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

PRESENT : DONNA M. MILLS **PART 2158**

Justice

REAL ESTATE ALTERNATIVES PORTFOLIO 4MR, LLC,

Plaintiff,

-v-

D.B. COMPUTER INVESTMENTS, INC., et al.,

Defendants.

INDEX NO. 106845/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 4
Answering Affidavits– Exhibits	
Replying Affidavits	3

CROSS-MOTION: _____ YES ___√___ NO

FILED

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH THE MEMORANDUM DECISION WHICH

IS ATTACHED.

Dated: 11/14/12

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ___√___ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

REAL ESTATE ALTERNATIVES PORTFOLIO

INDEX NO.
106845/11

Plaintiff,

- against -

D.B. COMPUTER INVESTMENTS, INC. d/b/a DATA RECOVERY CORP. and DMITRY BELKIN,

Defendants.

DECISION/ORDER

DONNA M. MILLS, J.:

Plaintiff Real estate Alternatives Portfolio 4MR, LLC ("Plaintiff")former owner and landlord of premises located at, and known as, 313 East 95th Street, New York, New York, seeks an award of summary judgment based upon a commercial lease entered in or around October, 31, 2008 with Defendant DB Computer Investments, Inc., d/b/a Data Recovery Corp. ("DB Computer") and an attached Guarantee by Defendant Dmitry Belkin, DB Computer's President. Defendants request that said motion be denied in that, at a minimum, material questions of fact exist.

BACKGROUND

It is undisputed that the Defendants took possession of the subject premises in or around October, 31, 2008 and vacated said premises in or around October, 2010. The terms of the lease was for five years, commencing on December 1, 2008 and expiring on November 30, 2013. Pursuant to the terms of the lease, D.B. Computer was, inter alia, required to pay base rent in the amount of $2,008.50 each month to plaintiff as and for the rental of the premises for the period from December 1, 2009 through November 30, 2010. As of June 2010, plaintiff claims that there was a rental balance of $200. D.B. Computer then failed to make the payment of any rent at all for the months of July, 2010 through

October, 2010, when D.B. Computer vacated the premises.

On May 4, 2011, plaintiff transferred ownership of the premises, and plaintiff now seeks rent due through May 4th in the amount of $22,655.06 plus late charges and legal fees.

Pursuant to the lease, the landlord was to perform the following:

> Tenant accepts the premises as "as-is" condition. However, promptly upon execution hereof, prior to tenant entering possession, landlord will remove the partitions shown on Exhibit "C-I" and will remove the existing air conditioner and patch the wall on the interior and exterior ("landlord's initial work") upon completion of the foregoing, landlord will deliver possession to tenant. The target time for the completion of landlord's initial work is on or before December 1, 2008. After completing landlord's initial work, and after the commencement date, landlord will replace the cornice above the store. If permitted by the Buildings Department and provided it complies with all laws, landlord will remove the steel platform in front of the building and replace with concrete steps leading to the entrance of the premises. Landlord will submit its application for permit to replace the steel step/platform (the "front step work") to the City.

The Guaranty for the Lease sets forth as follows:

> ...it is expressly understood and agreed by Landlord that Guarantor shall not be liable pursuant to this Guarantee for any of the foregoing obligations for any period commencing after the Original Tenant has, either voluntarily, or pursuant to a court order or judgment, physically vacated and surrendered legal possession of the Premises to Landlord.

Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

In support of summary judgment, the plaintiff submits a copy of the subject lease agreement and the guarantee of lease. Plaintiff also submits the affidavit of Ms. Mary Glascock, an employee of an affiliated agent. According to Ms. Glascock, pursuant to the terms of the lease D.B. Computer has failed to pay rent and additional rent that is past due and owing. In light of the evidence presented by the plaintiff, the Court finds that the plaintiff, upon the foregoing papers, has met its prima facie burden of demonstrating an entitlement to summary judgment on its causes of action against defendants D.B.

Computer and Dimitry Belkin for its breach of the lease agreement and based upon the subject guarantee. Thus, the burden now shifts to the defendants to raise a material triable issue of fact (see, Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557[1980]).

In opposition to summary judgment, defendant Dmitry Belkin submits an affidavit stating that he is the President of defendant D.B. Computer. He indicated that plaintiff breached the lease agreement by failing to remove a steel platform from the front of the premises. He claims that the removal of the steel platform was a requirement and a material part of the defendants lease of the premises. Mr. Belkin also asserts that the plaintiff failed to undertake electrical work to bring the premises in compliance with the National Electrical Code and failed to remove the air conditioning unit, as also required in the lease.

Various breaches of a commercial lease by a landlord have been found to be material by the courts where the breaches most frequently involve: (1) a double-leasing of leased property to a third party; (2) a failure to provide services; or (3) a violation of a noncompetition covenant. This Court finds that the plaintiff's failure to remove the platform or air conditioning unit are not sufficiently material breaches of the lease to absolve defendant D.B. Computer from its rent obligations, nor would it relieve defendant Belkin of his liability under the Guaranty.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted against defendants D.B. Computer Investments, Inc. and Dimitry Belkin on the first and second causes of action in the sum of $24, 920.56 plus interest from May 4, 2011 at the rate of 9

per cent per annum, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the defendants are found liable to plaintiff on the third cause of action and the issue of the amount of a judgment to be entered thereon shall be determined at a hearing to be held on January 25, 2013 at 10:00 AM/PM at 111 Centre Street, Room 574, New York, NY.

Dated: 11/14/12

ENTER:

J.S.C.

Donna M. Mills, J.S.C.

FILED
NOV 23 2012
NEW YORK
COUNTY CLERK'S OFFICE