

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CIVIL DIVISION**

ERT 163rd STREET MALL, LLC,

Plaintiff,

v.

CASE NO.: 2013-CA-10209

**NOEL ENTERPRISES, L.L.C.,
LINDA NOEL AND MERCY NOEL,**

Defendants.

**SUMMARY PROCEEDINGS
SOUGHT UNDER CHAPTER 51**

PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

Plaintiff, ERT 163RD STREET MALL, LLC ("Landlord"), moves for final summary judgment pursuant to Rule 1.510 of the Florida Rules of Civil Procedure against the Defendants, NOEL ENTERPRISES, LLC ("Tenant"), and LINDA NOEL, ("Guarantor"), upon the grounds that the pleadings, documents, and affidavits, filed or to be filed in this action, show that there is no genuine issue as to any material fact. Landlord is entitled to final summary judgment as a matter of law in its favor and against Tenant on Landlord's claim for possession and money damages and, against the Guarantor, for money damages.

INTRODUCTION

This case involves Landlord's attempt to recover losses it sustained as a result of the Tenant's failure to pay rent and other amounts due and owing under a written lease agreement. On or about March 20, 2013, Landlord filed its two-count Complaint for possession and breach of contract. On or about October 6, 2011, Tenant and Guarantor Linda Noel served an Answer to the Complaint.

For the reasons set forth below, there is no genuine issue of material fact that:

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- (a) Landlord and Tenant entered into a valid and enforceable Lease;
 - (b) Guarantor executed a guarantee that Tenant would fulfill its monetary obligations to Landlord pursuant to the Lease;
 - (c) Tenant failed to pay rent and other charges due and owing under the Lease; and
 - (d) Landlord has been damaged as a result of the Defendants' failure to pay rent and other charges due and owing under the Lease.

Accordingly, Landlord is entitled to final judgment as a matter of law in its favor and against Tenant in the amount of \$101,590.35, plus interest, attorneys' fees, and costs and against Guarantor in the amount of \$56,936.46, plus interest, attorneys' fees, and costs

UNDISPUTED MATERIAL FACTS

The following facts are uncontested in the pleadings or are supported by the record in this action. Concurrently with the filing of this Motion, and in support thereof, Landlord filed the Affidavit of Susan Martinez ("Landlord Aff."). The Landlord Aff. is attached hereto as **Exhibit A**

1. Landlord is a Delaware limited liability corporation, owning real property in Miami-Dade County, Florida at 1421 North East 163rd Street, Miami, Florida 33162, and commonly known as the Mall at 163rd Street. (Landlord Aff. 4).

2. Tenant is a Florida limited liability corporation doing business in Miami-Dade County, Florida. (See Defendants' Answer; Landlord Aff. 5).

3. On or about August 31, 2007, Landlord granted Tenant the right to use and occupy about 1,163 square feet of commercial space (Store No. 1358) within the Mall at 163rd Street Shopping Center (the "Premises") under an Agreement of Lease (the "Lease"). (Landlord Aff. 6).

4. The Lease and Assignment obligated Tenant to, among other things, pay minimum monthly rent in addition to Tenant's proportionate share of common area expenses, real estate taxes, and insurance. (Landlord Aff. 7).

5. On or about August 31, 2007, as a material inducement to Landlord executing the Lease, Guarantors executed a Guaranty (the "Guaranty"). (Landlord Aff. 8).

6. Tenant is in default of the Lease for failure to pay rent and other charges due under the Lease. (Landlord Aff. 9).

7. On February 18, 2013, Landlord provided written notice to Tenant pursuant to Section 83.20, Florida Statutes, of Tenant's failure to pay rent and demanded payment of the rent or possession of the Premises within ten (10) days. (Landlord Aff. 10).

8. Tenant, however, failed to cure its material default by paying rent or relinquishing possession of the Premises within the required ten day period. (Landlord Aff. 11).

9. On or about March 20, 2013, Landlord filed its Complaint against Tenant and Guarantors.

10. Tenant and Guarantor Linda Noel filed their Answer (the "Answer") on April 2, 2013. A true and correct copy of the Answer is attached as **Exhibit B**.

11. In the Answer, Tenant admitted that it signed the Lease attached to the Complaint and that Tenant was obligated by the Lease to pay minimum monthly rent in addition to Tenant's proportionate share of the common area expenses, real estate taxes and insurance. (See Defendants' Answer ¶ 1, 3)

12. In the Answer, Guarantor Linda Noel admitted that she signed the Guaranty. (See Defendants' Answer ¶ 2).

13. As of May 1, 2013, Tenant owes to Landlord the sum of \$101,590.35. (Landlord Aff. 12).

14. From May 1, 2011 to May 1, 2013, the 24 months for which the Guarantor is liable, Tenant owes to Landlord the sum of \$56,936.46. (Landlord Aff. 13).

15. Landlord retained the law firm of Shumaker, Loop & Kendrick, LLP to represent it in this action, and Landlord is obligated to pay reasonable attorney fees and costs for Shumaker, Loop & Kendrick, LLP's services in this matter. (Landlord Aff. 13).

LEGAL ARGUMENT

Summary Judgment Standard

16. Pursuant to Florida law, this Court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the declarations, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510.

17. This Court must enter summary judgment when all the undisputed "material" facts and "reasonable" factual inferences, construed most favorably to the non-moving party, demonstrate that there is no genuine issue of any material fact. *See Volusia County v. Aberdeen at Ormond Beach, LP*, 760 So. 2d 126, 130 (Fla. 2000). The term "genuine issue" means a real issue, as distinguished from a false or colorable issue. *See Harrison v. Consumers Mortgage Co.*, 154 So. 2d 194, 195 (Fla. 1st DCA 1963). The existence of a dispute as to matters not material to the action will not preclude entry of summary judgment. *See Armstrong v. Southern Bell Tel. & Tel. Co.*, 366 So. 2d 88, 90 (Fla. 1st DCA 1987).

18. A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979). Once the movant tenders competent evidence to support his motion, the opposing party must come forward with counterevidence sufficient to reveal a genuine issue of material fact. *Id.* It is not enough for the opposing party merely to assert that an issue does exist. *Id.*

19. The record in this case establishes that there is no genuine issue as to any material fact and that Landlord is entitled to a judgment as a matter of law in its favor against Tenant for breach of the Lease.

Landlord is Entitled to Possession of the Premises

20. Landlord is entitled to summary judgment as a matter of law as on its claim against Tenant for possession of the Premises. To prevail on a claim for Possession, Landlord need only show that Tenant has failed to pay the rent at the time it became due. § 83.05, Fla. Stat. *Helga Skin Therapy, Inc. v. Dead River Properties, Inc.*, 478 So. 2d 95, 97 (Fla. 2d DCA 1985) (Landlord entitled to possession of the premises once tenant failed to make rent payments).

21. The undisputed facts in this case demonstrate that Landlord has satisfied the elements to prevail on its claim for Possession. There is no genuine issue of material fact that (i) Landlord's and Tenant entered into the Lease, and (ii) Tenant failed to pay rent and other charges due and owing under the Lease.

22. Accordingly, Landlord is entitled to summary judgment in its favor and against Tenant, finding that Landlord is entitled to Possession of the Premises and directing the Clerk of Court to issue a Writ of Possession commanding the Sheriff to remove all persons from the Premises and place Landlord in possession of the Premises.

Tenant Breached the Lease and Damaged Landlord

23. Landlord is entitled to summary judgment as a matter of law as on its claim against Tenant for breach of the Lease. To prevail on a breach of contract claim, Landlord need

only show a valid contract, breach of the contract, and damages. *See Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So. 2d 253, 255 (Fla. 2d DCA 1994).

24. The undisputed facts in this case demonstrate that Landlord has satisfied the elements to prevail on its claim against Tenant. There is no genuine issue of material fact that (i) Landlord's and Tenant entered into the Lease, (ii) Tenant failed to pay rent and other charges due and owing under the Lease; and (iii) Landlord has been damaged as a result of Tenant's failure to pay rent and other charges due and owing under the Lease.

25. It is further undisputed that, the Tenant is in breach of the Lease for failure to pay rent and other charges due in the amount of \$101,590.35. Accordingly, Landlord is entitled to summary judgment in its favor and against Tenant in the total principal amount of \$101,590.35, less any amounts deposited into the Court Registry by Tenant as partial payment of rent, plus interest, attorney fees, and costs, on Landlord's claims for breach of the Lease.

Guarantor is Liable Pursuant to the Guarantee

26. Landlord is entitled to summary judgment as a matter of law as on its claim against Guarantor pursuant to the Guaranty.

27. The undisputed facts in this case demonstrate that Landlord has satisfied the elements to prevail on its claim against Guarantor. There is no genuine issue of material fact that (i) Landlord's and Tenant entered into the Lease, (ii) The Guarantor entered into the Guaranty, whereby they unconditionally guaranteed the performance of Tenant pursuant to the Lease, (iii) Tenant failed to pay rent and other charges due and owing under the Lease; and (iv) Landlord has been damaged as a result of Tenant's failure to pay rent and other charges due and owing under the Lease.

28. While the Guarantor admits to giving Landlord a guaranty of Tenant's performance under the Lease, she claims in her Answer that the Guaranty was only valid for the first five years of the lease. Guarantor, however, is bound by the plain and unambiguous language of the Guaranty. "[T]he interpretation of a written contract is a matter of law to be determined by the court." *DEC Elec., Inc. v. Raphael Const. Corp.*, 558 So. 2d 427, 428 (Fla. 1990). Even "[i]f an issue of contract interpretation concerns the intention of the parties, that intention may be determined from the written contract, as a matter of law." *Id.* at 429. If the language is not "reasonably susceptible to more than one interpretation" then the Court "cannot indulge in construction or interpretation of [the document's] plain meaning." *Lambert v. Berkley S. Condo. Ass'n, Inc.*, 680 So. 2d 588, 590 (Fla. 4th DCA 1996). The parties' subjective intent "does not alter the meaning of the [contract]." *Wallshein v. Shugarman*, 50 So. 3d 89, 90 (Fla. 4th DCA 2010).

29. Here, the Guaranty governs and clearly provides continuing liability for the Guarantor. It provides, in relevant part:

This Guaranty shall remain in full force for the first five (5) years of the Lease Term, **thereafter, the Guarantor's financial obligation hereunder shall not exceed twenty-four (24) months Rent and Additional Rent hereunder beginning in the sixth (6th) year of the Lease Term and continuing through the remainder of the Lease Term**, including any renewals thereof. (emphasis added)

30. Both Landlord and Guarantor are bound by the plain, unambiguous language of the Guaranty. As such, while the Guaranty is limited to a rolling 24 month window after the first five years, the Guarantor is still liable for up to 24 months of unpaid rent and additional rent, which totals \$56,936.46. (Landlord Aff. 13).

31. Accordingly, Landlord is entitled to summary judgment in its favor and against Guarantor in the total principal amount of \$56,936.46, plus interest, attorney fees, and costs, on Landlord's claims for breach of the Guaranty.

Landlord is Entitled to Reasonable Attorneys' Fees and Costs

32. Landlord has incurred attorney fees and costs in prosecuting this action and is entitled to recover its attorney fees and costs expended in prosecuting this action pursuant to the Lease and Guaranty. Under Florida law, it is well settled that attorney fees are proper, recoverable items of damages when provided for in a contract between parties. *See, e.g., Centex-Rooney Constr. Co. v. Martin County*, 725 So. 2d 1255 (Fla. 4th DCA 1999).

CONCLUSION

33. For the reasons set forth above, there is no genuine issue of material fact that Landlord is entitled to final summary judgment as matter of law in its favor and against Tenant:

- a. Determining that Landlord is entitled to Possession of the Premises;
- b. Directing the Clerk of this Court to issue a Writ of Possession commanding the Sheriff to remove all persons from the Premises and place Landlord in possession of the Premises;
- c. Entering judgment against the Tenant in the amount of \$101,590.35, plus interest, attorney fees, and costs, on Landlord's claims for breach of contract; and
- d. Entering judgment against the Guarantor in the amount of \$56,936.46, plus interest, attorney fees, and costs, on Landlord's claims for breach of contract.

Dated: April 29, 2013

SHUMAKER, LOOP & KENDRICK, LLP

By: _____

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bwillis@slk-law.com (secondary email)
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 29, 2013, I served a true and correct copy of the foregoing, via FedEx Overnight, to:

NOEL ENTERPRISES, LLC
275 NW 157th Street
Miami, FL 33169

LINDA NOEL
1303 NE 163rd Street
North Miami Beach, FL 33162

Attorney

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EXHIBIT A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CIVIL DIVISION

ERT 163rd STREET MALL, LLC,

Plaintiff,

v.

CASE NO.: 2013-CA-10209

NOEL ENTERPRISES, L.L.C.,
LINDA NOEL AND MERCY NOEL,

Defendants.

SUMMARY PROCEEDINGS
SOUGHT UNDER CHAPTER 51

AFFIDAVIT OF SUSAN MARTINEZ

STATE OF PENNSYLVANIA

COUNTY OF MONTGOMERY

BEFORE ME, the undersigned authority, personally appeared Susan Martinez, who after being duly sworn, deposes and says:

1. I am over the age of eighteen (18) years and am competent to execute this Affidavit.
2. This Affidavit is submitted in support of the Motion for Summary Judgment against NOEL ENTERPRISES, LLC (“Tenant”), and LINDA NOEL and MERCY NOEL, (“Guarantors”), filed in this action on behalf of the Plaintiff, ERT 163RD STREET MALL, LLC.
3. I am the South Region Collection Manager for the Landlord. In that capacity, I am familiar with Landlord’s books of account and have examined all of the books, records, and documents kept by Landlord concerning the lease documents at issue in this action. All of these books, records, and documents are made and kept by Landlord in the regular course of its business and are made at or near the time by, and from information transmitted by, persons with personal

knowledge of the facts, such as myself. It is the regular practice of Landlord to make and keep these books, records, and documents. The books, records, and documents that I have examined are in my custody, supervision, or control of and are complete, accurate, and correct.

4. Landlord is a Delaware limited liability corporation, owning real property in Miami-Dade County, Florida at 1421 North East 163rd Street, Miami, Florida 33162, and commonly known as the Mall at 163rd Street.

5. Upon information and belief, Tenant is a Florida limited liability corporation doing business in Miami-Dade County, Florida.

6. On or about August 31, 2007, Landlord granted Tenant the right to use and occupy about 1,163 square feet of commercial space (Store No. 1358) within the Mall at 163rd Street Shopping Center (the "Premises") under an Agreement of Lease (the "Lease"). A true and correct copy of the Lease is attached to the Complaint as Exhibit A.

7. The Lease and Assignment obligated Tenant to, among other things, pay minimum monthly rent in addition to Tenant's proportionate share of common area expenses, real estate taxes, and insurance.

8. On or about August 31, 2007, as a material inducement to Landlord executing the Lease, Guarantors executed a Guaranty (the "Guaranty"). A true and correct copy of the Guaranty is attached to the Complaint as part of Exhibit A.

9. Tenant is in default of the Lease for failure to pay rent and other charges due under the Lease.

10. On February 18, 2013, Landlord provided written notice to Tenant pursuant to Section 83.20, Florida Statutes, of Tenant's failure to pay rent and demanded payment of the rent

or possession of the Premises within ten (10) days. A true and correct copy of Landlord's February 18, 2013 Default Notice is attached to the Complaint as Exhibit B.

11. Tenant, however, failed to cure its material default by paying rent or relinquishing possession of the Premises within the required ten day period.

12. As of May 1, 2013, Tenant owes to Landlord the sum of \$101,590.35 (One hundred one thousand, five hundred ninety dollars and thirty-five cents).

13. From May 1, 2011 to May 1, 2013, Tenant owes to Landlord the sum of \$56,936.46 (Fifty six thousand, nine hundred thirty-six dollars and forty-six cents).


14. Landlord has retained the law firm of Shumaker, Loop & Kendrick, LLP to represent it in this action, and Landlord is obligated to pay reasonable attorney fees and costs for Shumaker, Loop & Kendrick, LLP's services in this matter.

THIS COMPLETES MY AFFIDAVIT.

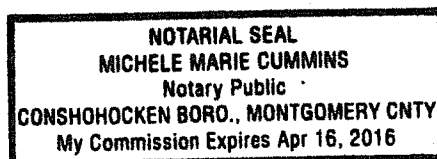


SUSAN MARTINEZ

Sworn to and subscribed before me this 23rd day of April, 2013, by SUSAN MARTINEZ, as South Region Collection Manager for ERT 163RD STREET MALL, LLC, who is personally known to me or [] produced _____ as identification and did take an oath.



NOTARY PUBLIC
Name: Michele Marie Cummins
My Commission Expires: April 16, 2016
[notary seal]



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EXHIBIT B

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CIVIL DIVISION

ERT 163rd STREET MALL, LLC

Plaintiff,

V.

NOEL ENTERPRISES, LLC
LINDA NOEL and MERCY NOEL

Defendants,

THE ORIGINAL FILED
IN THE OFFICE OF THE CLERK
LOC # 23
CIRCUIT & COUNTY COURTS
DADE COUNTY, FLORIDA
ON APR 02 2013

Case No: 13 - 10209 CA 10

Division: _____

Judge: _____

Delivered To:

Brian C. Willis, Esquire
Shumaker, Loop & Kendrick, LLP
101 E. Kennedy Boulevard, Suite 2800
Tampa, Florida 33602 | Telephone (813) 229-7600

Clerk of Circuit Court Miami-Dade County
73 West Flagler Street, Suite 242
Miami, Florida 33130

ANSWERS & DEFENSES TO COMPLAINT

Preliminary Allegations

1. (6) We have no dispute to the items referenced in this paragraph.
2. (7) The "Guaranty" mentioned is no longer valid, as it was for a period of Five (5) years which ended in August of 2012.
3. (8) No dispute is made in this regard
4. (9) The total amount due under the agreement is less than that stated in the complaint - reason being- Our rent was reduced in 2011 With the mutual agreement between "Tenant" and "Landlord" ~ "Landlord" agreed that the general performance of the "Shopping Center" was less than desirable and that vacancy rates were high - in excess of 50%.
5. (10) The amount of \$90,574.20 is disputed, as the "Landlord" as the monthly rent was reduced in January of 2010 which is not reflected in the figure.
6. (16) Tenant has suffered financial losses due to the misrepresentation of the "Landlord" that the "Shopping Center" would attract traffic and be occupied by quality tenants.
7. (17) Default Notice was not received

In response to Count III, "Breach of Guaranty"; The Guaranty was for a FIVE (5) Year period, which ended in August of 2012.

In summary, Our business entered into the lease contract under the impression that the New Mall at 163rd would be revitalized and our business (restaurant) would prosper. In reality, the "Shopping Center" was under performing, had low traffic and serious security issues.- making the "Shopping Center" a dangerous place to visit.

I invested my life savings into getting this business up and running- and have suffered total financial losses and on the verge of bankruptcy.

I am in the process of marketing the business for sale and or liquidation to recoup some of my loses and make payment on an agreed amount of the past due rent.

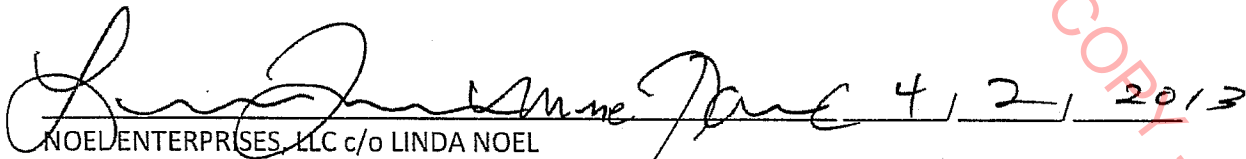
I am asking for One Hundred and Twenty Days (120) in order to vacate the premises in order to locate a new buyer or liquidate the business inventory and equipment.

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a copy of these ANSWERS & DEFENSES TO COMPLAINT has been hand delivered and/or sent via First Class Mail to the Clerk of The Court as well as The Plaintiff's Attorney on the ____ day of _____, _____

Brian C. Willis, Esquire
Shumaker, Loop & Kendrick, LLP
101 E. Kennedy Boulevard, Suite 2800
Tampa, Florida 33602 | Telephone (813) 229-7600

Clerk of Circuit Court Miami-Dade County
73 West Flagler Street, Suite 242
Miami, Florida 33130


NOEL ENTERPRISES, LLC c/o LINDA NOEL 4/2/2013