Silver Oak Realty Group., Inc. v Yan Kam Yeung
2018 NY Slip Op 33481(U)
December 4, 2018
Supreme Court, Queens County
Docket Number: 706515/2017
Judge: Marguerite A. Grays

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

X

SILVER OAK REALTY GROUP., INC.,

Plaintiff(s)

-against-

YAN KAM YEUNG AND E&A DYNASTY RESTAURANT, INC.,

Defendants(s)

X

Index Number 706515 2018 2017

Motion Date September 11, 2018

Motion Seq. No. 3

Motion Cal. No. 47

The following papers numbered EF57 - 100 read on this motion by plaintiff Silver Oak Realty Group Inc., for an Order granting summary judgment on the issue of liability on the causes of action for breach of contract and an account stated, and referring the matter to a Referee to determine the amount of damages, costs and attorney's fees.

	Papers Numbered
Notice of Motion-Memorandum of Law-Affirmation-Exhibits ...	EF 57-92
Opposing Affirmation-Exhibits.....	EF 96-99
Reply Affirmation.....	EF 100

FILED
DEC 19 2018
COUNTY CLERK
QUEENS COUNTY

Upon the foregoing papers this motion is determined as follows:

Plaintiff Silver Oak, as landlord, entered into a commercial lease and rider with defendants Yam Kam Yueng and E & A Dynasty Restaurant, Inc., dated March 13, 2018, whereby defendants leased a store located at 147-46 Northern Boulevard, Flushing, New York 11354, for a period of eight years, commencing on October 1, 2008, and ending on September 30, 2016. The lease provided that the tenants would use the premises for the purposes of operating a Chinese Restaurant. The lease described the demised premises as being located in a building known as 147-34 through 147-50 Northern Boulevard.

Plaintiffs commenced the within action for breach of contract and for an account stated on May 12, 2017. This court in an order dated January 25, 2018 dismissed the action, as neither party appeared for the scheduled compliance conference. In an order dated June

'14, 2018, the Order of January 25, 2018 was vacated and the matter was restored to the compliance conference calendar. Defendants have served an answer with counterclaims and plaintiff has served a reply to the counterclaims.

Plaintiff alleges in its complaint that defendants leased the commercial premises located at 147-46 Northern Boulevard, for a period of eight years, commencing on October 1, 2008 to September 30, 2016, for the operation of a Chinese restaurant. It is alleged that pursuant to the terms of the lease defendants were obligated to pay plaintiff rent of $5,346.99 a month in advance of the first of each month from October 1, 2015 through September 30, 2016; that the defendants have vacated the leased premises; that certain invoices attached to the complaint were issued to the tenants and remain unpaid; and that the tenant did not contest said invoices, late charges or accrued interest. The complaint alleges that the defendants have breached the lease and have failed to pay said invoices, and that "additional fees, costs, repairs, penalties and attorney's fees and costs will continue to accrue".

The complaint further alleges that the defendants did not keep the leased property in good repair and condition, causing structural damage to the property; that the defendants made "jury-rigged" alterations to the property that were not approved by the owner as required under the lease; that defendants abandoned their restaurant fittings, furniture and fixtures, such as "commercial kitchen, restaurant and refrigeration equipment, which must be removed at defendants' expenses under the Lease", and that said removal "will cause further damage to the structure for which Defendants are liable". It is also alleged that defendants allowed "roof leaks" causing water to enter the building and damage "structural, electrical and plumbing components".

Plaintiff's first cause of action for breach of contract seeks to recover damages in excess of $105,000, excluding attorney's fees and costs. This cause of action is based, in part, on the failure to pay the invoices attached to the complaint, as well as the failure to pay rent and additional rent under the terms of the lease for the period of June 1, 2016 through September 30, 2016.

The second cause of action for an account stated alleges that from January 2015 through April 2015, plaintiff submitted invoices to defendants for "money obligations" due under the lease and rider; that defendants accepted said invoices without protest or objection; and have failed to pay the amount due under said invoices. It is alleged that an account has been stated between the parties, and that defendants owe plaintiff no less than $105,000.00, exclusive of interest, late fees, costs and attorney's fees.

On a motion for summary judgment, the movant bears the initial burden of establishing, prima facie, entitlement to judgment as a matter of law, offering sufficient

evidence, in admissible form, to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324[1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d at 557; CPLR §3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626[1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231[1978]). Further, "[i]t is not the function of a court deciding a summary judgment motion to make credibility determinations" (*Vega v Restani Corp.*, 18 NY3d 499, 505 [2012], *citing Sillman*, 3 NY2d at 404).

"An account stated is an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance" (*Volkening v DeGraaf*, 81 NY 268, 270 [1880]; *see Gurney, Becker & Bourne, Inc. v Benderson Dev. Co.*, 47 NY2d 995, 996 [1979]; *Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151, 153 [1975]; *Styles Brook Homeowners' Assn. v Blasi*, 165 AD3d 1004 [2018]). An essential element to an account stated cause of action is that the parties came to an agreement with respect to the amount of the balance due (*see Newburger-Morris Co. v Talcott*, 219 NY 505, 512 [1916]; *Volkening v DeGraaf*, 81 NY at 270; *Styles Brook Homeowners' Assn. v Blasi*, 165 AD3d at 1004; *Raytone Plumbing Specialities, Inc. v Sano Constr. Corp.*, 92 AD3d 855, 856 [2012]; *Landau v Weissman*, 78 AD3d 661, 662 [2010]). "[W]hile the mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transaction may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found" (*Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151; *see Corr v Hoffman*, 256 NY 254, 266 [1931]; *Episcopal Health Servs., Inc. v POM Recoveries, Inc.*, 138 AD3d 917, 919 [2016]).

In support of the within motion for partial summary judgment, plaintiff submits an affidavit from Steven Wu Kuo, a shareholder and Vice-President of said corporation; copies

of the invoices attached to the complaint; a copy of the pleadings; and a copy of the lease and rider agreement. Mr. Kuo's affidavit is devoid of any facts and is offered solely as a vehicle for the submission of said invoices.

As plaintiff's counsel lacks personal knowledge of the facts, his affirmations lack probative value. In addition, plaintiff's counsel's memorandum of law contains several errors in that it describes the within action as arising out of a lease for a different property located at 147-16 Northern Boulevard, Flushing New York, 11354, for a term of ten years commencing on April 1, 2007 to June 30, 2017, to operate a Korean BBQ and Japanese Sushi Restaurant as assigned on January 21, 2009, makes reference to an assignment and assumption agreement pertaining to said lease, and asserts defenses that have not been raised by the defendants in this action. It appears to the Court that plaintiff's counsel has engaged in careless cutting and pasting from unrelated documents and failed to proofread his memorandum of law prior to e-filing it with the Court.

Defendants, in opposition, point out the errors in plaintiff's memorandum of law and further object to many of the invoices relied upon by plaintiff which do not refer to the subject leased premises or the defendants. Defendants also assert that material issues of fact exist regarding the invoices for sewer maintenance, annual backflow tests, parking area asphalt re-pavement and repairs, water, rent, fire prevention inspection, and disputes as to the amount of rent and/or additional rent. Defendants argue that the subject lease does not provide that the defendants would be responsible for the payments of invoices for sewer maintenance, annual backflow tests, parking area asphalt repavement and repairs, and for fire prevention inspection. In addition, defendant Yeung states in his affidavit that the defendants surrendered the premises to the plaintiff on May 31, 2016, at which time plaintiff promised that it would not charge the defendants for rent for June, July, August, and September 2016, as they provided plaintiff with sufficient time to find a new tenant to take over the premises, and that a new tenant did take over the premises. Defendant Yeung states that at the time the premises were surrendered on May 31, 2016, plaintiff acknowledged that the defendants had made payments for rent and additional rent up to said date, including real estate tax, tax petition fees and commissions, and water charges, and therefore there should be no outstanding balances. Defendant Yeung further states that although plaintiff promised to return the security deposit in the sum of $21,415.08, it has failed to do so.

This Court finds that plaintiff has failed to establish its prima facie entitlement to judgment as a matter of law on the cause of action for breach of contract. To the extent that the complaint alleges a breach of the lease agreement based upon the defendants failure to properly maintain the leased premises, including the roof; improper alterations; and the failure to remove certain fixtures, furniture and equipment, plaintiff has failed to submit any evidence by a party with personal knowledge of the facts which supports these allegations.

To the extent that the complaint alleges a breach of the lease agreement based upon the failure to pay the annexed invoices, the evidence submitted is insufficient to establish that each of the invoices were for expenses incurred by the plaintiff with respect to the leased premises and that defendants agreed to make such payments pursuant to the terms of the lease. With respect to plaintiff's claim for rent and additional rent owed after May 31, 2016, the Court finds that defendants have properly asserted a defense as to whether there was a surrender of the parties' lease by operation of law which would terminate plaintiff's right to seek rent and additional rent for the period of June through September, 2016 (*see generally, Chestnut Realty Corp. v Kaminsky*, 132 AD3d 797 [2015]; *Chestnut Realty Corp. v Kaminski*, 95 AD3d 1254 [2012]).

Plaintiff has also failed to establish its prima facie entitlement to judgment as a matter of law on the cause of action to recover on an account stated, as it submitted no evidence that the parties had come to an agreement with respect to the amount of the balance due (*see Styles Brook Homeowners' Assn. v Blasi*, 165 AD3d at 1004). In addition, plaintiff has not submitted any evidence establishing that the subject invoices were mailed to the defendants, that the defendants received said invoices, and that the defendants retained said invocies for an unreasonable period of time without objection such that the only reasonable inference would be that they assented to the correctness of the account items and balance due (*see Styles Brook Homeowners' Assn. v Blasi*, 165 AD3d at 1004; *Raytone Plumbing Specialities, Inc. v Sano Constr. Corp.*, 92 AD3d 855, 856 [2012]).

In view of the foregoing, plaintiff's motion for partial summary judgment on the issue of liability and to refer the matter to a referee is denied in its entirety.

Dated: DEC 04 2018

J.S.C.

FILED
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