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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

501 Fifth Avenue Company

-v-

Lifshutz & Lifshutz, P.C.

INDEX NO. 112813/11

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

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

Replying Affidavits _____ | No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/7/12

_____, J.S.C.
LOUIS B. YORK

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

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

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501 FIFTH AVENUE COMPANY, LLC

Plaintiff,

Index No: 112813/2011

-against-

LIFSHUTZ & LIFSHUTZ, P.C.,

-and-

MARVIN LIFSHUTZ,

Defendants.

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YORK, J.:

Defendant Marvin Lifshutz ("Lifshutz") seeks partial summary judgment dismissing a complaint against him as a guarantor under a commercial lease agreement. Plaintiff 501 Fifth Avenue Company, LLC ("501 LLC") opposes the motion and cross-moves for summary judgment on its first and second causes of action, to dismiss affirmative defenses and for attorney's fees. The respective motions are resolved as follows.

BACKGROUND

Defendant Lifshutz and Lifshutz , P.C ("L&L"or "Tenant"), a law firm, signed a lease with 501 LLC for rooms 506 and 512 at 501 Fifth Avenue, New York, New York 10003 ("Premises") starting on January 1, 2008 and expiring on December 31, 2014 ("the Lease").

Defendant Marvin Lifshutz, a member of the firm, is a guarantor under the Lease through the date the tenant vacates the premises: "Upon Tenant's (a) having vacated and surrendered the demised premises to Owner free of all subleases or licences in a broom clean condition and as to otherwise required by the lease and (b) having notified Owner or Managing Agent in writing and (c) delivered the keys to the demised premises to the Owner or its Managing Agent, Guarantor shall not be liable under this guarantee to pay rent, additional rent or other charges or payments accruing under the lease after the date of said surrender." (Pl. Exh. B)

On November 12, 2011, 501 LLC and L&L executed a modified lease agreement reducing the base rent from November 1, 2010, through June 30, 2011 from $15,708.75 to $12,442.50 per month. Under the modified agreement tenant agreed to pay all rents and additional rents in full no later than the 15th of each month. The agreement further stated: "It is an essential covenant of this agreement that in the event this is not observed rent shall revert to the amount set forth on the lease dated January 7, 2008, and any amounts waived during the Modified Period until said default shall immediately become due and payable. Time is of the essence." (Pl. Exh. C).

On June 30, 2011 the tenant vacated the premises, returning the keys and submitting a surrender letter.

Plaintiff started the present proceedings by a summons and complaint dated November 8, 2011. In the first cause of action, against L&L, it seeks payments under the lease in the total sum of $132,105.24 plus interest from June 30, 2011 and reasonable attorney fees and costs. This sum includes the base rent for the period from July1, 2011 through December 2011, electric meter charges from July 1 through November 2011, an additional rent reflecting the cost of

living adjustment from April 1, 2011 to September 30, 2011, a percentage of the increase in real estate taxes from the base year covering the second half of the 2011 tax year.

Plaintiff alleges that tenant's breach of the lease agreement also violates the essential covenant of the modified agreement. As a result, tenant is responsible for the balance of all amounts of base rent waived between November 1, 2011 and June 30, 2011.

In the second cause of action, against individual defendant, Marvin Lifshutz, under the limited guaranty, plaintiff claimed all amounts due prior to tenant vacating the premises. These amounts include sums waived between November 1, 2011 and June 30, 2011, a cost of living adjustment for the period from April 1 to June 30, 2011 and legal fees and costs.

In their answer defendants denied all allegations and advanced twelve affirmative defenses. Now both parties move for summary judgment pursuant to CPLR 3212, and plaintiff also moves to dismiss affirmative defenses under CPLR 3211(b).

DISCUSSION

Defendant Lifshutz's Motion for Summary Judgment

Defendant Lifshutz*'s* motion to dismiss the complaint against him as a guarantor of the lease is based on the limited character of the guaranty. Once the tenant has vacated and surrendered the premises to plaintiff, having paid all rents and additional rents for which it had been billed, the guaranty expires by its own terms. Lifshutz contests plaintiff's claim that tenant failed to pay the cost of living increase for the period of April 1- June 30, 2011, but the exhibit he refers to (Def. Ex. E) does not contain a relevant proof of payment. He further objects to additional monthly sum of $3,266.00, under the modification agreement, for the period November 2010 through June 30, 2011. On his account, this sum is due only if the tenant failed

to tender, in a timely manner, the modified rent during the period the modification agreement was in force. All checks, except one, written in this period are dated on or before the 15th of each month, and Lifshutz avers that checks were delivered by hand to plaintiff on the dates they were written. A check in the amount of $944.45, for the cost of living increases from July 1 to September 30 of 2010 was written on December 16, 2010. However, Lifshutz asserts that this payment is on an obligation incurred prior to the modification agreement, and thus not covered by it.

501 LLC claims that tenant breached the modification agreement. It asserts in its amended complaint that "tenant's breach of the lease agreement violates the essential covenant of the modified agreement because Tenant defaulted by vacating the premises on June 30, 2011." (Complaint, ¶21). To this it adds another ground in its opposition to Lifshutz motion for partial summary judgment --namely, that rents were paid untimely during the period under the modification agreement.It refers to the check dated December 16, 2010, and also to four other checks, all posted after the 15th of each month. Plaintiff holds that there is an issue of fact as to when the checks were delivered to plaintiff, and whether plaintiff received them in a timely manner, thus whether the rent reverted to its pre-modification amount, and the differential is due and owing. Plaintiff urges the court to deny defendant Lifshutz's motion for summary judgment.

To assess whether tenant's breach of the lease is at the same time a breach of the modification agreement it is sufficient to examine the plain language of the agreement. "When parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms. This principle is particularly important in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's

length. It is also important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases. S. Rd. Assoc., LLC v Intern. Bus. Machines Corp., 4 NY3d 272, 277; 793 N.Y.S.2d 835 [2005] (internal citations omitted).

The only default specified under the modified agreement is failure to pay rents and additional rents by the 15th of each month. Alan Abramson, a principal of 501 LLC, asserts in his affidavit that "the only reason that 501 entered into the modified agreement was so that L&L would remain in occupancy through the balance of the lease... I would not have signed the Modified Agreement if I was aware that L&L was going to abandon the premises before the termination of the lease agreement." (Abramson Aff., ¶57,59). The hope that tenant would stay at the premises if it received rent concessions could have been a motivation for Abramson to sign the modification agreement. However, "[i]n accordance with long-established principles, the existence of a binding contract is not dependent on the subjective intent of [either party]...In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds." Brown Bros. Elec. Contractors, Inc. v Beam Const. Corp., 41 NY2d 397, 399-400; 393 N.Y.S.2d 350 [1977]. The manifestation of a party's intention rather than actual, real or secret intent is controlling. Ahern v. South Buffalo Ry. Co., 303 N.Y. 545, 560–561 (1952). As manifested in the words of the agreement, the intent of 501 LLC was to be paid on time, and the court refuses to read into the agreement additional covenants not explicitly stated.

Defendant Lifshutz made out a *prima facie* case that tenant tendered all rents due under the lease in a timely manner by submitting copies of cancelled checks. Plaintiff attempts to raise a factual issue by presenting its own invoice record showing that several checks were "posted"

after the 15th of the relevant month. The rent is due on delivery date, and plaintiff fails to negate Lifshutz's statement that checks were delivered by hand on the dates written. It does not assert that it received checks by mail after the due date. It does not explain what the term "posted" means in its own ledger. Ordinarily, banks post checks on the dates they are cleared, and copies of checks presented by Lifshutz contain such notations. Unsurprisingly, dates that checks are posted by the bank are frequently later than the 15th of months in question. The dates of the same checks "posted" by plaintiff's on-line system differ from those posted by the bank. How the on-line system is set up is within the exclusive knowledge of 501 LLC, and plaintiff does not need discovery to find out the meaning of its own records.

Lifshutz's argument that the check dated December 16, 2010 is outside the scope of the modification agreement is a reasonable reading of the agreement's terms. This argument is strengthened by the fact that the check for rent and electricity for that month, for the much larger amount of $13,479.38, was written on December 14, 2010 and delivered on time.

Under the limited guaranty Lifshutz cannot be held personally liable "to pay rent, additional rent or other charges or payments accruing under the lease" after the date of surrender of the premises. The cost of living expenses accrue on the first day of the month immediately following the quarter for which they are due, and are payable when billed by the landlord (Lease, Pl. Exh.A, ¶ 46(b)). Thus the expense for the period of April 1-June 30, 2011 was due on July 1, 2011, only after the tenant had vacated the premises.

There are no pending charges under the lease that incurred during tenant's occupancy of the building, and defendant Lifshutz's responsibilities under the guaranty are terminated. This action should be dismissed against him as an individual.

Plaintiff's cross-motion

Summary judgment

501 LLC moves for summary judgment on its first and second cause of action, against L&L and Lifshutz. For reasons stated in the preceding section, the motion for summary judgment against Lifshutz is denied.

It is undisputed that L&L breached the lease agreement and is responsible for resulting damages to 501 LLC. However the items which 501 LLC included in its claims and the precise sums due are disputed by L&L.

First, L&L points to electricity charges billed to it from July 1, 2011 to March 31, 2011 while it was not using the premises. Though the lease agreement sets these charges at a sum certain of $1,036.88 for the life of the lease, it specifies that electricity is "provided for or used by Tenant" and $1,036.88 per month applies to "electric service and consumption of electricity in and to the demised premises."(P. Exh. A, ¶ 42). Plaintiff failed to explain how an absent tenant could consume electricity.

L&L further contests the calculation of the cost of leaving increases. The lease provides that this increase is based on the Consumer Price Index published by the Bureau of Labor Statistics of the US Department of Labor for All Urban Consumers. Defendant submits that landlord's billing does not reflect which, of several possible indices of the cost of living, it actually applied.

Plaintiff is not justified in claiming additional sums under the modified agreement, see *supra.*

Nowhere in its submission does plaintiff state when it subsequently rented out the vacated premises, and when defendant's responsibility for the unpaid rent and additional charges

ceased. The complaint requested award of damages through December 31, 2011, while the motion for summary judgment extends this request till March 31, 2012.

Plaintiff is entitled to partial summary judgment on its first cause of action as to liability, but the determination of damages must await trial.

Affirmative defenses

L&L made twelve statements in its answer to the complaint, designated as "affirmative defenses," though some of them are in fact counter-claims or offsets. Plaintiff now moves to dismiss them.

The first defense asserts the limited character of individual guaranty provided by Lifshutz and concludes that its conditions were fulfilled. The second defense states that tenant has not breached the modified agreement, and Lifshutz is not liable for additional rents that had allegedly accrued prior to tenant's surrender of the premises. Since the action against Marvin Lifshuts is dismissed these issues are moot.

In its third defense L&L claims that 501 LLC does not own the premises, and has no standing to bring this action. This assertion is contradicted by documentary evidence submitted by 501 LLC, and the defense is dismissed.

The fourth defense concerns improper service of process. However plaintiff submitted valid affidavits of service that comply with the requirements of CPLR, to which defendant has no objection. This defense is dismissed.

The fifth defense points to a contradiction in the amount of damages stated on the summons and the complaint and requests dismissal of the action on this ground. CPLR 305(b) requires that if a summons is served without a complaint, a notice attached to the summons must

contain a sum of money for which judgment can be taken on default. No such requirement applies to a summons with complaint, and whether the summons do not include a sum, or include an incorrect sum, does not render the summons defective. This defense is dismissed.

The sixth affirmative defense is for the offset of the money allegedly owed under the lease by the security deposit in the amount of $33,491.25 which remains in the landlord's possession. The security deposit will count in the determination of sums due, and the defense is preserved.

The seventh defense states that 'because the Complaint demands the entry of judgment in an amount to which the Plaintiff is clearly not entitled, the Complaint should be dismissed." This is not a cognizable defense, but a conclusory statement, and must be dismissed.

The eighth defense – "the guaranty referred to in the Complaint does not guaranty the Tenant's payment under and compliance with the lease for the benefit of the Plaintiff" – is flatly contradicted by the express language of the guaranty: "... as an inducement to Owner making the within lease with Tenant, the undersigned guarantees to Owner, Owner's successors and assigns, the full performance and observance of all the covenants, conditions and agreements, therein provided to be performed and observed by Tenant." (Pl. Exh. B). It is without merit, and is dismissed.

The ninth defense is landlord's non-compliance with the conditions precedent with respect to sums alleged as additional rents, referring to failure to send bills to the new address provided to landlord in the surrender letter. The lease in ¶28 specifies how notices and bills are to be delivered. The landlord was not justified in sending bills to the premises after they have been vacated and the former tenant informed him of its new address. The defense is valid.

The tenth defense states that tenant was in full compliance with the modification agreement and is not responsible for the balance of any rents waived under it. This issue is addressed *supra,* and resolved in favor of defendant.

The eleventh and twelfth defenses make claims that the premises were not fit to use, that the owner failed to make repairs in a timely manner, and that the tenant was actually and constructively evicted from the premises. In his affidavit Lifshutz described a roach infestation of the premises and public spaces in the building, his complaints to the owner, and unsuccessful attempts at insect extermination. He also alleged that the bathrooms in the common area were rarely cleaned and often overflowed. "An actual eviction occurs only when the landlord wrongfully ousts the tenant from physical possession of the leased premises. There must be a physical expulsion or exclusion." Barash v Pennsylvania Term. Real Estate Corp., 26 NY2d 77, 82; 308 N.Y.S.2d 649 [1970]. It is uncontroverted that L&L was not expelled by the landlord, and vacated the premises of its own will. At most, defendant may claim constructive eviction. In response to this claim plaintiff submitted its invoices for monthly extermination in the building and an affidavit from a member of a law firm, a sub-tenant of L&L, who denied that there existed any problems with hygiene on the premises. There is a factual dispute between the parties on the condition of the premises and common areas in the building, and prior to discovery the defenses of unfitness for use and constructive eviction cannot be dismissed.

CONCLUSION

For the foregoing reasons it is

ORDERED that defendant Lifshutz's motion for summary judgment to dismiss the complaint as against him is granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the first cause of action is granted as to liability and denied as to damages, and on the second cause of action is denied; and it is further

ORDERED that plaintiff's motion for summary judgment to dismiss affirmative defenses is granted in part, and the third, fourth, fifth, seventh and eighth affirmative defenses are dismissed .

Dated: 6/7/12

ENTER:

lvy

J.S.C.

FILED

JUN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK
J.S.C.