Hearing Date: No hearing scheduled
Location: <<CourtRoomNumber>>
Judge: Calendar, Y

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Mariyana T. Spyropoulos
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

30 Degree Design LLC, Brad Behmer and Kenneth Mayle	)	
Plaintiff/Counterdefenants	)	
v.	)	No. 2022L 010246
	)	Judge John J. Tully, Jr.
GP Opportunity Fund LLC	)	
Defendant/Counterplaintiffs.	)	

KENNETH MAYLE'S 'S TRIAL MATERIALS
AMENDED STATEMENT OF CASE

Commercial tenant and his guarantor sued their former landlord, the property manager .

Former commercial landlord has claims for rent and property damages, against former tenant and guarantors It is not clear from the landlord's prayer for relief and pleading from whom they wish to obtain judgments from.

The guarantor Kenneth Mayle is represented by Berton Ring of Berton Ring P.C.

The landlord GP Opportunity Fund LLC is represented by Zachary Limbaugh of Limbaugh Law firm

There is no appearance for Brad Behmer or for 30 Degree Design LLC and the court has held Brad Behmer in default and there is no attorney appearance for 30 Degree Design LLC..

WITNESSES

Mayle's witnesses are Kenneth Mayle, Bryon Finke, and a representative from the insurance company and Brad Behmer. Mayle issued 237 notices for Bryon Finke to his lawyer and directly to Brad Behmer and 30 Degree Design LLC.

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PLEADINGS

The operative remaining pleadings consist of landlord's counterclaim, Mayle's answer and affirmative defenses. There is not yet any response to those affirmative defenses at the time of this writing .

Mayle's and the other plaintiffs' filed 6-count complaint (3rd amended) is dismissed as the tenant has been defaulted and their claims dismissed as this Court has ruled that there are not separate viable claims for the guarantors against the property manager plaintiff. The court has previously dismissed plaintiffs' count 6 against the City of Chicago with prejudice.

LEGAL MEMORANDUM

In Illinois (A) any ambiguity in the Lease's insurance provisions or the lease as a whole must be construed against Landlord, which precludes Landlord's claim for fire damage to the Premises; (B) no default existed at the time of the fire because Tenant's rent obligations were prepaid and Landlord never served the notice required by Section 12 of the Lease; (C) Landlord in any event waived any right to declare a default through its own conduct; (D) Landlord cannot recover damages since it made no reasonable effort to mitigate; (E) Mayle's personal guaranty does not support the damages Landlord seeks against him. (F) Landlord failed to demand strict adherence to the lease; (G) Landlord does not own the building and the damages belong to the owner not the listed plaintiff; (H) Mayle is entitled to his property being returned his bit coin transfer for the prepaid rent and security deposit due to the equitable principle of "money had and received" (I) The plaintiff cannot prove any damages and (J) Multiple events demonstrate a landlord constructively evicted the tenant.

BRIEF FACTUAL BACKGROUND

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Landlord and Tenant entered into the Lease in October 2021 for the Premises, a 13,000 square-foot industrial unit, for a term running from October 1, 2021, through September 31, 2026, at a monthly rent of $7,150.00. Mayle executed a personal guaranty in connection with the Lease. The guarantee does not have a waiver of presentment or the usual stated considerations for the guarantee. There are no provisions in the lease which required the guaranty before the landlord would offer a lease to the tenant. The lease shows prepaid eighteen (18) months worth of rent, totaling $128,700.00 consisting of a transfer from Mayle's bitcoin account, pursuant to Section 29.C of the Lease. The lease also shows a security deposit of $42,900.00 with Landlord pursuant to Section 11 again through Mayle's bitcoin transfer.

Section 12 of the Lease provides that Tenant is in default only after Landlord provides written notice of the claimed default and the applicable cure period — five days for a monetary default, ten days for any other default — has expired without cure. Section 27 of the Lease further provides that neither party's failure to enforce any provision of the Lease shall be construed as a waiver of that party's right to subsequently enforce the Lease.

A fire occurred at the Premises before the eighteen-month prepayment of rent was exhausted, meaning Tenant's rent obligations were current and fully paid in advance at the time of the fire. Notwithstanding the fire and any claimed defaults arising from it, Landlord never served Tenant with a written default notice under Section 12 and never filed an eviction or forcible entry and detainer action with respect to any default, at any time. Landlord nonetheless now seeks damages from Tenant and Mr. Mayle for rent and for property damage arising from the fire, together with attorney's fees, in its amended counterclaim.

A. Any Ambiguity in the Lease's Insurance Provisions Must Be Construed Against Landlord and Precludes Landlord's Claim for Fire Damage to the Premises.

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Section 6 of the Lease requires Tenant to maintain "liability and property insurance" at its own expense. Section 6.B requires Tenant to insure "loss or damage to Landlord's property located in the Premises," including damage from fire, at full replacement value. Section 6.C then provides that "Tenant agrees that any claim against the Landlord for any loss, damage or injury to property which is covered by insurance carried by Tenant" — without stating any consequence for such a claim. The Lease nowhere states, clearly or otherwise, that Tenant is liable to Landlord for fire damage to the building itself, as opposed to Landlord's personal property located within the Premises.

It is well settled under Illinois law that a lease drafted by the landlord is construed against the landlord, and that any ambiguity is resolved in the tenant's favor. *Book v. Blue Star*, 33 Ill. App. 3d 22, 31 (1961); *American National Bank v. Lembessis*, 116 Ill. App. 2d 5; Restatement (Second) of Contracts § 206, (1981). Courts always construe leases against landlords no matter who drafted them. Landlord drafted the Lease. Any ambiguity as to the scope of Section 6, including the undefined phrase "Landlord's property located in the Premises," must therefore be resolved against Landlord and in favor of Tenant and Mayle.

Moreover, Illinois courts have squarely held that, absent clear and unambiguous lease language making a tenant liable for negligently caused fire damage, a tenant who pays rent is a co-insured under the landlord's own property insurance policy, and the landlord's insurer has no right of subrogation against the tenant for fire damage to the premises. *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314 (1992); *Cerny-Pickas & Co. v. C.R. Jahn Co.*, 7 Ill. 2d 393 (1955); *Lexington Insurance Group v. Northstar Aero, Inc.*, 406 Ill. App. 3d 1213 (2011). The Lease contains no clear statement that Tenant assumed liability for negligently caused fire damage to the building; it requires only that Tenant carry certain insurance. Under *Dix Mutual* and *Lexington*

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Insurance Group, which is not sufficient to impose fire-damage liability on Tenant, and Landlord's claim for fire damage to the Premises should be barred as a matter of law.

B. No Default Existed at the Time of the Fire Because Tenant's Rent Obligations Were Prepaid and Landlord Never Served the Notice Required by Section 12.

Section 12 of the Lease is explicit: Tenant is not in default, and Landlord acquires no remedy, unless and until Landlord provides written notice of the claimed default and the applicable cure period lapses without cure. The lease showed a prepaid eighteen months of rent under Section 29.C, and the fire occurred before that prepayment was exhausted. Tenant's rent account was therefore current, and no monetary default existed for Landlord to act upon at the time of the fire.

Landlord never served any default notice under Section 12 with respect to any alleged breach and never filed an eviction action. Under the plain terms of the Lease that Landlord itself drafted, no default ever matured into an enforceable breach, because the contractual precondition to any such default — written notice and an expired cure period — was never satisfied. Landlord cannot now be heard to claim damages for defaults it never declared and never gave Tenant the opportunity to cure.

C. Landlord Waived Any Right to Declare a Default Through Its Own Conduct.

Illinois law has long held that "any act of a landlord which affirms the existence of a lease and recognizes a tenant as his lessee after the landlord has knowledge of a breach of lease results in the landlord waiving his right to forfeiture of the lease." *Wolfram Partnership v. LaSalle National Bank*, 328 Ill. App. 3d 207, 224. Commercial landlords are likewise held to a standard of commercially reasonable conduct in dealing with their tenants. *Toys "R" Us v. NBD Trust Co.*, 1995 U.S. Dist. LEXIS 14878 (N.D. Ill. 1995).

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Here, Landlord knew of the fire and any claimed defaults arising from it yet continued to accept the benefit of Tenant's prepaid rent, took no steps to declare a default, served no notice, and filed no eviction action — conduct that affirmed the continued existence of the Lease and recognized Tenant as lessee in good standing. Under *Wolfram*, that conduct operates as a waiver of any right Landlord might otherwise have asserted based on those defaults. In addition, landlord knew early on that both the insurance policy was cancelled for non- payment, and the certificate of insurance did not include building insurance only liability insurance.

Section 27 of the Lease, on its own terms, provides only that a party's "failure to enforce" a provision is not a waiver of the right to enforce it later. That provision addresses inaction; it does not, and cannot, immunize a landlord's affirmative acts recognizing the tenancy and accepting the benefits of the Lease after knowledge of a breach, which is precisely the conduct Wolfram addresses. Landlord's continued acceptance of prepaid rent covering the period during and after the fire, without ever declaring a default, was an affirmative recognition of Tenant's continued tenancy, not a mere failure to act, and Section 27 does not save Landlord's untimely and previously unasserted claims. *McGill V. Wire Sales Co.* 174 Ill App 3d 56 held that “it is well settled that where the landlord’s conduct has led the tenant to believe that the landlord will not insist on strict compliance with the terms of the lease a curt will not permit forfeiture of the tenant’s rights because of his failure to comply strictly with the lease’s terms unless the landlord has notified the tenant that he intends to hod the tenant strictly to the lease’s provisions in the future. “ id 61 . This also includes if the lease has an anti waiver provision. “any act of a landlord that affirms the existence of a lease and recognizes a tenant as his lessee, after the landlord had knowledge of a breach of the lese, result in the landlord waiving his right to a forfeiture of the lease” id at 60.

D. Landlord Failed to Mitigate its damages .

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Section 9-213.1 of the Illinois Code of Civil Procedure imposes an affirmative duty on landlords to take reasonable measures to mitigate the damages caused by a tenant's breach, and a landlord may not recover damages from a defaulting tenant without making a reasonable effort to re-let the premises. 735 ILCS 5/9-213.1. The burden of proving mitigation is on the landlord. *Snyder v. Ambrose*, 266 Ill. App. 3d 163, 639 N.E.2d 639 (1994). Landlord has the burden at trial to establish that it took reasonable steps to mitigate any damages it claims, including any claimed loss of rent, and its failure to do so bars recovery of those damages.

E. Mayle's Personal Guaranty Does Not Support the Damages Landlord Seeks.

Illinois law strictly construes a guaranty in favor of the guarantor, and a guarantor's liability cannot be extended by construction beyond the guarantor's actual undertaking: "[a] guarantor is a favorite of the law and may stand on the strict terms of his obligation when such terms are ascertained." *Farmer's State Bank v. Doering*, 80 Ill. App. 3d 959, 961 (1980). Mr. Mayle is not an owner, officer, or director of the tenant, and his guaranty must be strictly construed and not extended beyond its terms.

More fundamentally, a guarantor's liability is derivative of, and cannot exceed, the underlying liability of the party whose obligations are guaranteed. *1002 E 87th LLC V Midway* 2018 Il App (1st) 171691 P 27 Because Tenant is not liable for the fire damage Landlord claims, for the reasons set forth in Section III.A above, and because no default was ever validly declared against Tenant, for the reasons set forth in Sections III.B and III.C above, there is no underlying obligation to which Mr. Mayle's guaranty can attach. Landlord's claims against Mr. Mayle as guarantor accordingly fail together with its claims against Tenant.

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More than 120 years ago in *in Mamerow V. National Lead Co.* 206 Ill 626 (1903) the court held that to hold a guarantor liable, the creditor must provide notice to the guarantor of the debtor's default unless the guarantor is an owner, officer or director of the entity that is the debtor. Here the evidence at trial will show that no notice was ever given to Mayle about any default of the tenant.

F. Landlord failed to reinstate any strict adherence to the lease.

In *LaSalle Nat'l Bank V. Khan* 191 Ill App 3d 41 (1989) a commercial lease case the court held that the landlord was required to issue a notice to the tenant that he is mandating strict compliance to the lease including the requirement to pay rent on the first, before he could institute the late charge penalty after he allowed the tenant to pay late without consequence for a number of years before the landlord can assert a default for the late payment of the rents. "Failure to enforce conditions of a lease such as the covenant for the prompt payment of rent , can give rise to a waiver of the condition." Id at 44 and "where the lessor waives lessee's forfeiture by an act inconsistent with the declaration of a forfeiture, such as the acceptance of late rent payments, the lease continues in force. ", id at 44. Thus the landlord's allowance of the previous defaults against the tenant including the failure to provide compliance with the purported provision concerning insurance waives that requirement as a default for damages.

G. Only the owner and not the management company has standing to be entitled to damages

*Inland Real Estate Corp. V. Tower Const. Co.*174 Ill App 3d 421, 428 (1988) the Court held that only the owner and not the property manager has a right to damages such as damages and rent owed. In another case where the court emphasized the distinction between an owner and

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property management company as it related to security deposit violations, *Munroe V. Brower Realty & Management Co.,* 206 Ill App 3d 699, (1990), the court held the management company had no liability concerning the security deposit violations under Illinois law since they are not the owner.

Conversely here, the owner and not anyone else has the right to collect rent, see also 735 ILCS 5/9-201, the management company would only have the right if it is contractually assigned to them. A management company since they did not own the building has no right to property damages on a building that they did not own. Here the plaintiff is not the owner of the building and not the beneficiary of the land trust that owns the building.

H. The plaintiff has no right to retain monies paid by a non lessee or non obligor

The guarantor only had an obligation to guarantee not to pay. Here the payment by the guarantor with no obligation to pay requires the defendant to return those monies to the plaintiff the guarantor under the Money had and received theory. *Kaiser V. Fleming* 315 Ill App 3d 921 (2000) "an action for money had and received is maintainable where defendant has received money which is in equity and good conscience belongs to the plaintiff. The cause of action is one that is maintainable to recover money either under the theory of an implied contract or under the theory of a quasi contractual obligation. " id at id at 925. Here Mayle had no obligation to pay the 18 moths or rent and the 6 months of security deposit as those obligations belong to the tenant and not the guarantor.

I. The plaintiff cannot prove damages.

The usual measure of damages for permanent damage to buildings is the decrease in the value of the property. *Illinois Cent Ry Co, V Ferrell* 108 Ill App 659 (1902) *and Stirs Inc. V. City of*

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Chicago 24 Ill app 3d 118 (1974). See also Illinois Pattern Civil Jury Instruction 30.18. “the damage to real property determined by the difference between the fair market value of the real property immediately before the occurrence and its fair market value immediately after the occurrence.“.

Here, defendant failed to identify any opinion witnesses. Therefore they cannot prove any damages.

J. Multiple events demonstrate the landlord constructively evicted the tenant.

In Illinois, the law is clear on constructive eviction for commercial tenants. The seminal case is *Juhn Munic Meat Co. v. H. Gartenberg & Co.* 51 Ill App 3d 413 (1977) which held that a tenant has no more responsibility to pay rent when the constructive eviction took place. Here it is clear that either the City closure order of June, 2022 or the later fire in February 2023 resulted in the constructive eviction of the tenant therefore there is no liability for any rent claims against either the tenant or the guarantor.

CONCLUSION

For the foregoing reasons, Kenneth Mayle respectfully requests that the Court consider the foregoing issues of law in connection with the trial of this matter, and enter judgment in favor of Mr. Mayle and against Landlord on Landlord's counterclaim.

/s/ Berton N. Ring
Attorney for Kenneth Mayle

BERTON N. RING, #12735

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CERTIFICATE OF SERVICE

I, Berton Ring-attorney, certify pursuant to Illinois Code of Civil Procedure Section 1-109 that I served a copy of this document upon the named above attorneys at above-corresponding email addresses on or about 5 p.m. on August 11, 2026.

/s/Berton Ring