UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WEISS-JENKINS IV LLC,

Plaintiff,

v.

UTRECHT MANUFACTURING CORPORATION, *et al.*,

Defendants.

Case No. C14-0954RSL

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on "Plaintiff's Motion for Partial Summary Judgment on Liability and Dismissing Defendants' Affirmative Defenses." The parties agree that defendant Utrecht Manufacturing Corporation prematurely vacated premises it leased from plaintiff and that both defendants are liable for damages under the terms of the amended lease. The parties disagree, however, regarding the measure and scope of damages and the viability of defendants' affirmative defenses.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case "bears the initial responsibility of informing the district court of the basis for

its motion" (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and "citing to particular parts of materials in the record" that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate "specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324. The Court will "view the evidence in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in that party's favor." Krechman v. County of Riverside, 723 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the jury genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the "mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient" to avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. S. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921, 925 (9th Cir. 2014). In other words, summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor. FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties and having heard the arguments of counsel, the Court finds as follows:

A. Measure and Scope of Damages

The amended lease agreement provides that, upon the lessee's failure to pay rent, the landlord may cancel the lease and take possession of the property.

> Notwithstanding such retaking of possession by Landlord, Tenant's liability for the rent provided herein shall not be extinguished for the balance of the

> term of this Lease. Upon such default, cancellation or re-entry, Landlord may elect either (i) to terminate this Lease; or (ii) without terminating this Lease, to relet or attempt to relet all or any part of the Premise . . . . In either event, the liability of Tenant for the full rental provided for herein shall not be extinguished for the balance of the term of this Lease, and the Tenant covenants and agrees to make good to the Landlord any deficiency arising from a re-entry and good faith effort of reletting of the Premises at a lesser rental than the rental herein agreed to, and Landlord may bring an action therefor as such monthly deficiency shall arise.

Dkt. # 27-1 at 7-8. "Rent" is defined to include both a base monthly amount and a percentage of gross sales made at the premises. Dkt. # 27-1 at 3.

Plaintiff seeks a summary determination that defendants are obligated to pay (a) rent, operating expenses, and other payments that were due under the lease, less any amounts collected after the premises was relet, (b) contractual late charges, (c) expenses incurred in returning the premises to the condition it was in when it was turned over to Utrecht, (d) reletting expenses, and (e) other costs arising from defendants' breach. There is ample case law to support plaintiff's requests. When a tenant breaches a lease, "[t]he measure of damages is the difference between the present worth of the property with the lease less the present worth of the property without the lease." Wash. Trust Bank v. Circle K Corp., 15 Wn. App. 89, 93 (1976).

> In the event the lessor relets the premises, he is entitled to hold the lessee liable for the difference, if any, in the rent contracted for and that actually recovered. . . . Additional damages which a lessor may recover for breach of a lease may properly include consequential damages which flow from the breach and which could reasonably have been anticipated by the parties. The amount of damages should reflect what is required to place the lessor in the same financial position he would have enjoyed in the absence of the breach.

Family Med. Bldg., Inc. v. State, Dep't of Soc. & Health Servs., 104 Wn.2d 105, 114

(1985).

Defendants rely on a separate line of cases to argue that when the landlord opts to terminate a lease for failure to pay rent, it waives its right to any damages other than the rent lost between the date of breach and the date the premises is relet.[1] The Court need not attempt to harmonize these strands of Washington case law because even if defendants' preferred line of cases governs, exceptions to the strict temporal limitation on damages apply. Cases such as Hargis v. Mel-Mad Corp., 46 Wn. App. 146, 150-51 (1986), state that when a lessee voluntarily abandons a leased premises, the landlord has the option to terminate the lease and relet the premises for his or her own account or to keep the lease (and the obligation to pay rent) in place and attempt to relet on the tenant's account. See also Lacey Marketplace Assocs. II, LLC v. United Farmers of Alberta Cooperative Ltd., 2015 WL 2345179, at *9 (W.D. Wash. May 14, 2015). If the landlord opts to terminate the lease, the general rule is that "all liability not already accrued is at once at an end." Heuss v. Olson, 43 Wn.2d 901, 905 (1953). That rule does not apply, however, if the termination is qualified, "as in the case of a lease which expressly saves the lessor's right to also recover damages based on unaccrued rent . . . or where the notice of forfeiture communicates to the lessee the lessor's intention to hold the lessee [liable] for such damages, notwithstanding the forfeiture . . . ." Id. Both of the exceptions apply here: the lease expressly reserves the landlord's right to collect rent throughout the term of the lease despite a termination (Dkt. # 27-1 at 7-8) and the notice of termination not only reminded defendants of the relevant contractual obligations, but also stated that the landlord intends to "seek damages for the remaining rent term" (Dkt. # 28-3 at 2).

[1] The Court has considered this argument on its merits despite defendants' failure to raise it as an affirmative defense to plaintiff's contract claims.

As specified in the contract between the parties, plaintiff may, therefore, recover lost rents between July 2013 and the time the premises was relet, plus any shortfall in the rental amount received between the reletting and February 2018. As for the other categories of damages mentioned in the motion, plaintiff bears the burden of showing both the amount of damages and that they were caused by defendants' breach. The Court declines to determine whether as-yet unspecified expenses are causally related to the breach or whether damages for wholly speculative losses (such as a future failure on the part of the new tenant to pay rent) are recoverable.

B. Affirmative Defenses

Plaintiff seeks dismissal of defendant's affirmative defenses on the grounds that they (i) are inadequately pled and (ii) fail on the merits. Whether the heightened pleading standard set forth in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), applies to the pleading of affirmative defenses is an open question. See Barnes v. AT&T Pension Ben. Plan-Nonbargained Program, 718 F. Supp.2d 1167, 1171 (N.D. Cal. 2010) ("The court can see no reason why the same principles applied to pleading claims [in Twombly and Iqbal] should not apply to the pleading of affirmative defenses which are also governed by Rule 8."); Kohler v. Staples Office Superstore, LLC, 291 F.R.D. 464, 468 (S.D. Cal. 2013) ("Absent further direction, this Court declines to extend the Twombly/Iqbal pleading standards to affirmative defenses."). The Court finds that the language of Fed. R. Civ. P. 8(c), the fact that a defendant is not required to show that it is entitled to relief when pleading an affirmative defense, the short time frame in which defendant must investigate plaintiff's accusations and file a response, and the form answer presenting an affirmative defense all militate against imposing the Twombly pleading standard on affirmative defenses.

Nevertheless, the answer, when read in conjunction with the allegations of plaintiff's complaint and other matters in the record, must comply with Rule 8's requirement of a "short and plain" statement to give the opposing party fair notice of the defense and the grounds upon which it rests. Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1023 (9th Cir. 2010) (quoting Wyshak v. City Nat. Bank, 607 F.2d 824, 827 (9th Cir. 1979)). Most of defendants' affirmative defenses are lacking even under this more relaxed standard. Nothing in the pleadings would enable plaintiff to understand the grounds upon which the defenses of unjust enrichment, waiver, estoppel, and/or unclean hands are based: plaintiff's claims are contractual in nature, and defendants' appeal to equity is unexplained and cannot be justified by plaintiff's alternative claim for restitution.[2] With regards to the demand for set-off, defendants offer no basis upon which one could infer that they have a claim against plaintiff which might generate an off-setting liability.

The only affirmative defense which had potential applicability based on the pleadings is failure to mitigate. Washington law imposes a duty to mitigate on the landlord, and plaintiff's complaint is silent as to the efforts it made to satisfy that duty. Defendant has not, however, provided any evidence in support of this defense. The record shows that plaintiff made reasonable and successful efforts to obtain a new tenant, and defendant acknowledged at oral argument that there is no evidence that a more favorable lease arrangement could have been negotiated, that the lease terms were collusive, or that plaintiff otherwise failed to limit the losses caused by defendant's breach. Defendant seems to be arguing that, even in the absence a failure to mitigate, plaintiff's damages

[2] Defendants' explanation in response to plaintiff's motion suggests that these "defenses" are more accurately described as an assertion that Washington law limits the measure and scope of plaintiff's claim for damages.

should, as a policy matter, end when the premises is relet as a means of "incentivizing" the landlord to negotiate the best bargain it can. That is simply not the law in Washington. Short of a failure to mitigate, "[i]f there is an inequity that, by virtue of the facts of this case, must fall on either of the parties, we have decided that it should fall on the party who breached the lease. The defaulting tenant should not get the benefit of his breach." Hargis, 46 Wn. App. at 154 (quoting N.J. Indus. Props., Inc. v. Y.C & V.L., Inc., 495 A.2d 1320, 1329 (N.J. 1985).[3]

For all of the foregoing reasons, plaintiff's motion for summary judgment is GRANTED in part. Defendants are liable for lost rents between July 2013 and the time the premises was relet, plus any shortfall in the rental amount received between the reletting and February 2018. Plaintiff may also seek to recover other contractual and consequential damages caused by defendants' breach. Defendants' affirmative defenses of failure to state a claim,[4] unjust enrichment, waiver, estoppel, unclean hands, failure to mitigate, and set-off are STRICKEN.

Dated this 14th day of September, 2015.

Robert S. Lasnik
United States District Judge

[3] To the extent defendant is arguing that certain elements of plaintiff's damages are actually capital improvements or are not causally related to the breach, that is merely an assertion that plaintiff will not be able to satisfy its burden of establishing its quantum of damages. Defendants may put plaintiff to its proofs at trial, but such an argument is not a proper affirmative defense.

[4] Defendants acknowledge that plaintiff has stated a claim upon which relief can be granted. Dkt. # 31 at 13.