.2(f). *See* Action No. 1, Dkt.

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[1] Two members of Tenant, Sarid Drory and Stephanie Schulman, executed "good guy" guarantees of the Lease. *See* Action No. 1, Dkt. 238 at 70 (the Guaranty). In the instant actions, Landlord has not counterclaimed for breach of the Guaranty. Citations to "Action No. __, Dkt. __" refer to documents filed on NYSCEF in the specified action.

[2] The baselessness of Tenant's multiple bankruptcy filings and other instances of frivolous delay are addressed herein.

70. Landlord amended its answer on May 31, 2017, asserting new counterclaims for ejectment. *See* Action No. 1, Dkt. 84.

On June 14, 2017, Tenant, represented by yet a third law firm, Adam Leitman Bailey, P.C., commenced Action No. 2 after receiving a Notice to Cure from Landlord dated May 9, 2017, which alleged that Tenant breached sections 11.1 and 11.2 of the Lease by, respectively, not maintaining the required insurance coverage and furnishing to Landlord certificates evidencing such insurance. *See* Action No. 2, Dkt. 5 (the May 2017 Notice). The court issued a temporary restraining order pending a hearing on Tenant's *Yellowstone* motion, set for July 26, 2017. *See* Action No. 2, Dkt. 29.

On July 7, 2017, Landlord moved to vacate the First *Yellowstone* Injunction due to Tenant's non-payment of U&O. On July 10, 2017, Tenant's counsel of record in Action No. 1, DRA, moved to be relieved, thereby delaying both Landlord's motion in Action No. 1, which, along with Tenant's *Yellowstone* motion in Action No. 2, were adjourned to August 9, 2017. On July 12, 2017, Landlord filed an answer in Action No. 2 in which (as in Action No. 1) it asserted declaratory judgment claims regarding Tenant's breaches of the Lease set forth in the May 2017 Notice, a claim for rescission, and a claim for attorneys' fees under section 17.2(f).

On August 9, 2017, a fourth law firm, Rosenberg & Estis, P.C., appeared on behalf of Tenant. After oral argument [*see* Action No. 2, Dkt. 97 (8/9/17 Tr.)], the court denied Tenant's *Yellowstone* motion in Action No. 2 due to Tenant's "failure to obtain the required insurance" and "due to the unclean hands of [T]enant whose repeated bad acts and gamesmanship militate in favor of denying equitable relief." *See* Action No. 2, Dkt. 98.[3] Immediately thereafter, there was

[3] *See, e.g.*, Dkt. 97 (8/9/17 Tr. at 20) ("among the more egregious issues, is the tenant has submitted a forged letter [allegedly] from the lender to the landlord. The landlord has submitted

a status conference in both actions. In light of Tenant's clear lack of the requisite insurance coverage (e.g., workers' compensation), and in light of Tenant's breach of the First *Yellowstone* Injunction (i.e., failure to pay U&O), the court ordered that Landlord file a motion for summary judgment by August 23, 2017, which would be argued on September 13, 2017. *See* Action No. 1, Dkt. 158.

On August 21, 2017, Tenant moved by order to show cause in Action No. 2 for reargument and renewal of the court's denial of its second *Yellowstone* motion and for disqualification of Landlord's counsel. That same day, the court denied the motion. *See* Action No. 2, Dkt. 115. Later that day (i.e., two days before Landlord was to file its summary judgment motion), Tenant again filed for bankruptcy. *See In re Artisanal 2015, LLC*, No. 17-12319 (Bankr SDNY). In the bankruptcy action, Landlord moved, *inter alia*, for dismissal or relief from the automatic stay so this court could complete its adjudication of the instant actions. By order dated November 3, 2017, the bankruptcy court (Garrity, J.) granted Landlord's request and permitted Landlord "to move forward in the [instant] *Yellowstone* Actions through final judgments." *See* Action No. 1, Dkt. 165 (the November 2017 Decision) at 37.

Judge Garrity's thorough November 2017 Decision explains why it was improper for Tenant to seek to scuttle the instant actions and seek adjudication before what it hoped would be a more favorable judge. As Judge Garrity explained:

> At its core, this is a single asset, two party case pitting the Debtor [Tenant] against the Landlord. The Debtor is a repeat bankruptcy filer **who commenced this and an earlier chapter 11 case as part of its litigation strategy** in addressing its many disputes with the Landlord arising out of its alleged defaults under the Lease. At bottom, in filing this case, the Debtor seeks to have this Court stay the proceedings that the Debtor initiated and that are pending in the State Court—

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affidavits to show that the letter was, indeed, forged, saying that the tenant here is up on its rent, is not in default.").

> some on appeal—**and substitute its judgment for that of the State Court in regard to the matters at issue therein**.

November 2017 Decision at 3 (emphasis added). Despite Judge Garrity's ruling [*see* November 2017 Decision at 16-17 ("There is no merit to the assertion" that Tenant is entitled to "breathing space" in bankruptcy if it lacks valid basis to seek reorganization under chapter 11)], Tenant continues to take the position that it was proper to twice file for bankruptcy to obtain the benefits of the automatic stay. *See* Action No. 2, Dkt. 204 at 5, 7-8.[4] Indeed, Judge Garrity explained that it is well settled that a bankruptcy petition is considered to have been filed in bad faith "if it is clear that on the filing date there was no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings." *See* November 2017 Decision at 18 (citation omitted). After an exhaustive analysis of the governing law and the issues in the instant actions (including Tenant's conduct), Judge Garrity concluded that [t]he facts here plainly support a finding **that [Tenant] filed this case in bad faith**, and the Court so holds." *See id.* at 30 (emphasis added). While Judge Garrity did not dismiss the bankruptcy action at that time, as noted below, he eventually did and issued a filing injunction. *See id.* at 37.

Shortly after Landlord in these actions filed a notice that the automatic stay had been lifted, on November 20, 2017, Rosenberg & Estis moved to be relieved as Tenant's counsel. The court made the motion returnable on November 30, 2017. *See* Action No. 1, Dkt. 172. One day beforehand, on November 29, 2017, Mr. Nash of Goldberg Weprin Finkel Goldstein LLP

[4] Tenant also does not explain why a chapter 11 petition for reorganization makes any sense for an LLC whose only asset is its lease and only major creditor other than its landlord is its member. As Judge Garrity explained, a reasonable litigant has no expectation that such a chapter 11 petition would result in a reorganization. Tellingly, Tenant's defense of its multiple bankruptcy filings is made only in the client's affidavits (counsel, as discussed herein, did not submit either an affirmation or brief in connection with the instant motions).

(Goldberg Weprin) (the firm that, as discussed below, now represents Tenant in this action)[5] brazenly removed this action to the United Stated District Court for the Southern District of New York, seeking referral back to Judge Garrity on the ground that the action was related to Tenant's pending bankruptcy proceedings. *See* Action No. 1, Dkts. 187 & 188. Again, the court was deprived of subject matter jurisdiction.[6] There is no doubt in this court's mind that this maneuver was another delay tactic that had no reasonable likelihood of success since Judge Garrity had already decided that Tenant was to litigate the matter before this court.[7]

In any event, after Tenant procured a further delay of nearly two months (beyond the two-month delay from the time this court would have heard Tenant's motion in September 2017), by order dated January 23, 2018, Judge Garrity remanded this case back to this court. *See*

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[5] Goldberg Weprin sought an adjournment of the April 4, 2018 oral argument on the instant motions, claiming to need more time, even though the firm has been involved in the matter since November 2017.

[6] Prior to the November 29 removal, on November 3, Tenant and its bankruptcy counsel were put on notice by Judge Garrity that removal is not justified to seek more time absent a reasonable basis to believe favorable relief will be obtained in the bankruptcy court. Nonetheless, Tenant's counsel acted to avoid adjudication in this court, ignoring Judge Garrity's express ruling.

[7] The court seriously considered ordering Goldberg Weprin to show cause as to why this court should not sanction it for its frivolous conduct that was apparently designed solely to delay this case. "Pursuant to 22 NYCRR 130–1.1(a) and (b), the court, 'in its discretion,' may ... impose financial sanctions against an attorney or firm that engages in 'frivolous conduct.'" *In re Kover*, 134 AD3d 64, 73-74 (1st Dept 2015) (emphasis added). 22 NYCRR 130-1.1(c) provides that it is frivolous to engage in conduct which "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or "**is undertaken primarily to delay or prolong the resolution of the litigation.**" *See id.* at 74 (emphasis added). 22 NYCRR 130-1.1(d) further provides that "[a]n award of costs or the imposition of sanctions may be made ... **upon the court's own initiative**, after a reasonable opportunity to be heard (emphasis added). Moreover, the court finds Ms. Schulman's explanations regarding the need to change counsel specious, especially as to Rosenberg & Estis and Adam Leitman Bailey, firms that are well equipped to handle this case and were competently and zealously advocating for their client to the best of their ability. That said, in the interest of finality and mindful of the ramifications of sanctioning an attorney, the court declines to commence sanctions proceedings. This admonishment hopefully will suffice.

Action No. 1, Dkt. 201. The court then granted Rosenberg & Estis' motion to withdraw in orders, entered in both actions, dated February 9, 2018. *See* Action No. 1, Dkt. 203; Action No. 2, Dkt. 162 (collectively, the February 9 Orders). The February 9 Orders required Tenant to retain new counsel before a February 26, 2018 telephone conference with the court. *See id.* The orders provided that Tenant would be held in default if new counsel did not appear. *See id.* The February 9 Orders further noted that the court provided Tenant with a shorter than usual time to retain new counsel given its numerous frivolous delay tactics. *See id.*

In an order dated February 28, 2018, the court held that Tenant was in default due to its failure to retain new counsel and appear at the February 26 conference, and that Landlord may move to dismiss Tenant's complaints and seek a default judgment on its counterclaims. *See* Action No. 1, Dkt. 209. On March 20 and 23, 2018, Landlord moved by orders to show cause, respectively, in Action Nos. 1 and 2, for dismissal of Tenant's claims and for default judgments on its counterclaims. Oral argument was scheduled for April 4, 2018. *See* Action No. 1, Dkt. 266 (4/4/18 Tr.).

It should be noted that Landlord's papers include a conditional order issued by Judge Garrity, dated December 18, 2017, which gave Landlord the option to terminate the Lease on or before January 4, 2018 if Tenant did not make a $75,000 rent payment (unsurprisingly, it did not pay). *See* Action No. 1, Dkt. 233; *see also* Action No. 1, Dkt. 269 at 7 (December 28, 2017 order requiring Tenant to surrender premises to Landlord) (the December 28 Order). Landlord also submitted an order, dated March 1, 2018, in which Judge Garrity dismissed Tenant's bankruptcy action and enjoined Tenant from filing for bankruptcy for two years. *See* Action No. 1, Dkt. 234. That order noted that the Lease had been terminated by the December 28 Order.

See id.[8] Consequently, at this juncture, the court has complete jurisdiction over all aspects of this action. Moreover, the Lease's termination moots the need for Landlord to regain possession of the premises and, as Landlord seeks monetary damages for the amounts due under the Lease, such an election of remedies warrants dismissal of Landlord's rescission claim.[9]

After the deadline to respond to Landlord's motions had passed, and more than a month after Tenant's deadline to retain new counsel, Goldberg Weprin contacted the court to indicate that it would serve as Tenant's *fifth* counsel in these actions and requested an adjournment of the April 4 oral argument. Goldberg Weprin requested more time despite, as noted, having been involved in the matter since at least November 29. The court viewed this as yet another attempt to delay the case and refused to grant an adjournment. On the evening prior to oral argument, April 3, 2018, Goldberg Weprin filed a notice of appearance on behalf of Tenant and opposition to Landlord's motion (copies were not given to the court prior to argument given the timing).

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[8] Hence, all that remains to be adjudicated are Landlord's claims for damages. *See* Action No. 1, Dkts. 268 & 269 (April 17, 2018 letters from Tenant's counsel explaining why the December 28 Order did not affect Tenant's damages claim). Specifically, Landlord cites authority for the proposition that the rejection of a lease is treated as a breach, and does not eliminate tenant's pre-petition liability under the lease. *See* Action No. 1, Dkt. 269 at 3. This makes sense, as a rule to the contrary would allow a bad faith chapter 11 filing, as here, to discharge a tenant's obligation to pay rent for the duration of the lease's term if, as here, the lease so provides upon tenant's breach. Indeed, Tenant's chapter 11 filing did not result in a reorganization or discharge. In Tenant's April 18, 2018 letter, it does not rebut these contentions. Rather, without citation to relevant authority, Tenant argues that it was absolved of all rent payments obligations after surrender. *See* Action No. 1, Dkt. 270. Yet, Tenant is correct in averring that it will eventually be entitled to a set off once the premises are leased to another tenant. Below, the court accounts for this eventuality. That said, as the scope of the Guaranty is not at issue in this action, nothing herein shall be construed as opining on the amount of the guarantors' liability. All that is res judicata is the fact that Tenant committed the discussed breaches and is liable for the damages addressed herein.

[9] "While a party is permitted to plead inconsistent theories of recovery (CPLR 3014), it must elect among inconsistent positions upon seeking expedited disposition." *On the Level Enterprises, Inc. v 49 E. Houston LLC*, 104 AD3d 500, 501 (1st Dept 2013); *see* Action No. 1, Dkt. 268 at 2 ("insofar as [Landlord] sought rescission of the Lease ... all such counterclaims are hereby withdrawn.").

Landlord promptly filed notices of rejection. While there is no good cause to consider the untimely opposition filed without plausible excuse for the delay, the court will consider it. *Cf. QRT Assocs., Inc. v Mouzouris*, 40 AD3d 326 (1st Dept 2007) ("A default may not be vacated without demonstrating a reasonable excuse for the failure to respond and a meritorious cause of action. Even assuming that plaintiffs had a reasonable excuse for their default, they did not present an affidavit of merit or otherwise demonstrate any merit to their claims.") (internal citation omitted); *JPMorgan Chase Bank, Nat'l Ass'n v Lu*, 155 AD3d 551, 552 (1st Dept 2017) ("Given the lack of a reasonable excuse for her default, it is not necessary for us to consider whether defendant demonstrated the existence of a meritorious defense."), accord *Fidelity & Deposit Co. of Maryland v Arthur Andersen & Co.*, 60 NY2d 693, 695 (1983) (Sufficiency of affidavit of merit is "ordinarily to be left to the discretion of the lower courts."). That said, by opposition, the court does not mean that Goldberg Weprin actually submitted a brief or even an attorney affirmation. Rather, in each action, Ms. Schulman – who, as noted earlier, is a member of Tenant and a guarantor – submitted affidavits. *See* Action No. 1, Dkt. 258; Action No. 2, Dkt. 204.

In her affidavit in Action No. 1, Ms. Schulman does not raise any question of fact regarding Tenant's non-payment of rent or U&O, nor does she dispute Landlord's calculation of the amount of rent owed for the duration of the Lease (which Landlord is entitled to under section 17.1(d) upon default). *See* Action No. 1, Dkt. 238 at 43-44. She regurgitates Tenant's claims regarding the Department of Building not having plans on file for one of the entranceways to the premises. *See* Action No. 1, Dkt. 258 at 2. Landlord previously explained why this was a baseless assertion, namely that Tenant was not prevented from completing its work or seeking the necessary permits, and that this issue did not affect the Fixed Rent

Commencement Date. *See* Action No. 1, Dkt. 37 at 7-9. On this record, it is clear that Tenant did not complete construction due to its own lack of funds, which also is why it repeatedly failed to pay U&O during the pendency of these actions.[10]

Nor is any genuine question of fact raised in Ms. Schulman's affidavit in Action No. 2, where she contends that Tenant cured its failure to maintain the insurance coverage required by the Lease. Landlord had previously demonstrated a lapse in coverage (a lapse, it should be noted, that Ms. Schulman now admits), including a lack of workers' compensation coverage (in this case involving a build-out). *See* Action No. 2, Dkt. 204 at 4 (admitting the policy "lapsed after one year on December 9, 2016."). Ms. Schulman did not submit any policy actually evidencing all required coverage. While she did submit insurance certificates evidencing commercial general liability (CGL) coverage for December 9, 2015 through September 1, 2017 for which Tenant is the named insured and Landlord is an additional insured, these certificates provide that these CGL policies ***do not include workers' compensation coverage***. *See* Action No. 2, Dkt. 208 (box for workers' compensation coverage not checked; no coverage amounts provided). Indeed, Ms. Schulman does not contend these certificates evidence workers' compensation coverage. Rather, as proof of workers' compensation coverage, she relies exclusively on a March 24, 2017 email from Michael Silverman, Tenant's insurance broker (not its carrier), in which he tells Mr. Drory that he "confirmed with the insurance company that the

[10] It should be noted that Ms. Schulman raises the entranceway issue notwithstanding the Guaranty being unconditional and containing a waiver of "all defenses other than payment in full." *See* Action No. 1, Dkt. 238 at 71 ("**Guarantor waives all defenses other than payment in full.**") (emphasis added).

workers compensation is in full force and the payment accepted." *See* Action No. 2, Dkt. 209 at 2.[11] This self-serving hearsay does not raise a material question of fact.

Section 11.2 of the Lease requires Tenant to prove it has the requisite coverage by providing Landlord with a "Certificate" of coverage. *See* Action No. 1, Dkt. 238 at 34. Not only is an email from a broker without any coverage details insufficient under section 11.2, that email does not address the policy period in which coverage was in effect or indicate if retroactive coverage was procured for the periods where coverage indisputably lapsed. *See Harrison v Canal Furniture Corp.*, 2014 WL 359335 (Sup Ct, NY County 2014) (collecting cases for the proposition that failure to procure occurrence based coverage, such as workers' compensation coverage, is an incurable default unless retroactive coverage is obtained), citing *Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 AD3d 528, 529 (1st Dept 2009) ("Plaintiffs' attempt to demonstrate their ability and readiness to cure the alleged violation by procuring, during the cure period, insurance coverage prospectively for the remaining 10 months of their lease term is unavailing, as such policy does not protect defendant against the unknown universe of any claims arising during the period of no insurance coverage."); *see also Prince Fashions, Inc. v 60G 542 Broadway Owner, LLC*, 149 AD3d 529, 530 (1st Dept 2017) ("The fact that plaintiff obtained this prospective CGL insurance coverage cannot retrospectively cure the default arising from plaintiff's failure to have continuously maintained insurance coverage in the landlord's favor as required by its commercial lease.").

In sum, were these cases to be decided on the merits, there is no question that Landlord

[11] If the "mistake" had been resolved by the carrier at the time of the March 27, 2017 email, then it strains credulity to believe that the June 2, 2017 insurance certificate would have continued to indicate a lack of workers' compensation coverage. *See* Action No. 2, Dkt. 208 at 3. And if coverage was procured from another carrier, something from that carrier indicating coverage should have been produced.

would prevail. That said, Tenant has foregone its rights to challenge the merits because, even after all of its dilatory actions, it inexcusably defaulted by failing to timely retain new counsel in accordance with the February 9 Orders. Were this a mere oversight or if the court thought a great injustice would occur by granting victory to Landlord on default, the court would permit the case to proceed. On the contrary, Tenant neither has a meritorious defense nor an excuse for its default and continuous delays.

Pursuant to CPLR 3215 and 22 NYCRR 202.27, where, as here, a party fails to appear at a conference directed in connection with an order relieving their counsel, they should be held in default and their pleadings should be stricken. *See 60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511 (1st Dept 2013). Tenant's complaints and answers, therefore, are stricken. Tenant "is deemed to have admitted all the allegations in [Landlord's counterclaims]", *McGee v Dunn*, 75 AD3d 624 (2d Dept 2010), because a defaulting party "admits all traversable allegations in [their adversary's pleadings], including the basic allegation of liability", *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984), and "all reasonable inferences that flow from them." *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003).

Once a pleading is stricken, the non-defaulting party's "standard of proof is not stringent, amounting only to some firsthand confirmation of the facts." *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) (citations omitted); *see Whittemore v Yeo*, 117 AD3d 544, 545 (1st Dept 2014). Landlord has met that burden. It alleges (and has proven) that Tenant breached the Lease by, *inter alia*, not paying rent and maintaining the required insurance coverage. As discussed, even if these allegations were not deemed admitted (which they are by virtue of Tenant's default), there still would be no question of fact as to Tenant's liability. The record is sufficient

for summary judgment, and, as a result, is more than sufficient to establish liability on a motion for a default judgment.

As for damages, Tenant does not dispute that the base rent and estimated real estate tax escalations for the balance of the original Lease term (i.e., beginning on or about January 2, 2018 through November 30, 2031) total $23,312,621. Added to this amount is the $759,716.64 in unpaid rent and U&O accrued since February 8, 2017, with pre-judgment interest of 9% running from October 8, 2017 (a reasonable intermediate date). *See* CPLR 5001 & 5004. And since entry of a single judgment is most efficient, the instant cases are hereby consolidated for all purposes under the Index Number of Action No. 1.

That said, the court: dismisses Landlord's implied covenant claim as duplicative [*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 (1st Dept 2009)]; Landlord's rescission claims are moot and otherwise barred by the election of remedies doctrine [*see On the Level Enterprises,* 104 AD3d at 501]; and Landlord's punitive damages demand is stricken because this is purely a private dispute [*see Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 (1994)].

Finally, the court awards Landlord its reasonable costs and attorneys' fees in these actions, which shall be computed by a Special Referee. Such fees shall include all reasonable costs and legal fees incurred by Landlord in federal district and bankruptcy court, as they fall within the scope of section 17.1(f) of the Lease since they concern the parties' dispute over the Lease. That such amounts may be excessive is Tenant's own fault, as it chose to prolong this litigation (and thus made it more expensive) by baselessly running to federal court three times. Accordingly, it is

ORDERED that Landlord's motions for default judgment against Tenant are granted,

Tenant's complaints are hereby stricken and the claims asserted therein are dismissed with prejudice, and the two actions are hereby consolidated for all purposes under Index No. 650103/2017; and it is further

ORDERED that, in Action No. 1 (Index No. 650103/2017), the Clerk is directed to enter judgment in favor of 387 Park South L.L.C. and against Artisanal 2015, LLC in the amount of (a) $23,312,621; plus (b) $759,716.64 plus 9% pre-judgment interest from October 8, 2017 to the date judgment is entered; and it is further

ORDERED that within 30 days of 387 Park South L.L.C. leasing the premises to another tenant, Artisanal 2015, LLC shall be given a copy of the new lease and shall have the right to offset and/or recoup the judgment entered against it with all amounts received from such new tenant, which shall be promptly disclosed to Artisanal 2015, LLC upon receipt; and it is further

ORDERED that as a condition for the above, Artisanal 2015, LLC must cause Sarid Drory and Stephanie Schulman to provide (and keep up to date) 387 Park South L.L.C. with their home and email addresses; and it is further

ORDERED that 387 Park South L.L.C.'s claims for reasonable attorneys' fees are hereby severed and are referred to a Special Referee to hear and report; and it is further

ORDERED that within one week of the entry of this order on NYSCEF, Landlord shall serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is respectfully directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date.

Dated: April 27, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.