SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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JAMES LEONARD 6, INC.

Plaintiff,

Index No.
160161/2015

DECISION and ORDER

- against -

Mot. Seq. #001

SIX & CORNELIA ASSOCIATES

Defendant,

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SIX & CORNELIA ASSOCIATES

Defendant and
Third-Party Plaintiff,

- against -

LEON FOLGEN and JAMES ZISMAN

Third-Party Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff James Leonard 6, Inc. ("James Leonard" or "Plaintiff") is an optician's office that entered into a ten (10) year, three (3) month lease (the "Lease") with Defendant Six & Cornelia Associates ("Six & Cornelia" or "Defendant") dated June 30, 2014 for the rental of commercial premises located at 329 Avenue of the Americas, New York, NY 10014 (the "Premises"). The Lease was to expire on September 30, 2024. Pursuant to the Lease, James Leonard posted a security deposit of $24,000. Leon Folgen and James Zisman ("Folgen and Zisman"), former vice presidents of James Leonard, guaranteed performance of the Lease in a Limited Good Guy Guaranty agreement (the "Guaranty Agreement") dated June 30, 2014. James Leonard vacated the property on May 15, 2015.

In or about October 2015, Plaintiff commenced this action to recover the security deposit. Defendant Six & Cornelia opposed and made counterclaims and joined Folgen and Zisman as Third-Party Defendants.

Six & Cornelia now moves for an order pursuant to CPLR § 3212 granting summary judgment in favor of Six & Cornelia and against James Leonard and Folgen and Zisman. Six & Cornelia also seeks the dismissal of James Leonard's claim for its security deposit pursuant to CPLR § 3212. James Leonard and Folgen and Zisman both oppose.

Six & Cornelia seeks damages in the amount of $105,105.93, plus attorney's fees. In its motion, Defendant seeks $10,000 in unpaid rent for the month of May 2015. The remaining $95,105.93 is for damages that accrued from rent concessions given to the new tenant and broker's fees from the reletting of the Premises.

I

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 257 N.E.2d 890, 309 N.Y.S.2d 341 [1970]). However, pursuant to CPLR § 3212(f), the court may deny a motion for summary judgment, "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated". (CPLR § 3212[f]).

In support of their motion, Six & Cornelia submits the affidavit of Willliam Harra, the property manager of the Premises. Mr. Harra avers that Plaintiff and Defendant entered into a ten (10) year, three (3) month lease for the Premises, that Plaintiff defaulted on Lease, and that Plaintiff and Third-Party Defendants are liable to Six & Cornelia for rent through the date that Plaintiff vacated the premises and damages incurred due to future rent concessions and broker's fees.

In opposition, Plaintiff claims that the lease was terminable at will. Plaintiff submits the affirmation of Alexander Karasik, in which he avers that Plaintiff did not default on the lease because the lease was terminable at will with proper notice and that proper notice was given to the Defendant.

As evidence that the lease was terminable at will, Plaintiff provides the Folgen and Zisman affidavits, which state at Paragraph eight (8):

> When Plaintiff indicated to Defendant Landlord that he is contemplating terminating the Lease, Defendant said that was fine, but hoped the Plaintiff could remain until September, 2015 because he had someone interested in leasing the location but they could not move in until September. In order to induce Plaintiff to stay, Defendant offered abatement on the monthly rent in the amount of $2,000. *Plaintiff did not accept*, but said he would consider the offer, but ultimately decided to terminate the lease as soon as possible, making sure to give ample notice to Defendant via a letter from Plaintiff's attorney. (Emphasis added).

Plaintiff contends that the issue of whether or not the lease was terminable at will is an issue of fact sufficient to survive Defendant's summary judgment motion.

When a contract states that no provision thereof "may be waived, changed or cancelled except in writing," one party may not be allowed to claim an oral modification to the contract because it would render the merger clause ineffective. (*Torres v. D'Alesso*, 80 A.D.3d 46, 56 [1st Dep't App. Div. 2010]). Further, General Obligations Law § 15-301 provides that changes to a written agreement may not be made orally if the agreement contains a provision requiring an executory agreement in writing signed by the party against whom enforcement the change is sought. When a general merger clause is contained in an agreement, parol evidence is not admissible and the granting of summary judgment is permissible. (*Rodas v. Manitaras*, 159 A.D.2d 341 [1st Dep't App. Div. 1990]).

In the Lease, there is a merger clause which states that "[a]ll understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between Owner and Tenant and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought." Here, the lease is

for a fixed term and no provision of the lease provides that it is terminable at will upon notice.

In accordance with the Lease, Defendant may retain the $24,000 security deposit "in the event Tenant defaults in respect of any of the terms, provisions and conditions of this Lease, *including, but not limited to*, the payment of rent and additional rent ... or for any other sum which Landlord may expend or may be required to expend by reason of Tenant's default..." (emphasis added). Since Defendant is entitled to recover an amount larger than the security deposit, the Plaintiff's claim is dismissed.

II

In opposition to the claims against them, Folgen and Zisman claim that they are not liable for damages that occurred after the Plaintiff vacated the premises in accordance with the Guaranty Agreement and not liable for the monetary damages and attorney's fees.

Six & Cornelia relies on the words "without limitation" in the Guaranty Agreement. However, Folgen and Zisman argue that they are only responsible for the Tenant's obligations "up to and including the date the Tenant and any party claiming under Tenant vacate the entire Demised Premises."

The pertinent clause of the Guaranty reads as follows:

> Under all circumstances, including Tenant's default, and in addition to the security deposit posted under this Lease, Guarantor guarantees to Landlord the payment and performance of Tenant's obligations under and in accordance with the Lease, including *without limitation*, (i) the payment of Fixed and Additional Rent which accrue under the Lease *up to and including the date Tenant and any party claiming under Tenant vacate the entire Demised Premises*, the delivery of the keys therefor and, at Landlord's option, the execution by Tenant and delivery of an instrument of surrender and release... (emphasis added).

The reletting expenses, including rent concessions, and broker's fees occurred after the Plaintiff vacated the Premises and returned the key on May 15, 2015. Defendant does not dispute that Plaintiff returned the keys and vacated the entire premises. Therefore, when James Leonard vacated the property on May 15, 2015, Folgen and Zisman's liability for future rent ceased.

Pursuant to the lease, additional rent is inclusive of "reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding."

Wherefore, it is hereby

ORDERED that Six & Cornelia Associates' motion for summary judgment as against James Leonard 6, Inc. is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Six & Cornelia Associates and against James Leonard 6, Inc. in the amount of $95,105.93 (representing damages shown less security of $24,000); and it is further

ORDERED that Six & Cornelia Associates' motion for summary judgment against Leon Folgen and James Zisman is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Six & Cornelia Associates and against Leon Folgen and James Zisman in the amount of $10,000.00; and it is further

ORDERED Six & Cornelia Associates is entitled to reasonable attorneys' fees against James Leonard 6, Inc., Leon Folgen and James Zisman

ORDERED that the amount of reasonable attorney's fees and costs is severed and referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including Plaintiff, of the date of the hearing; and it is further

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: AUGUST 1, 2016

J.S.C.

HON. EILEEN A. RAKOWER

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