

**61 Broadway Owner, LLC v Strategic Capital
Solutions, LLC**

2012 NY Slip Op 31146(U)

April 23, 2012

Sup Ct, NY County

Docket Number: 109736/11

Judge: menzez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

61 BROADWAY OWNER, LLC,

Plaintiff,

-against-

STRATEGIC CAPTIAL SOLUTIONS, LLC and
EDWARD O. MEHRFAR,

Defendants.

INDEX NO. 109736/11
MOTION DATE 03 -14-2012
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits... **FILED**

Answering Affidavits — Exhibits _____ cross motion

Replying Affidavits _____

PAPERS NUMBERED
2
3 - 4
APR 30 2012 5

Cross-Motion: Yes X No

NEW YORK
COUNTY CLERK'S OFFICE

Upon a reading of the foregoing cited papers, it is ordered that plaintiff's motion pursuant to CPLR §3212, for summary judgment, is granted only as to defendants' first, sixth, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, eighteenth, nineteenth and twentieth affirmative defenses and all of the defendants' counterclaims.

Plaintiff seeks an Order granting summary judgment pursuant to CPLR §3212, claiming that there are no issues of fact and it is entitled to a monetary judgment against both Strategic Capital Solutions, LLC (hereinafter referred to as "SCS") and Edward O. Mehrfar, based on the lease and a limited personal guarantee. Plaintiff also seeks an Order granting summary judgment, that strikes and dismisses all of defendants' affirmative defenses and counterclaims as having no basis in law or fact.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

The interpretation of leases generally applies the same rules of construction as to contracts (George Backer Management Corp. v. Acme Quilting, 46 N.Y. 2d 211, 385 N.E. 2d 1062, 413 N.Y.S. 2d 135 [1978]). In those instances where the terms of the contract are unambiguous, the contract must be enforced by its terms (Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y. 3d 470, 775 N.Y.S. 2d 765, 807 N.E. 2d 876 [2004]).

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

Plaintiff brought this action seeking a money judgment to recover rent with escalations, and additional rent based on default and pursuant to a lease agreement with SCS (Mot. Exh. E). Plaintiff asserts causes of action against SCS for rent and additional rent in the amount of \$37,169.13 due from February, 2011 through August 31, 2011. Plaintiff also seeks a judgment against SCS for rent and additional rent for the period from September 1, 2011 through March 31, 2014, the end of the lease. Plaintiff asserted separate causes of action against Edward O. Mehrfar, individually based on his limited personal guaranty (Mot. Exh. E). Plaintiff claims that because all of the rent and additional rent was not paid before SCS vacated the premises on August 2, 2011, Mr. Mehrfar is also obligated to pay \$37,169.13 through August 31, 2011, and for any other rent or additional rent due until SCS fully complies with any obligations under the lease or a money judgment is entered.

On September 12, 2006, plaintiff and SCS entered into a lease agreement for a term of seven (7) years and three (3) months (Mot. Exh. A). SCS owed a base rent \$13,257.73, commencing January 1, 2011, the fifth year of the lease. Plaintiff claims that the lease includes provisions that provide for additional rent for electrical service. The lease also has a provision for the portion of real estate taxes which would be charged as additional rent (Mot. Exh. A). Plaintiff states that pursuant to paragraph 18(c) of the lease, it is entitled to legal fees for this action and an eviction proceeding commenced in Civil Court for SCS's default in paying rent. Plaintiff's papers make no specific reference to the lease provisions that apply to the remaining amounts charged as additional rent.

Plaintiff claims that pursuant to paragraph 2 of the Limited Personal Guaranty, Edward O. Mehrfar remains liable for the rent and additional rent due through August 11, 2011 and any accruing amounts until the entry of judgment or the expiration of the lease (Mot. Exh. B).

Plaintiff relies on the rent ledger to establish that from February, 2011, SCS did not pay rent or additional rent (Mot. Exh. F). The ledger annexed to the motion papers is a print-out titled "CM Receivables Ledger" and appears to have been prepared by "MRI Management 40," not the plaintiff. The ledger does not indicate that February rent and additional rent was unpaid. The ledger shows that as of March 28, 2011, SCS paid all that was owed except for \$256.25, billed on March 1, 2011, for legal fees. On June 29, 2011, plaintiff commenced a Commercial Landlord and Tenant Non-payment of Rent Eviction proceeding in the Civil Court (Mot. Exh. C). Plaintiff does not provide a basis for charging the March 1, 2011 legal fees, three months before it commenced any legal proceedings and why the ledger shows no legal fees were billed in April of 2011. Plaintiff does not state the basis for charging additional rent under "Miscellaneous Tenant," in the ledger (Mot. Exh. F). Plaintiff states the amounts sought are correct and authorized pursuant to the lease but does not provide a basis for all the charges.

Plaintiff has not established it is entitled to a money judgment for February, 2011 through August 31, 2011 in the amount of \$37,169.13, or money judgment for the period from September, 2011 through the expiration of the lease. There remains issues of fact concerning the amount of additional rent charged to SCS and the applicable lease provisions for additional rent. Plaintiff has not established that Mr. Mehrfar owes \$37,169.13, through August 31, 2011, with accruing amounts pursuant to the guaranty.

A motion to dismiss affirmative defenses pursuant to CPLR §3212 [e], can be based upon any of the grounds asserted in CPLR §3211[a]. The affirmative defenses should not be dismissed if there is any doubt (*Houston v. Trans Union Credit Info. Co.*, 154 A.D. 2d 312, 546 N.Y.S. 2d 312 [N.Y.A.D. 1st Dept., 1989]). Conclusory affirmative defenses setting forth no factual basis to formulate a response are a basis for dismissal (*Kronish Lieb Weiner & Hellman, LLP v. Tahari, Ltd.*, 35 A.D. 3d 317, 829 N.Y.S. 2d 7 [N.Y.A.D. 1st Dept., 2006]).

A process server's affidavit of service is prima facie evidence of proper service absent a non-conclusory sworn denial of service (*Ayala v. Basset*, 57 A.D. 3d 387, 870 N.Y.S. 2d 261 [N.Y.A.D. 1st Dept., 2008]).

Plaintiff has provided the affidavit of its process server and the Secretary of State, it has established that service was proper on both defendants (Mot. Exh. I). The defendants provided no denial of service. The first affirmative defense of lack of jurisdiction is dismissed.

Plaintiff has established that pursuant to Article 18 (b) of the lease, it was not under a duty to mitigate damages. Paragraph 1 (C) of the lease applies to the payment of rent, and prohibits any, "...setoff, offset, abatement or deduction whatsoever..." (Mot. Exh. A). Paragraph 24 of the lease contains a no waiver clause without a writing signed by the plaintiff (Mot. Exh. A). Defendants sixth affirmative defense of mitigation of damages, thirteenth affirmative defense seeking an offset and nineteenth affirmative defense of release and waiver, do not apply pursuant to the lease and are dismissed.

Defendants' seventh, eighth, tenth, eleventh, twelfth, fourteenth, fifteenth, eighteenth and twentieth affirmative defenses are conclusory or repetitive and are dismissed.

The second, fifth, ninth, sixteenth and seventeenth affirmative defenses pertain to improper, unreasonable, excessive or miscalculated monetary demands. There is a possible basis for these affirmative defenses.

The third and fourth affirmative defenses pertain to compliance with condition precedent to obligations under the lease. Defendants state they complied in all material respects with the conditions precedent to the lease and guarantee. They also state plaintiff failed to provide authority, direction and cooperation which was a condition precedent to any obligations. The seventh affirmative defense states that plaintiff's damages were caused in whole or in part by the plaintiff. There is a potential merit to these defenses.

The lease at paragraph 33 permits the plaintiff to apply the security deposit to arrears (Mot. Exh. A). Plaintiff is not obligated under the lease to apply the security deposit to the arrears and has stated that it has not done so because it is waiting for a judgment or a determination of the full amount of damages. Pursuant to paragraph 3 of the Limited Personal Guarantee, the security deposit shall not be credited against the amounts owed by either the tenant or the Guarantor. Defendants first four counterclaims seek the return of the security deposit and letter of credit or the application to the amount plaintiff claims it is owed. Defendants are not entitled to

this relief pursuant to the lease and guarantee. The first, second, third and fourth counterclaims are dismissed.

The fifth counterclaim seeks damages based on reliance on representations, agreements and covenants that there is no money owed after the surrender of the premises. Paragraph 24 of the lease contains a no waiver clause (Mot. Exh. A) without a writing signed by the plaintiff. Defendants do not provide any proof signed writings exist. The fifth counterclaim is dismissed.

The sixth counterclaim states the conclusory claim of breach of Implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing requires proof and facts to establish that a party intentionally sought to prevent performance of a contract (Dalton v. Educational Testing Service, 87 N.Y. 2d 384, 663 N.E. 2d 289, 639 N.Y.S. 2d 977 [1995]). Defendants provide no basis for this counterclaim and it is dismissed.

The seventh counterclaim seeks attorney fees. Defendants have not stated a basis to obtain attorney fees based on the lease and guarantee. They did not obtain dismissal of the Civil Court Eviction proceedings on the merits. The seventh counterclaim is dismissed.

Summary judgment cannot be avoided by a claim that discovery is needed unless an evidentiary basis is provided establishing that the discovery sought will produce relevant evidence (Lee v. Ana Development Corp., 83 A.D. 3d 545, 921 N.Y.S. 2d 232 [N.Y.A.D. 1st Dept., 2011]).

Defendants seek discovery and pursuant to CPLR §3212[f], claim that summary judgment should be denied. They claim discovery is needed as to plaintiff's possible purpose in preventing SCS from vacating the premises and mitigation of damages. Defendants have not stated a basis to prevent the granting of partial summary judgment.

Upon review of all the papers submitted, this Court finds that there remain issues of fact concerning the amount of additional rent charged to SCS and the applicable lease provisions for additional rent. There also remaining issues of fact concerning the amounts owed by Edward O. Mehrfar under the guaranty. Plaintiff is entitled to partial summary judgment pursuant to CPLR §3212[e], concerning some of the affirmative defenses and defendants counterclaims.

Accordingly, it is ORDERED that plaintiff's motion pursuant to CPLR §3212 for summary judgment, is granted only as to defendants' first, sixth, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, eighteenth, nineteenth and twentieth affirmative defenses and these are dismissed, and it is further,

ORDERED, that all of the defendants' counterclaims, are dismissed, and it is further,

ORDERED, that the remainder of plaintiff's motion is denied.

This constitutes the decision and order of this court.

Dated: April 23, 2012

ENTER:



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED

APR 30 2012

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