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| 1350, LLC v Cogswell Realty |
| 2018 NY Slip Op 31630(U) |
| March 13, 2018 |
| Supreme Court, New York County |
| Docket Number: 155415/2015 |
| Judge: Nancy M. Bannon |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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1350, LLC,

Plaintiff,

Index No. 155415/2015

v

DECISION AND ORDER

COGSWELL REALTY, LLC, CRG MANAGEMENT, LLC,
CRG REAL ESTATE SERVICES, LLC, COGSWELL
REALTY GROUP OF NJ, LLC, ROSS JACOBS,
ANTHONY STAPLETON, ERIC SARNER, ARTHUR
STERN, and MARK LANDSTROM

MOT SEQ 001

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover rent and additional rent under a commercial lease and on several guaranties, the plaintiff moves pursuant to CPLR 3212 for summary judgment on the complaint and dismissing the defendants' affirmative defenses. The defendants cross-move pursuant to CPLR 1015 and 1021 to substitute Ann Chang Stapleton, as executor place and stead of the deceased party.

The cross motion is deemed to be a separate motion, and is thereupon granted, without opposition, as the defendants have submitted the necessary proof that Anthony Stapleton died during the pendency of this action and motion, and that Ann Chang Stapleton was issued letters testamentary. The automatic stay that went into effect on the date of the decedent's death is thus

vacated.

Upon the parties' stipulation, the court deems the defendants' opposition to the motion and the plaintiff's reply thereto to have been timely served nunc pro tunc subsequent to the substitution of Ann Chang Stapleton for the decedent and the concomitant vacatur of the automatic stay.

Upon consideration of the defendants' opposition and the plaintiff's reply, the motion is granted to the extent that the plaintiff is awarded summary judgment on the issue of liability on the first cause of action against the defendants Cogswell Realty, LLC, CRG Management, LLC, CRG Real Estate Services, LLC, and Cogswell Realty Group of NJ, LLC (collectively the tenants), on the third cause of action against the defendants Ross Jacobs, Ann Chang Stapleton, as executor of the estate of Anthony P. Stapleton, Eric Sarnier, Arthur Stern, and Mark Landstrom (collectively the guarantors), jointly and severally in the sum of \$157,817.62, and dismissing the defendants' first through twelfth affirmative defenses. The motion is otherwise denied.

II. BACKGROUND

By lease dated February 26, 2010, the plaintiff leased the 17th floor of 1350 Avenue of the Americas in Manhattan to the tenants for a period of 4 years and 10 months, commencing November 1, 2011. The guarantors personally guaranteed the

tenants' obligations under the lease for the period of time in which the tenants occupied the leasehold. The tenants vacated the leased premises on June 22, 2012. The landlord seeks to recoup rent and additional rent for the duration of the lease term, along with the costs of reletting the premises, which it accomplished on February 8, 2013. It also seeks to recover on the guaranties and to recover its attorneys' fees.

This action was commenced on May 29, 2015. The plaintiff served a copy of the summons and complaint upon the defendant Anthony Stapleton on July 13, 2015, pursuant to CPLR 308(2), and filed proof of service on the same date, so that service upon him was deemed complete as of July 23, 2015. The instant motion was made on May 20, 2016. Stapleton died on June 30, 2016, and Ann Chang Stapleton was issued letters testamentary on October 21, 2016. On December 12, 2016, the defendants purported to cross-move to substitute Ann Chang Stapleton as a defendant in place of Anthony P. Stapleton. Before this court disposed of that request for relief, the defendants, on December 13, 2016, submitted opposition to the plaintiff's motion, and the plaintiff, on January 12, 2017, submitted a reply affirmation.

III. DISCUSSION

A. Status of The Action Upon Stapleton's Death

It is well settled that "the death of a party divests a

court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015(a).” Griffin v Manning, 36 AD3d 530, 532 (1st Dept. 2007); see Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Manto v Cerbone, 71 AD3d 1099 (2nd Dept. 2010); Nieves v 331 E. 109th St. Corp., 112 AD2d 59 (1st Dept. 1985). Any determination rendered or proceedings held without such a substitution is generally deemed a nullity. See Griffin v Manning, supra; Stancu v Cheon Hyang Oh, 74 AD3d 1322 (2nd Dept. 2010); Morrison v Budget Rent A Car Syst., Inc., 230 AD2d 253 (2nd Dept. 1997); Nieves v 331 E. 109th St. Corp., supra. Rather, the action is automatically stayed. See Perez v City of New York, supra. Nor can the parties “by agreement confer subject matter jurisdiction upon [a] court where there is none.” Cuomo v Long Island Lighting Co., 71 NY2d 349, 351 (1988); see Haverstraw Park, Inc. v Runcible Properties Corp., 33 NY2d 637 (1973). Indeed, any such stipulation is “legally inoperative.” Morrison v Budget Rent A Car Syst., Inc., supra at 261.

Hence, this action was automatically stayed as of June 30, 2016, when Anthony P. Stapleton died, and the defendants should not have submitted opposition to the plaintiff’s motion, nor should the plaintiff have submitted a reply, until Ann Chang Stapleton was substituted for Anthony P. Stapleton. Similarly, since the plaintiff’s pending motion for summary judgment was and

is stayed during the same interval, no proceedings should have been initiated or continued in connection with that motion and, hence, the employment of a cross motion was improper, even if the substitution itself was the relief sought thereby. Rather, the defendants should have separately moved for leave to substitute Ann Chang Stapleton for Anthony P. Stapleton.

In light of the parties' stipulation, however, and in the interest of judicial economy, the court deems the cross motion to be a separate motion, and grants it, thus vacating the stay. Upon the substitution of Ann Chang Stapleton as a party defendant and the vacatur of the stay, the court deems the defendants' opposition to the plaintiff's motion and the plaintiff's reply to have been served nunc pro tunc after the vacatur of the stay. Hence the court may now properly consider those filings.

B. Plaintiff's Right To Recover Rent and Additional Rent

A landlord has no duty to mitigate damages by re-renting leased premises upon a tenant's default. See Holy Props. v Cole Prods., 87 NY2d 130 (1995); 85 John St. Partnership v Kaye Ins. Assoc., L.P., 261 AD2d 104 (1st Dept. 1999); Gordon v Eshaghoff, 60 AD3d 807 (2nd Dept. 2009). The subject lease expressly provides that the tenants shall be responsible for all rent and additional rent accruing over the entirety of the lease term, regardless of whether the premises were relet during that term.

Contrary to the defendants' contention, article 6.01 of the lease does not permit the tenants to offset the amounts of rent and additional rent paid by the new lessee, during the lease term, that are in excess of those for which the tenants are obligated. In fact, that provision expressly prohibits such a credit in the form of an offset. The court rejects the defendants' argument that the term credit means anything other than an offset, or that the two terms define separate concepts. See generally Matter of C. H. Heist Corp. v State Tax Commn., 50 NY2d 438 (1980); Cronos Group Ltd. v XComIP, LLC, 156 AD3d 54 (1st Dept. 2017).

Nor are the tenants entitled to offset their security deposit from their liability for rent and additional rent at this juncture. Rather, only upon the entry of final judgment will the tenants be entitled to offset the amount of the security deposit from the total amount awarded to the plaintiff. See Ring v Anabil USA, Inc., 29 AD3d 408 (1st Dept. 2006).

Although the plaintiff has established its prima facie entitlement to judgment as a matter of law on the issue of liability on the first cause of action, which seeks rent and additional rent, it has failed to establish, with proof in admissible form, the precise amounts due and owing for additional rent, such as electric utility fees and the proportionate share of real estate taxes to be allocated to the subject leasehold.

C. Recovery Under the Guaranties

"Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012) (internal quotation marks and citation omitted). The terms of the subject guaranties are clear, unambiguous, absolute and unconditional, and the defendants fail to raise a triable issue of fact as to whether they are ambiguous or defective as to the amounts sought by the plaintiff on the third cause of action.

Paragraph 3 of the subject guaranties states that "[t]he liability of Guarantor hereunder is direct, unconditional and co-extensive with that of Tenant and may be enforced without requiring Landlord first to resort to any other right, remedy or security." Hence, the guarantors are not permitted to offset the amount of the security deposit from their contractual obligations. The sum sought under the so-called "good guy" guaranties on the third cause of action is limited to the time when the tenants were in possession of the premises. Since that amount is not in dispute, an award of summary judgment to the plaintiff on the third cause of action in the sum of \$157,817.62 is warranted.

D. Costs of Reletting the Premises

The plaintiff, however, failed to submit proof in admissible form demonstrating that the amounts it allegedly incurred in retaining a broker to relet the premises, and a contractor to rebuild the premises for its new lessee, were reasonable and necessary. The mere submission of non-detailed invoices for those charges, even though accompanied by an affidavit of the person who accepted and paid therefor, is insufficient to make a prima facie showing of the amounts to which the plaintiff is entitled to recover for reletting the premises. Hence, summary judgment must be denied to the plaintiff on the second cause of action.

E. Attorneys' Fees

Since the action has not been resolved, it is premature to award summary judgment in connection with the fourth cause of action, which seeks to recover attorneys' fees. The language of the guaranties is ambiguous as to whether the guarantors are obligated, upon the tenants' default, for all of the tenants' obligations under the lease, or only those accruing during the time when the tenants occupied the premises. In light of this ambiguity, which must be resolved against the plaintiff, as drafter, dismissal of the thirteenth affirmative defense, which alleges that the guarantors may not be held liable for attorneys' fees because they accrued after the tenants' occupancy, is not

warranted.

F. Other Affirmative Defenses

The defendants' first, second, third, fourth, sixth, seventh, eighth, tenth, and twelfth affirmative defenses have been rendered academic, and must be dismissed, since they all challenge the validity of the guaranties. The defendants' fifth, ninth, and eleventh affirmative defenses are not truly affirmative defenses, but are simple defenses, as they essentially deny the truth of the plaintiff's allegations as to the amounts due and owing. Since the denials set forth in the answer proper are sufficient to place those issues in dispute, those affirmative defenses must be dismissed as having no merit.

IV. CONCLUSION

Accordingly, it is

ORDERED that the defendants' cross motion is deemed to be a separate motion; and it is further,

ORDERED that the defendants' separate motion is granted, Ann Chang Stapleton, as executor of the estate of Anthony P. Stapleton, is substituted as a party defendant in place and stead of Anthony P. Stapleton, the automatic stay that has been in effect since June 30, 2016, is vacated, and the caption is amended to read as follows:

1350, LLC,

Plaintiff,

v

COGSWELL REALTY, LLC, CRG MANAGEMENT, LLC, CRG REAL ESTATE SERVICES, LLC, COGSWELL REALTY GROUP OF NJ, LLC, ROSS JACOBS, ANN CHANG STAPLETON, as executor of the estate of ANTHONY STAPLETON, ERIC SARNER, ARTHUR STERN, and MARK LANDSTROM,

Defendants

and it is further,

ORDERED that the Clerk of the court shall amend his records accordingly; and it is further,

ORDERED that the defendants' opposition to the plaintiff's motion for summary judgment, and the plaintiff's reply thereto, are deemed to have been timely served, nunc pro tunc, subsequent to the substitution of Ann Chang Stapleton for Anthony Stapleton; and it is further,

ORDERED that the plaintiffs' motion for summary judgment is granted to the extent that it is awarded summary judgment (a) on the issue of liability on the first cause of action, (b) on the second cause of action against the defendants Ross Jacobs, Ann Chang Stapleton, as executor of the estate of Anthony P. Stapleton, Eric Sarnar, Arthur Stern, and Mark Landstrom, jointly and severally in the sum of \$157,817.62, and (c) dismissing the defendants' first through twelfth affirmative defenses, the first through twelfth affirmative defenses are dismissed, and the

motion is otherwise denied; and it is further,

ORDERED that the defendants shall serve a copy of this order upon the trial support clerk to permit the Clerk of the court to amend the caption as herein directed.

This constitutes the Decision and Order of the court.

Dated: March 13, 2018

ENTER: 
J.S.C.

HON. NANCY M. BANNON