SHORT FORM ORDER

INDEX No. 9838/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY



***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12/03/12
ADJ. DATES 01/11/13
Mot. Seq. # 001 - MD
P.C. Scheduled: **02/22/13**
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ISLAND TENNIS, L.P.

Plaintiff,

-against-

VARILEASE FINANCE, INC.

Defendant

CLAUDE OKIN and ISLAND TENNIS, INC.

Counterclaim Defendants.

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LAZER, APTHEKER, *et. al.*
Attys. For Plaintiff &
Counterclaim Defendants
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Melville, New York 11747

PORZIO, BROMBERG, *et. al.*
Attys. For Defendant
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New York, New York 10019

Upon the following papers numbered 1 to 10 read on this motion by the plaintiff and counterclaim defendants for dismissal of all counterclaims; Notice of Motion/Order to Show Cause and supporting papers 1- 3; ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4-5 ; Reply papers ; Other 6 (Def. Brief); 7-8 (Pltf. Memorandum of Law); 9-10 (Pltf. Reply Memorandum of Law) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion (#001) by the plaintiff and the counterclaim defendants for an order dismissing the five counterclaims asserted in the defendant's answer is considered under CPLR 3211(a)(1) and (a)(7) and is denied; and it is further

***ORDERED*** that a preliminary conference shall be held in this action on **Friday, February 22, 2013** at 9:30 a.m., Part 45, in the courtroom of the undersigned located in the Supreme Court Annex Building of the courthouse at One Court Street, Riverhead, New York 11901, at which counsel are directed to appear ready to confer with the court.

The plaintiff commenced this action to obtain various forms of declaratory relief with respect to the rights and interests of the parties under the terms of a September 1, 2009 Master Lease Agreement,

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Purchase Agreement with Leaseback and Conditional Bill of Sale and written guarantees of the obligations of the plaintiff under these contracts that were executed by the additional counterclaim defendants, Claude Okin and Island Tennis, Inc. The plaintiff, who did not attach a copy of its complaint or amended complaint to its moving papers, characterizes its demands for relief as including the following declarations: that the "Equipment Lease" and the plaintiff's obligations to pay rent thereunder have terminated; that the defendant breached its obligations under the "Sale Contract" for which the defendant is liable for money damages; that the interest rate set by the equipment lease, if it were extended, is usurious; that the automatic renewal provisions of the lease are an unenforceable penalty. Also demanded is the remedy of an accounting with respect to the million dollar reserve deposit and damages caused by the defendant's failure to return the plaintiff's security deposit.

In its amended answer to the amended complaint, the defendant asserts five counterclaims, two of which are aimed at the plaintiff due to its purported breach of the Master Lease Agreement and another aimed at regaining the equipment that was the subject of such lease. Also asserted are counterclaims to recover money damages from each of the guarantor defendants, who were joined as additional counterclaim parties by the defendant.

By the instant motion, the plaintiff and the counterclaim defendants seek dismissal of each of the defendant's counterclaims pursuant to CPLR 3211(a)(1) and (a)(7). Various grounds are advanced including that the Master Lease, which contained an automatic renewal provision following the expiration of its initial 30 month term, was not renewed after its purported expiration date of May 1, 2012 because: 1) the plaintiff did not elect to renew in accordance with the renewal provision; and 2) the automatic renewal provisions are unenforceable due to the defendant's failure to serve a proper notice in writing affording not less than 15 days nor more than 30 days notice of the date by which the lessee must elect to release the property at the end of the lease term as required by GOL § 5-901. Although a purported notice was issued by the defendant, it is alleged to have been untimely, not in proper form and not served "personally or by mail" as required by GOL § 5-901. The movants thus contend that the counterclaims are legally insufficient under CPLR 3211(a)(7) or are otherwise subject to dismissal pursuant to CPLR 3211(a)(1) under the terms of the transactional writings signed by the parties.

The defendant opposes the motion upon allegations that the 30 month original lease term expired not on May 1, 2012 as alleged by the plaintiff, but instead, on June 30, 2012. According to the defendant, this date was set by paragraph 2a of the Master Lease which defined the term of the lease as comprised of progress Funding Term, Installation Term and Base Term. The Base Term commenced on "the first day of the calendar quarter following the date specified on the Installation Certificate", by which the lessee certified and acknowledged the completed installation of all equipment that was the subject of the Master Lease. The plaintiff issued the Installation Certificate on October 19, 2009. The defendant thus claims that the Base Term of the lease commenced on January 1, 2010, that being the first day of the calendar quarter following the date of completed installation set forth on the Installation Certificate issued by the plaintiff. The defendant further claims that its December 6, 2012 service via the United Parcel Service of a notice regarding the automatic renewal of the lease was compliant with the requirements of GOL § 5-901 because it was served 27 days prior to the date on which the plaintiff was required to elect to release the property which was fixed under the lease at 180 days prior to the end of the Base Term of such lease (January 2, 2012), or to purchase same or to continue the lease for

another 12 months. According to the defendant, neither the form of its statutory notice nor its in-hand delivery by UPS vitiates its effectiveness.

In reply, the plaintiff and counterclaim defendants do not address the defendant's claims as to the timeliness of the defendant's GOL § 5-901 notice, which were based upon its calculation of the commencement of the base term of the Master Lease on January 1, 2010. Instead, the movants confine their arguments to the purported defective service of the defendant's notice by UPS delivery rather than by US mail and to the form of such notice which was "buried within a letter that heralds the industry success of Defendant which was accompanied by an enclosed five page reprinted magazine article that had nothing to do with the automatic renewal provisions of the Equipment Lease" (*see* Subpart B on page 3 of the movants' Reply Memo of Law). Finally, the movants dispute the defendant's suggestion that plaintiff should be estopped from asserting a GOL § 5-901 defense since it remains in possession of the subject equipment without paying therefor.

Upon its review of the record adduced on this motion and for the reasons stated below, the court denies this joint motion (#003) by the plaintiff and the counterclaim defendants for relief pursuant to CPLR 3211.

The legal standard to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) is whether "the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist College v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], quoting ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). On such a motion, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Goshen v Mut. Life Ins. Co. of N.Y.,*** 98 NY2d at 314, 326, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). However, bare legal conclusions and factual averments flatly contradicted by the record are not presumed to be true (*see* ***Simkin v Blank***, 19 NY3d 46, 945 NYS2d 222 [2012]); ***Khan v MMCA Lease, Ltd.***, 100 AD3d 833, 954 NYS2d 595 [2d Dept 2012]; ***U.S. Fire Ins. Co. v Raia***, 94 AD3d 749, 942 NYS2d 543 [2d Dept 2012]; ***Parola, Gross & Marino, P.C. v Susskind***, 43 AD3d 1020 [2d Dept 2007]).

Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7) and such proof is considered but the motion has not been converted to one for summary judgment, "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1997]; *see* ***Bua v Purcell & Ingrao, P.C.,*** 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; ***Jannetti v Whelan***, 97 AD3d 797, 949 NYS2d 129 [2d Dept 2012]; ***Bokhour v GTI Retail Holdings, Inc.***, 94 AD3d 682, 941 NYS2d 675 [2d Dept 2012]). Upon a court's consideration of evidentiary material, a motion to dismiss pursuant to CPLR 3211(a)(7) should be granted only where: (1) it has been shown that a material fact alleged in the complaint is not a fact at all; and (2) there is no significant dispute regarding it (*see* ***Weill v East Sunset Park Realty, LLC***, 101 AD3d 859, 955 NYS2d 402 [2d Dept 2012]; ***Cucco v Chabau Café Corp.***, 99 AD3d 965, 952 NYS2d 463 [2d Dept 2012]; ***Norment v Interfaith Ctr. of New York***, 98 AD3d 955, 951 NYS2d 531 [2d Dept 2012]; ***Basile v Wiggs***, 98 AD3d 640, 950 NYS2d 148 [2d Dept 2012]). However,

the burden never shifts to the nonmoving party to rebut a *defense* asserted by the moving party (*see* ***Weill v East Sunset Park Realty, LLC***, 101 AD3d 859, *supra*; ***Quiroz v Zottola***, 96 AD3d 1035, 948 NYS2d 87 [2d Dept 2012]; ***Sokol v Leader***, 74 AD3d 1180, *supra*). "Thus, a plaintiff 'will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint'" (*id.* at 1181, 904 NYS2d.2d 153, quoting ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635, 389 NYS2d 314 [1976]).

In contrast, a motion to dismiss pursuant to CPLR 3211(a)(1) based on documentary evidence is governed by a different standard as it is grounded on a defense asserted by the moving party. Such a motion is properly granted only where the documentary evidence adduced utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (*see* ***Green v Gross and Levin, LLP***, 101 AD3d 1079, 2012 WL 6684704 [2d Dept 2012]; ***Rabos v R & R Bagels & Bakery, Inc.***, 100 AD3d 849, 955 NYS2d 109 [2d Dept 2012). To succeed on such a motion, the movant must establish that the documentary evidence that forms the basis of the motion resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim (*see* ***AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.***, 5 NY3d 582, 590–591, 808 NYS2d 573 [2005]; ***Bua v Purcell & Ingrao, P.C.*** 99 AD3d 843, *supra*; ***Fontanetta v Doe,*** 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]). To qualify as "documentary," the evidence relied upon must be unambiguous and undeniable in a manner like judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Documents compiled by the parties such as affidavits, notes, accounts, depositions, correspondence and the like generally do not constitute documentary evidence within the ambit of CPLR 3211(a)(1) (*see* ***Granada Condominium III Assn. v Palomino***, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]; ***Fontanetta v Doe***, 73 AD3d 78, *supra*).

Here, the plaintiff and counterclaim defendants failed to demonstrate that any of the plaintiff's counterclaims are subject to dismissal pursuant to CPLR 3211(a)(1) due to a lack of legal sufficiency. There's been no showing that a material fact alleged in the counterclaim portion of the defendant's answer is not a fact at all and that there is no significant dispute regarding it (*see* ***Weill v East Sunset Park Realty, LLC***, 101 AD3d 859, *supra*; ***Cucco v Chabau Café Corp.***, 99 AD3d 965, *supra*). Instead, the contentions of the movants, as distilled in their reply papers, simply raise a defense to the counterclaims that is based upon the defendant's purported failure to comply with the notice provisions imposed by GOL § 5-901. However, a claim of legal insufficiency pursuant to CPLR 3211(a)(7) that is premised upon a defense asserted by the movant is not determinative of whether the claim is legally insufficient, since *the burden never shifts to the non-moving party to rebut a defense* asserted by the moving party where, as here, there's been no conversion of the application for dismissal into one for summary judgment (*see* ***Quiroz v Zottola,*** 96 AD3d 1035, *supra*; ***Sokol v Leader***, 74 AD3d 1180, *supra*). Those portions of the instant motion wherein the plaintiff and the counterclaim defendants seek dismissal of the defendant's counterclaims pursuant to CPLR 3211(a)(7) are thus denied.

Also denied are the remaining portions of this motion wherein the movants seek dismissal of the defendant's counterclaims pursuant to CPLR 3211(a)(1) on the basis of documentary evidence. The record is devoid of documentary proof that sufficiently resolves all factual issues as a matter of law and conclusively disposes of the defendant's counterclaims (*see* ***AG Capital Funding Partners, L.P. v State St. Bank Co.***, 5 NY3d 582, 590–591, *supra*; ***Bua v Purcell & Ingrao, P.C.,*** 99 AD3d 843, *supra*). The

movants' objections to the defendant's compliance with the notice provisions of GOL § 5-901 do not conclusively dispose of the defendant's counterclaims which sound in breach of the Master Lease and the guarantees. The timeliness of the defendant's statutory notice was clearly established in the defendant's opposing papers and by the transactional documents themselves, in response to which, the plaintiff had no reply. The notice included the language required by the statute and its delivery by UPS may have satisfied the "*personally or by mail*"service requirements imposed upon the defendant as the issuer of the statutory notice. In addition, the submissions of the movants failed to demonstrate that the documentary evidence relied upon by them utterly refuted the defendant's counterclaim allegations (*see* ***Green v Gross and Levin, LLP***, 101 AD3d 1079, *supra*; ***Rabos v R & R Bagels & Bakery, Inc.***, 100 AD3d 849, *supra*). Accordingly, the movants' demands for dismissal of the counterclaims pursuant to CPLR 3211(a)(1) are denied.

The record reflects that no preliminary conference has been held in this action notwithstanding its pendency since April of 2012. Counsel are thus directed to appear for the preliminary conference scheduled above for **February 22, 2013.**

Dated: January 29, 2013

THOMAS F. WHELAN, J.S.C.