

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONTARIO

ROUTE 96 PROPERTIES, LLC,

Plaintiff,

Index No. 127226-2020

vs

ADVENTURES IN MOVEMENT AND
SENSATION, INC., AND MARK KLYCZEK,

AFFIDAVIT

Defendants.

STATE OF NEW YORK)
COUNTY OF ONTARIO) SS.:

Mark DiFelice, being duly sworn, deposes and says:

1. I am a member of Plaintiff Route 96 Properties, LLC (the "Plaintiff"). I make this affidavit in support of Plaintiff's motion for summary judgment based in part on personal knowledge and in part on Plaintiff's books and records made, obtained and retained in Plaintiff's regular and ordinary course of business; and which it was Plaintiff's regular and ordinary course of business to make, obtain and retain; and which were made at or about the time of the events and transactions recorded.

2. Plaintiff is the owner of real property commonly known as 6548 Anthony Drive, Victor, New York (the "Property"). The Property is a commercial property with space available for rent.

3. On or about January 14, 2016, Plaintiff and Defendant Adventures in Movement and Sensation, Inc. (the "Tenant") entered into a Lease Agreement, a copy of which is annexed as Exhibit A (the "Lease"), with respect to a portion of the Property.

4. On or about April 22, 2016, Landlord and Tenant executed a Lease Addendum (the "Addendum") correcting the Tenant's name and identifying the portion of the real property to be leased as 6548 Anthony Drive, Suite B, Victor, New York (the "Leased Premises"). A copy of the Addendum is annexed as **Exhibit B**.

5. Under the Lease, Tenant agreed to pay base monthly rent according to the Rent Schedule annexed as Exhibit C to the Lease (Exhibit A, § 3.01); late charges in an amount equal to five percent of any rent payment not paid within five days of the due date (§ 3.04); and interest on any amounts due under the Lease at the rate of 12% per annum commencing on the date the payment falls due (§ 3.04).

6. The Lease provides that the tenant's failure to pay all rent within ten days' written notice shall constitute an event of default (§ 11.01[a]).

7. The Lease further provides that, if an event of default occurs and is not cured, the Landlord may terminate the Lease by giving written notice to the Tenant (§ 11.02).

8. The Lease provides that, in the event the Lease is terminated under § 11.02, the Landlord shall be entitled to either the full amount of the rent due under balance of the Lease term or \$50,000.00, whichever is less.

9. Defendant Mark Klyczek ("Klyczek") personally guaranteed Tenant's obligations under the Lease. A copy of the Guaranty is annexed here as **Exhibit C**.

Plaintiff is Entitled to Summary Judgment on its First Cause of Action

10. The Tenant failed to pay the base monthly rent falling due March 1, 2020.

11. I instructed Plaintiff's attorneys to prepare and send a Notice of Default to Tenant and Defendant Klyczek. Plaintiff's attorneys sent the Notice of Default on March 12, 2020. A copy of the Notice of Default is annexed as **Exhibit D**.

12. The Notice of Default demanded payment in the amount of \$5,003.25, which consists of base rent in the amount of \$4,765.00 and a late fee in the amount of \$238.25

13. The Tenant has failed to cure the default.

14. Plaintiff is entitled to summary judgment on its first cause of action against the Tenant in the amount of \$5,003.25, together with interest at the rate of 12% per annum from March 1, 2020.

Plaintiff is Entitled to Summary Judgment on its Second Cause of Action

15. The Tenant's failure to pay all rent due for the month of March 2020 within 10 days of the Notice of Default constituted an "Event of Default" under § 11.01(a) of the Lease.

16. When the Tenant failed to cure the default, I instructed Plaintiff's attorneys to terminate the lease pursuant to § 11.02 of the Lease.

17. Through written notice dated March 30, 2020, Plaintiff exercised its right to terminate the Lease. A copy of the Notice of Termination is annexed as **Exhibit E**.

18. Pursuant to § 11.05(a)(iii) of the Lease, in the event the Lease is terminated, Plaintiff is entitled to recover as damages either the full amount of the rent scheduled under the remainder of the Lease or \$50,000.00, whichever is less.

19. The total rent scheduled to fall due under the remainder of the Lease was \$63,625.00. See Exhibit E. The Notice of Termination therefore demanded damages in the amount of \$50,000.00.

20. The Tenant has failed to pay the amount demanded or any portion thereof.

21. Plaintiff is entitled to summary judgment on its second cause of action in the amount of \$50,000.00, together with interest at the rate of 12% per annum from March 30, 2020.

**Plaintiff is Entitled to Summary Judgment on its Third Cause of Action
Against Defendant Klyczek**

22. Pursuant to § 11.05 of the Lease, Plaintiff is entitled to recover the amounts demanded under both its first and second causes of action.

23. Through the demands annexed as Exhibits D and E, Plaintiff demanded that Defendant Klyczek, as guarantor of the Tenant's obligations, cure the Tenant's defaults under the Lease.

24. Defendant Klyczek has failed to pay the Tenant's obligations or any portion thereof despite Plaintiff's demands.

25. Plaintiff is entitled to a money judgment against Defendant Klyczek in the amount of \$55,003.25, together with interest at the rate of 12% per annum from March 30, 2020.

Attorneys' Fees

26. The Lease and the Guaranty provide that Defendants shall be responsible for Plaintiff's reasonable attorneys' fees. See Exhibit A § 11.08; Exhibit C, p. 2, first paragraph.

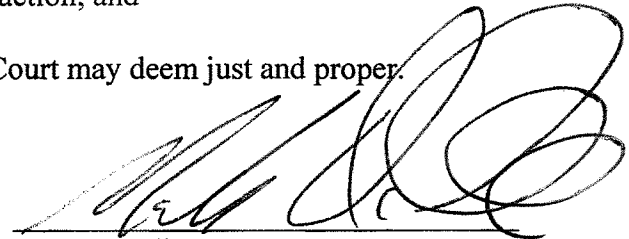
27. Plaintiff retained Lacy Katzen LLP to enforce its rights. No attorney or employee of Lacy Katzen LLP is a salaried employee of Plaintiff.

28. Therefore, there is an additional amount due Plaintiff from Defendant for Plaintiff's reasonable attorneys' fees in an amount to be determined by the Court.

WHEREFORE, Plaintiff respectfully requests an Order granting its motion for summary judgment as follows:

1. On its first cause of action against the Tenant in the amount of \$5,003.25, together with interest at the rate of 12% per annum from March 1, 2020;
2. On its second cause of action against the Tenant in the amount of \$50,000.00, together with interest at the rate of 12% per annum from March 30, 2020;

- 3. On its third cause of action against Defendant Klyczek in the amount of \$55,003.25, together with interest at the rate of 12% per annum from March 30, 2020;
- 4. An award of attorneys' fees in an amount deemed reasonable by the Court;
- 5. The costs and disbursements of this action; and
- 6. Such other and further relief as the Court may deem just and proper.



Mark DiFelice

Sworn to before me this 24 day
of September, 2020.

Cynthia M. Wait
Notary Public

CYNTHIA M WAIT
NOTARY PUBLIC-STATE OF NEW YORK
No. 01WA6250633
Qualified in Monroe County
My Commission Expires 10-31-2023