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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 103495/2011

NEW 24 WEST 40TH STREET LLC

VS

XE CAPITAL MANAGEMENT, LLC

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

T _____

N _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

FEB 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/16/12

_____, J.S.C.
EMILY JANE GOODMAN

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 : IAS PART 17

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NEW 24 WEST 40TH STREET LLC,

Plaintiff,

-against-

Index No. 10[illegible]95/11

XE CAPITAL MANAGEMENT, LLC,

Defendant.

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EMILY JANE GOODMAN, J.:

Plaintiff New 24 West 40th Street, LLC (Landlord) moves, pursuant to CPLR 3212 (e), for partial summary judgment against defendant XE Capital Management, LLC (XE) for rent, additional rent and liquidated damages in the amount of $1,622,093.74.[1] XE cross-moves, pursuant to CPLR 3212, for an order dismissing the complaint against it and for leave to amend/supplement its affirmative defenses.

This case involves a commercial lease entered into in March 2004, for a term of 10 years and 6 months, between the Landlord and XE for the third floor in a building located at 24 West 40th Street, New York, New York.

The lease agreement was twice modified, adding the 2nd floor, and ultimately the 15th floor to the leased premises. The first modification, dated December 1, 2004, contained the same

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[1] As discussed further below, in its papers in opposition to XE's motion for an order dismissing the case and in further support of its own motion for partial summary judgment, the Landlord revises downward the amount it seeks for rent, additional rent, and liquidated damages to $1,449,921.30 .

expiration date as the original lease, September 14, 2014. The second modification, dated April 30, 2007, which added the 15th floor to the leased premises, contained an expiration date of September 30, 2017; the expiration date for the 2nd and 3rd floor leases remained September 14, 2014.

In or about September 2010, XE entered into a sublease with A2iA Corp. (A2iA) for the third floor of the building and then, in October 2010, XE entered into a separate sublease with Lightbox Capital Management, LLC (Lightbox), for the second floor of the building. XE continued to occupy the 15th floor of the building.

Pursuant to the lease, XE agreed to pay Fixed Annual Rent in amounts specified in Article 37 of the lease and Article 3 of the respective lease modifications. Pursuant to Article 63 of the lease, if XE was not in default beyond applicable cure periods, it was entitled to a credit against its fixed annual rent of $14,129.50 per month for a 180-day period. In the event that the lease was terminated for breach by XE, however, the credited rent would be due and payable to the Landlord as Additional Rent. The complaint alleges that XE breached the lease, and is now obligated to pay back $84,777.00 of the credited rent as Additional Rent.

The lease also contained a liquidated damages clause providing as follows:

> In the event of the termination of this Lease pursuant to any provision of Article 17, not withstanding the provisions of Article 18, Landlord shall, at Landlord's option, forthwith be entitled to recover from Tenant as and for liquidated damages with respect to any such Lease termination, an amount equal to the rent reserved hereunder for the unexpired portion of the term demised. In computation of such damages, all rent payable hereunder after the date of termination shall be discounted from the date installments of rent would be due hereunder if this Lease had not been terminated to the date of payment at the rate of four (4%) percent per annum. In the event that the Demised Premises are relet after the date of such termination and the date of the collection of the aforesaid liquidated damages, then the Landlord agrees that on the date which would otherwise have been the normal expiration of this Lease but for the termination of this Lease pursuant to the provisions of Article 17, Landlord shall pay to Tenant a sum equal to the Fixed Annual Rent actually paid Landlord (exclusive of escalation payments, tax payments, fuel payments, operating cost payments, percentage payments and the like whether denominated as rent or otherwise) from the date of such termination to the Expiration Date, less any and all expenses of any type, kind or nature incurred by Landlord in connection with reletting the Demised Premises, whether foreseen or unforeseen. ... The foregoing, however, shall not imply any obligation upon Landlord to relet the Demised Premises hereunder in the event of any termination pursuant to the provisions of Article 17, nor shall it constitute Landlord as Tenant's agent with respect to any reletting of the Demised Premises hereunder.

Lease Agreement, Article 59.

The complaint alleges that in January 2011, XE failed to pay the Fixed Annual Rent and Additional Rent[2] due under the lease, and that it abandoned the 15th floor, leaving the subtenants in possession of the 2nd and 3rd floors. The complaint further

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[2] Additional Rent includes, for example, the tenant's proportionate share of real estate taxes payable for the year.

alleges that the Landlord served a Notice of Default on XE, dated January 25, 2011, giving XE until February 7, 2011, to cure the default by paying $75,117.32 in full to the Landlord. When the default was not cured, the Landlord served a Notice of Termination on XE, dated February 8, 2011, indicating that the Landlord elected to terminate the Lease effective March 3, 2011, based on XE's failure to comply with the Notice of Default. The notice further stated that should XE not remove itself from the premises on or before March 3, 2011, the Landlord would commence summary proceedings to remove XE from the premises. The complaint alleges that, when XE took no action regarding the Notice of Termination, the Lease was terminated as of March 3, 2011.

After the lease was terminated, the Landlord entered into direct leases with A2iA and Lightbox at the same rent that they were paying to XE under their respective subleases. It is undisputed that the rent paid under the original subleases and the current leases with the Landlord is less than the amount that XE was required to pay under its lease with the Landlord, leaving a shortfall in Fixed Annual Rent for the second and third floors. According to the Landlord, the 15th floor remains vacant and it is not receiving any rent for that space.

The complaint asserts three causes of action for: 1) Fixed Annual Rent and Additional Rent due from XE, for the months of

January, February and March 2011, through and including the termination date of the lease in a sum of not less than $180,681.09, together with prejudgment interest, for the 2nd, 3rd and 15th floors; 2) liquidated damages on the Fixed Annual Rent due for the balance of the lease term (less the amount A2iA and Lightbox will pay the Landlord over the term of their leases), together with prejudgment interest, in an amount not less than $2,825,705.00; 3) liquidated damages on the Additional Rent[3] due for the balance of the lease term, together with prejudgment interest, in an amount not less than $234,738.00; and 4) attorneys' fees and expenses, together with prejudgment interest.

Plaintiff moves for partial summary judgment, contending that with a commercial lease, where there is neither fraud, nor overreaching, the clauses in the lease for acceleration of rent are enforceable. *Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc.*, 46 NY2d 573, 575 (1979). Here, according to the Landlord, there was neither fraud nor overreaching, and it should be entitled to recover 1) the $84,776.94 Rent Credit from XE provided in the lease; 2) the unpaid Fixed Annual Rent through March 31, 2011, the date the lease was terminated; and 3)

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[3] The Landlord contends that, pursuant to the lease, in addition to recovering rent not paid due to the rent credit, it is entitled recover real estate taxes, attorneys' fees, electric charges and other miscellaneous charges, but is not seeking those amounts in this motion. Rather, the Landlord reserves the right to seek those amounts at a future time.

liquidated damages representing the Fixed Annual Rent due on the balance of the lease term, less what the Landlord will receive from Lightbox and A2iA on their new leases with the landlord, discounted for present value at the rate of 4% per annum, pursuant to the lease. The Landlord contends that, after applying XE's deposit of $339,108.00, the amount owed by XE to the landlord is $1,622,093.74. The landlord contends that, there are no questions of fact which preclude partial summary judgment.

A. XE's Cross Motion

Before examining the Landlord's individual causes of action the court will consider XE's cross motion for summary judgment. XE first argues that the accelerated rent clause is unconscionable and unenforceable. Citing *Ross Realty v V & A Iron Fabricators, Inc.* (5 Misc 3d 72, 73 [App Term, 9th and 10th Jud Dists 2004]), XE argues that an accelerated rent clause must require the landlord to re-rent the premises when it recovers possession after a rent default, and that if it does not contain such a requirement, the clause constitutes a penalty and is unenforceable.

Whether an early termination fee is enforceable as a liquidated damages clause or constitutes an unenforceable penalty "is a question of law giving due consideration to the nature of the contract and the circumstances." *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 379 (2005). As the Court

further stated:

> "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced"

Id. at 380, quoting *Truck Rent-A-Center v Puritan Farms 2nd*, 41 NY2d 420, 425 (1977). Here, since the amount agreed to in the liquidated damages clause is based upon the original rent, less what the Landlord recovers in re-letting the premises, it is not grossly disproportionate to the probable loss. Furthermore, the Court of Appeals has expressly held that "a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages." *Holy Props. Ltd., L.P. v Kenneth Cole Prods., Inc.*, 87 NY2d 130, 133 (1995). That being the case, it is hard to find that a liquidated damages clause, in a lease which does not require the landlord to relet the premises constitutes, an unenforceable penalty. The court concludes that the decision in *Ross Realty v V & A Iron Fabricators, Inc.* is not consistent with New York law with respect to the validity of liquidated damages clauses in commercial leases.[4]

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[4] *Benderson v Poss* (142 AD2d 937 [4th Dept 1988]), which is also relied on by XE in support of its argument that the liquidated damages clause is unconscionable, is similarly inconsistent with current law. *See* discussion, *Seven Corners*

XE next argues that the Landlord has failed to mitigate damages. Although generally, a party who is injured by a breach of contract is under an obligation to minimize damages, the general rule is not applied to leases. *Holy Properties Ltd., L.P. v Kenneth Cole Prods., Inc.*, 87 NY2d at 133; *see also, Rios v Carrillo*, 53 AD3d 111, 113 (2nd Dept 2008) (neither commercial nor residential landlords have a duty to mitigate damages). According to the Court in *Holy Properties*, when a tenant abandons the premises before the lease expires, the landlord has three options:

> (1) it could do nothing and collect the full rent due under the lease; (2) it could accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the tenant's benefit. If the landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and reletting and then to pay the tenant's rent obligation.

Holy Properties Ltd., L.P. v Kenneth Cole Prods., Inc., 87 NY2d at 133-134 (citations omitted).

Here the Landlord has, in fact, acted to mitigate damages, though not to the extent desired by XE. It has entered into new leases with A2iA and Lightbox, at the same rent that they were

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Shopping Ctr. Falls Church v Chesapeake Enters. USA LLC, 2009 WL 700868, 2009 US Dist LEXIS 20445 (WD NY 2009).

paying XE in the subleases, and has apparently attempted, though unsuccessfully, to lease the 15th floor. Nor was the Landlord obliged to permit XE to seek to negotiate new leases for A2iA and Lightbox at terms that might have decreased the shortfall under the original lease, as XE contends, particularly in light of XE's failure to pay rent or to respond to the Landlord's Notice of Default or Notice of Termination.

Next, XE argues that the Landlord seeks a remedy which results in its unjust enrichment. XE incorrectly argues that the Landlord is seeking the full terms of the rent for the second and third floors even though A2iA and Lightbox are still occupying those spaces. As required by the liquidated damages clause of the original lease, however, the Landlord is crediting XE for any rent received from A2iA and Lightbox under the new leases, and has indicated that it will credit XE for any rent it receives for the 15th floor, if and when that floor is leased.

XE next contends that the Landlord has failed to provide full credit to it for the construction allowance provided for in Article 9 of the lease. XE submits documents indicating that it received $122,876.00 rather than the full $153,595.00 provided for in the lease. XE contends it is, therefore, still owed $30,719.00 under Article 9. The Landlord counters that XE failed to obtain all of the necessary approvals for its construction, and failed to provide all of the documentation required to obtain

the full amount of the construction allowance.

Although the documentation submitted by XE is not sufficient to establish how much, if anything, it is entitled to recover from the Landlord as a construction credit, XE has, at least, raised a question of fact regarding whether it was compensated to the extent required by the lease. Even assuming that XE is entitled to reimbursement for the construction allowance, that amount is not sufficient to conclude that the complaint must be dismissed on the ground of unjust enrichment.

Finally, XE contends that the Landlord incorrectly calculated the security deposit which XE paid pursuant to the lease. According to XE, the Landlord received a total of $498,838.67 as a security deposit, but only recognizes $339,108.00 of that amount. In its reply papers, the Landlord indicates that in reviewing its records it recognizes that XE is entitled to an additional credit of $172,172.35 as a security deposit for a total of $511,280.35, which, the court notes, is approximately $12,200 more than the security deposit credit claimed by XE.

For these reasons, XE's cross motion for summary judgment dismissing the complaint is denied.

2. Motion to amend/supplement

XE also moves for leave to amend/supplement its affirmative defenses. Although leave to amend pleadings is generally freely

granted, pursuant to CPLR 3025 (c), in order to conserve judicial resources it is appropriate to examine merits of the proposed amended pleadings. Though "on a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, [it must] show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 501 (1st Dept 2010)(citations omitted).

Here XE seeks to amend its pleadings to assert five affirmative defenses: 1) failure to state a cause of action; 2) failure to mitigate or attempt to mitigate damages; 3) unconscionable or unenforceable lease terms or clauses; 4) unjust enrichment; and 5) constructive eviction. The first proposed affirmative defense is merely a boiler plate objection. In the discussion above, the court has already rejected XE's second and third proposed affirmative defenses. To the extent that the court has indicated that there are questions of fact regarding XE's entitlement to reimbursement of construction costs, the court has not completely rejected the defense of unjust enrichment; however, since XE has pleaded that defense in Defendant's Response to Complaint, dated April 11, 2011, it is not necessary to grant XE's motion to amend its pleadings. With respect to the fifth proposed affirmative defense of constructive eviction, XE fails to make any showing whatever that the defense

is not palpably insufficient, despite the affidavit of the Landlord's managing agent stating that XE did not pay rent in January 2011, abandoned the 15th floor, and failed to respond to notices of default and termination. For these reasons, defendant XE's motion for leave to amend/supplement its affirmative defenses is denied.

3. Landlord's Motion for Summary Judgment

Returning to plaintiff Landlord's motion for partial summary judgment, plaintiff is seeking to recover: 1) Fixed Annual Rent and Additional Rent due from XE, for the months of January, February and March 2011, through and including the termination date of the lease; 2) liquidated damages on the Fixed Annual Rent due for the balance of the lease term (less the amount A2iA and Lightbox will pay the Landlord over the term of their respective leases); and 3) liquidated damages on the Additional Rent[5] due for the balance of the lease term.

With respect to the first cause of action, the Landlord has submitted the affidavit of its managing agent stating that XE failed to pay its Fixed Rent and Additional Rent due pursuant to the lease and lease modifications from January 2011 through March 2011, when the lease was terminated by the Notice of Termination

[5] As noted in footnote 3 above, in connection with this motion, the Landlord is seeking only a limited category of Additional Rent, and reserves the right to seek additional categories of Additional Rent at a future time.

served by the Landlord, and failed to respond to the Notices of Default and Termination. Although in Defendant's Response To The Complaint XE denies the allegation that it failed to pay rent, it submits no evidence to counter the managing agent's affidavit. The Landlord is, therefore, entitled to recover the Fixed Rent due and owing from January 2011, until the termination date of the lease.

With respect to the second cause of action, the court has concluded above that the liquidated damages clause in the lease may be enforced, and the Landlord is, therefore, entitled to collect the amount of Fixed Annual Rent that would be due from the termination date of the lease, March 3, 2011, through the respective expiration dates of the lease and lease modifications, less the amounts the Landlord obtains from Lightbox and A2iA, for the second and third floor rent, pursuant to the new leases with those tenants. Should the Landlord successfully rent the 15th floor before the expiration date of the second lease modification, XE will be entitled to reimbursement for its payments to the Landlord for the 15th floor rent, to the extent that the Landlord obtains rent payments from the new tenant.

In connection with its motion for partial summary judgment, pursuant to the third cause of action, the only aspect of the Additional Rent sought by the Landlord at this time is payment of $84,777.00 for the 180 days of rent credit to which the Landlord

contends it is entitled pursuant to Article 63 of the lease, because of XE's default under the lease. Since XE has failed to submit evidence establishing that it did not default on the lease, the Landlord is entitled to recover the rent credited, pursuant to Article 63. However, questions of fact remain concerning whether XE is entitled to any further reimbursement for construction expenses, pursuant to Article 9 of the lease.

Accordingly, it is hereby

ORDERED that plaintiff New 24 West 40th Street LLC's motion for partial summary judgment is granted to the extent that defendant XE Capital Management, LLC is found liable to plaintiff for:

a) Fixed Annual Rent and Additional Rent for the period between January 2011 and March 3, 2011;

b) liquidated damages on the Fixed Annual Rent from March 3, 2011 to the expiration dates of the lease and lease modifications, less amounts received pursuant to the new leases for the 2d and 3rd floor of the building and potential new lease for the 15th floor of the building, as specified in Article 59 of the Lease; and

c) liquidated damages on the Additional Rent, to the extent that it is entitled to recover the rent credited pursuant to Article 63 of the Lease, in an amount to be determined following a hearing on the issue of

construction expenses, as set forth above;

and it is further

ORDERED that the action shall continue as to the balance of the third cause of action; and it is further

ORDERED that defendant XE Capital Management, LLC's cross motion for summary judgment dismissing the complaint and for leave to amend/supplement its affirmative defenses is denied; and it is further

ORDERED that counsel are direct to appear for a conference in Part 17, Room 581, 111 Centre Street on April 16, 2012 , at 10:00 AM.

Dated: 2/16/12

FILED

FEB 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.

EMILY JANE GOODMAN