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SHORT FORM ORDER

INDEX No. 10-40338
CAL No. 15-00427CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-9-15
ADJ. DATE 4-23-15
Mot. Seq. # 006 - MotD

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TOWER NATIONAL INSURANCE COMPANY a/s/o NORTHERN VENTURES LLC d/b/a ELDORADO SOUTHERN GRILL,

Plaintiff,

- against -

A & C REAL ESTATE MANAGEMENT LLC and OCEAN SPRAY POOLS INC. d/b/a OCEAN SPRAY HOT TUBS AND SAUNAS,

Defendants.

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MITCHELL J. DEVACK, PLLC
Attorney for Defendant A & C Real Estate
90 Merrick Avenue, Suite 500
East Meadow, New York 11554

ANTHONY B. TOHILL, P.C.
Attorney for Defendant Ocean Spray Pools
12 First Street, P.O. Box 1330
Riverhead, New York 11901

Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13 - 14 ; Replying Affidavits and supporting papers 15 - 17 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant A & C Real Estate Management, LLC for an Order, pursuant to CPLR 3212, granting summary judgment in its favor against the defendant Ocean Spray Pools Inc. d/b/a Ocean Spray Hot Tubs and Saunas in the amount of $219,292.96, based on its cross claims against said codefendant, is granted to the extent that summary judgment is awarded as to said codefendant's liability for rent due and reasonable attorney's fees, and directing an immediate trial on these claims, and is otherwise denied.

The plaintiff discontinued this action with prejudice against the defendants by stipulation dated July 21, 2014, filed with the Clerk of the Court on September 11, 2014. Said stipulation excluded the cross claims of the defendant A & C Real Estate Management, LLC ("A&C") against the defendant Ocean Spray Pools Inc. d/b/a Ocean Spray Hot Tubs and Saunas ("Ocean Spray"). A&C's cross claims

seek to recover damages for unpaid rent and attorney's fees allegedly due pursuant to a commercial lease between the parties dated December 23, 2005 ("the lease"). It is undisputed that the plaintiff is the owner of 48-37B Nesconset Highway, Port Jefferson Station, New York ("the premises"), that Ocean Spray executed the subject lease for the premises, and that the lease provided for the term to commence on delivery and end on November 13, 2015. Ocean Spray failed to make payment of the rent due November 1, 2008, and by an undated letter advised A&C that it was "leaving" the premises and returned the keys to the landlord. By letter dated December 24, 2008, counsel for A&C notified Ocean Spray that, to the extent that the tender of possession and the keys was intended to be an offer to surrender the premises it was rejected, and that the landlord "intends to enforce it rights under the Lease."

A&C now moves for summary judgment in its favor on its second cross claim for rent in the amount of $219,292.96, and on its third cross claim for attorney's fees. In support of its motion, A&C submits the affidavit of its managing member, the stipulation discontinuing the plaintiff's action, the relevant pleadings, the lease, the deposition of Ocean Spray's president, a copy of a lease for the premises with a new tenant dated February 18, 2011, and the above-referenced correspondence between the parties.

In his affidavit, Joseph DiMaria ("DiMaria") avers that he is the managing member of A&C, that Ocean Spray took possession of the premises on or about December 23, 2005, that Ocean Spray abandoned the premises on or about December 12, 2008, and that the premises remained vacant until March 1, 2011, when it was able to re-let the premises to a new tenant. He states that, pursuant to the rent schedule in the lease, and the computation set forth in paragraph 8 of his affidavit, Ocean Spray owes rent in the amount of $219,292.96 for the period November 1, 2008 to March 1, 2011 when the new tenant took possession of the premises.

At his deposition, Joseph Musnicki testified that he is the president of Ocean Spray, and that he signed the lease for the premises on behalf of Ocean Spray. He stated that Ocean Spray vacated the premises in November or December 2008 after he met with DiMaria in an attempt to get a rent reduction, and that, when that was unsuccessful, he made the decision to vacate the premises because business was "bad." He indicated that it was his understanding that the lease did not provide Ocean Spray a right to terminate the lease and leave the premises if business was poor.

Paragraph 58 of the lease, entitled "Bankruptcy or Other Default," provides in subparagraph 58.04 that:

> Tenant shall continue liable during the full period which would otherwise have constituted the balance of the term hereof, and shall pay as liquidated damages ... the Basic Rent and additional Rent and other charges ... and Landlord may rent the Demised Premises either in the name of the Landlord or otherwise ... without releasing the original Tenant from any liability.

Paragraph 24 of the Lease contains the following provision:

> No act or thing done by Owner or Owner's agents during the term hereby demised shall be deemed in acceptance of a surrender of said premises and no agreement to accept such surrender shall be valid unless in writing signed by Owner. No employee of Owner or Owner's agent shall have any power to accept the keys of said premises prior to the termination of the lease and the delivery of keys to any such agent or employee shall not operate as a termination of the lease or a surrender of the premises.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the part opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

While it is true that a landlord's acceptance of a surrender of the lease will generally release the tenant from further rental obligation under the terms of the lease, the parties are free to contract otherwise (***Chestnut Realty Corp. v Kaminski***, 95 AD3d 1254, 945 NYS2d 708 [2d Dept 2012]). Here, the lease contains a clause which establishes that the parties have contracted to provide a method for the tenant to surrender the premises. It is undisputed that Ocean Spray has not requested, nor has A&C provided, a writing accepting any purported surrender of the premises. Whether or not a surrender by operation of law has occurred in a particular case is a factual determination (***Ford Coyle Props., Inc. v 3029 Ave. V Realty, LLC***, 63 AD3d 782, 881 NYS2d 146 [2d Dept 2009), and where the pertinent facts are not disputed, the determination is made as a matter of law (***Brock Enters. v Dunham's Bay Boat Co.***, 292 AD2d 681, 738 NYS2d 760 [3d Dept 2002]). It is determined that Ocean Spray vacating of the premises and delivery of the keys did not operate as a surrender of the premises (***Hudson Towers Hous. Co., Inc. v VIP Yacht Cruises, Inc.***, 63 AD3d 413, 881 NYS2d 46 [1st Dept 2009]; *see e.g.* ***Connaught Tower Corp. v Nagar***, 59 AD3d 218, 873 NYS2d 553 [1st Dept 2009]).

In addition, paragraph 19 of the Lease provides that:

> If Tenant shall default in the observance or performance of any term or covenant ... and if Owner in connection therewith or in connection with any default by Tenant in the covenant to pay rent, makes any expenditures or incurs any obligations for the payment of money, including but not limited to attorney's fees, in instituting prosecuting or defending any

> actions or proceedings, such sums so paid or obligations incurred ... shall be deemed additional rent hereunder and shall be paid by Tenant to Owner.

Where a provision in a lease provides for the payment of attorney's fees if the landlord should be compelled to institute proceedings due to the tenant's default under the lease, the landlord is entitled to recover the reasonable amount of his or her attorney's fees (***715 Ocean Parkway Owners Corp. v Klagsbrun***, 74 AD3d 1314, 905 NYS2d 630 [2d Dept 2010]; ***LeVine v Catskill Regional Off-Track Betting Corp.***, 57 AD3d 624, 871 NYS2d 191 [2d Dept 2008]).

Movant having established its *prima facie* entitlement to summary judgment as to Ocean Spray's liability for rent and attorney's fees, it is incumbent upon Ocean Spray to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to the instant motion, Ocean Spray submits the affirmation of its attorney. In his affirmation, counsel for Ocean Spray contends that information demanded at DiMaria's deposition "bearing directly on issues of fact and issues of law" regarding A&C's "efforts to mitigate damages" has not been provided by A&C, and that DiMario's calculation of the rent owed is in error and actually "equals 214,292.96."

In essence, Ocean Spray contends that this motion for summary judgment is premature, and that A&C has not proven the amount of damages it is entitled to receive. It is well-settled that once the tenant has abandoned the premises prior to the expiration of the lease, the landlord is within its rights to do nothing and collect the full rent due under the lease (***Holy Props. v Cole Prods.***, 87 NY2d 130, 637 NYS2d 964 [1995]; ***REP A8 LLC v Aventura Tech., Inc.***, 68 AD3d 1087, 893 NYS2d 83 [2d Dept 2009]). Here, the lease terms do not require the landlord to mitigate its damages. "[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (***Williams v D & J School Bus***, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; ***Panasuk v Viola Park Realty***, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]). The facts surrounding A&C's "efforts to mitigate damages" are not relevant to this action. In addition, A&C is not required to establish the amount of its damages in order to succeed on its motion. "The point of CPLR 3212 ... is precisely to determine all issues except damages on a motion where, as here, it is reasonable to infer that there probably are damages from the breach" (***Northway Mall Assoc. v Bernlee Realty Corp.***, 90 AD2d 739, 739, 455 NYS2d 684, 685 [1st Dept 1982]; *see* ***30 Broadway, LLC v Grand Cent. Dental, LLP***, 96 AD3d 934, 947 NYS2d 545 [2d Dept 2012]).

In its reply, A&C acknowledges that the calculation of the rent owed by Ocean Spray set forth in DiMario's affidavit contains what it calls a "typographical" error, and that the amount due is actually $214,292.96 as Ocean Spray claims. Regardless, in Ocean Spray's undated letter returning the keys to the premises, Joseph Musnicki writes that it is with "regret that I must leave [the premises]. Please keep the 2 months security." A&C submission does not indicate whether it credited Ocean Spray for the two months security, or the amount of security in its possession at the time of the abandonment of the

premises. Neither does A&C submit any evidence as to the amount of its attorney's fees in prosecuting its cross claims.

Accordingly, A&C's motion for summary judgment is granted as to the liability of Ocean Spray for rent owed and attorney's fees, and this matter is set down for an immediate trial as to damages. Upon service of a copy of this Order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part calendar for the next available trial date.

Dated: September 18, 2015

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**