

<b>26/32, LLC v Vallat, Inc.</b>
2017 NY Slip Op 30852(U)
April 21, 2017
Supreme Court, New York County
Docket Number: 158825/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
26/32, LLC,

Plaintiff,

Index No. 158825/2014

-against-

**DECISION/ORDER**

VALLAT, INC. d/b/a CAFÉ NOIR, GEORGE  
FORGEOIS and 35 LISPENARD CAFÉ, INC.,

Defendants.  
-----X

**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for: \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition .....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits .....	<u>2</u>

Plaintiff commenced the instant action seeking, among other things, unpaid rent in connection with a commercial lease for the premises located at 32 Grand Street, Store #4 and #5, New York, NY. It now moves for an Order pursuant to CPLR § 3211(a)(1) and § 3212 dismissing the second, third, fourth, fifth, seventh, eighth, ninth, tenth and eleventh affirmative defenses. Defendants do not oppose the dismissal of the second, third, fourth and fifth affirmative defenses and these affirmative defenses are dismissed. As will be explained more fully below, the eighth affirmative defense is also dismissed and the remainder of the motion is denied.

The relevant facts with respect to this motion are as follows. Defendant Vallat, Inc.,

d/b/a Café Noir (“Vallat”) is a former tenant of the premises located at 32 Grand Street, Store #4 and #5, New York, NY (the “Premises”). Vallat occupied the Premises pursuant to a commercial lease (the “Lease”) with plaintiff and used the Premises to operate a bar and restaurant under the name “Café Noir.” Sometime in 2013, Vallat fell behind in its rent and plaintiff commenced a summary proceeding against it. The summary proceeding was settled pursuant to a stipulation between the parties. Pursuant to the stipulation, plaintiff was awarded a judgment for \$151,937.04, representing rent arrears through September 30, 2013, with a warrant of eviction to issue forthwith. However, execution of the warrant was stayed for Vallat to pay off the judgment. Vallat failed to pay off the judgment and vacated the Premises on or about November 7, 2013. Defendants allege, upon information and belief, that after Vallat vacated the Premises in 2013, plaintiff performed work on the Premises, including structural work, and attempted to re-rent the Premises. Plaintiff has admitted in this litigation that it re-rented a portion of the Premises as of May 1, 2015.

Plaintiff seeks dismissal of defendants’ seventh affirmative defense which alleges that plaintiff’s damages, if any, were caused in whole or in part by the fault of plaintiff; defendants’ eighth affirmative defense which alleges that plaintiff’s claims are barred by laches, waiver, estoppel and/or unclean hands; defendants’ ninth affirmative defense which alleges that plaintiff’s actions effected a surrender of defendants’ tenancy and/or obligations to pay rent and additional rent for the Premises; defendants’ tenth affirmative defense which alleges that plaintiff failed to mitigate its damages; and defendants’ eleventh affirmative defense which alleges that plaintiff mitigated its damages.

Pursuant to CPLR § 3211(b), “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” On such a motion,

defenses that consist of bare legal conclusions without supporting facts will be stricken. See *Robbins v. Growney*, 229 A.D. 2d 356, 358 (1<sup>st</sup> Dept 1996). However, if “a party demonstrates that facts may exist in opposition to a motion to dismiss, discovery is sanctioned.” *Amigo Foods Corp. v. Marine Midland Bank*, 39 N.Y.2d 124 (1976); CPLR Rule 3211(d).

Initially, defendants’ eighth affirmative defense that plaintiff’s claims are barred by laches, waiver, estoppel and /or unclean hands is granted as defendants have failed to specify facts that support these claims in their answer or opposition papers.

However, the court finds that the seventh, ninth, tenth and eleventh affirmative defenses should not be dismissed at the present time as the motion to dismiss these affirmative defenses is premature in the absence of any discovery yet having taken place in this action. These affirmative defenses relate to defendants’ claim that plaintiff’s actions after defendant Vallat vacated the Premises in 2013, including making alterations to the Premises and re-letting the Premises, effectuated a surrender of the Premises, thereby relieving defendants of any liability for the payment of rent. In the seventh affirmative defense, defendants allege that plaintiff’s damages were caused in whole or part by plaintiff’s actions; in the ninth affirmative defense, defendants allege that plaintiff’s actions effected a surrender of defendants’ tenancy and or obligation to pay rent or additional rent for the Premises; and in the tenth and eleventh affirmative defense, defendants allege that plaintiff mitigated its damages and failed to mitigate its damages. Defendants are entitled to conduct discovery to support their claim that plaintiff’s actions with respect to the Premises after Vallat vacated the Premises effected a surrender of the Premises. Under these circumstances, there is no basis for dismissing these affirmative defenses at this point in the litigation.

Based on the foregoing, the second, third, fourth, fifth and eighth affirmative defenses are

