535-545 Fee, LLC v Evrotas Enters., Inc.
2018 NY Slip Op 32552(U)
January 23, 2018
Supreme Court, New York County
Docket Number: 160151/2014
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

535-545 FEE, LLC,
Plaintiff,
-against-

EVROTAS ENTERPRISES, INC., d/b/a CINEMAN CAFÉ, STEVEN GALANIS, and ANATASIOS MANIKIS,
Defendants,

INDEX NO. 160151/2014
MOTION DATE 01/10/2018
MOTION SEQ. NO. 002
MOTION CAL. NO. ____

The following papers, numbered 1 to 8 were read on this motion and cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3; 4 - 6
Answering Affidavits — Exhibits	4- 6
Replying Affidavits	7 - 8

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion for summary judgment on liability pursuant to CPLR §3212 and Plaintiff's cross-motion for summary judgment pursuant to CPLR §3212, are denied.

Pursuant to a Commercial Lease agreement (Moving Papers Exs. D-F) between Plaintiff-landlord and Defendant-Evrotas Enterprises, Inc., d/b/a Cineman Café ("Evrotas"), Evrotas agreed to operate a café as a tenant in Suite 1800 of the building located at 545 Fifth Avenue, New York, New York ("Building") from October 1, 2005 to October 1, 2015 (Moving Papers Ex. A). In 2010 after Evrotas fell behind in rental payments, Plaintiff commenced an action in Civil Court of the City of New York, Index No.: L&T 84315/2010 for non-payment of rent in the amount of $362,756.43. On December 22, 2010 the parties settled the action pursuant to a Stipulation of Settlement that provided a payment schedule of a one-time payment of $181,378.22 followed by eighty (80) monthly payments of $2,267.23, in addition to the monthly rent due pursuant to the Lease (*Id* at Ex. H). Defendant Steven Galanis personally guaranteed the payment of the stipulated amount on behalf of Evrotas.

On July 28, 2014 Evrotas sent a letter to Plaintiff stating it vacated the Building and returned the keys to the Plaintiff. Evrotas alleges that both parties agreed to its unconditional surrender of the Lease (*Id* at Ex. I). On July 30, 2014 Evrotas sent a second letter stating it was under the belief that the Plaintiff intended to re-let the suite to another restaurant and therefore left its furniture and equipment, but if not, would make the necessary arrangements to remove the items (*Id* at Ex. J). At the time of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Evrotas alleged surrender, it owed $88,698.84 pursuant to the Stipulation of Settlement. The Plaintiff later incurred expenses for removing the equipment and furnishing Evrotas left behind. On October 16, 2014 Plaintiff commenced this action seeking damages for additional rent pursuant to the Lease, rental arrears pursuant to the Stipulation of Settlement, reimbursement for the costs of repairs, and legal fees (*Id* at Ex. A). The Note of Issue was filed on April 14, 2017.

The Defendants now move for summary judgment on liability pursuant to CPLR §3212. Plaintiff opposes the motion and cross-moves for summary judgment a second time in this action pursuant to CPLR §3212.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

"A surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated" (Riverside Research Inst. v KMGA, Inc., 68 NY2d 689, 506 NYS2d 302, 497 NE2d 669 [1986]). "As distinguished from an express surrender, a surrender by operation of law is inferred from the conduct of the parties" (*Id*). The facts determine whether a surrender by operation of law has occurred (PK Rest., LLC v Lifshutz, 138 AD3d 434, 30 NYS3d 13 [1st Dept. 2016]).

Defendants fail to make a prima facie showing that the Plaintiff agreed to Evrotas' surrender of the Lease. While Defendants took acts demonstrating their intent to deem the lease terminated, they fail to put forth any documented evidence of acts taken by the Plaintiff to warrant a finding that there was a surrender by operation of law (Connaught Tower Corp. v Nagar, 59 AD3d 218, 873 NYS2d 553 [1st Dept. 2009]). The Plaintiff never responded to, signed, or acknowledged the July 28, 2014 letter sent by Evrotas stating its intention to surrender the Lease. The Plaintiff also did not respond to the July 30, 2014 letter confirming the surrender and that the suite was left in "turn-key" condition. Mr. Galanis' affirmation stating that the Plaintiff engaged in "numerous conversations" to accept Evrotas surrender and that he helped to find a replacement tenant is insufficient to meet its prima facie burden. The record does not indicate when the Plaintiff removed the equipment Evrotas left behind. This creates an issue of fact as to whether this is "an act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated" (Riverside Research Inst., *supra*).

"Multiple summary judgment motions in the same action should be discouraged in the absence of newly discovered evidence or sufficient cause" (Pub. Serv. Mut. Ins.

Co. v Windsor Place Corp., 238 AD2d 142, 655 NYS2d 947 [1st Dept. 1997]). Plaintiff's previous attempt to cross-move for summary judgment seeking the same relief was denied by this Court's April 20, 2016 Order (NYCSEF Docket No.: 45). On this record before the Court at this time, the Plaintiff fails to offer newly discovered evidence or sufficient cause to address the merits of Plaintiff's second cross-motion for summary judgment. The Plaintiff annexes to this motion the same three documents used as exhibits in the first cross-motion for summary judgment. The Court already considered the same evidence relied on previously and denied Plaintiff's cross-motion for summary judgment. Furthermore, the Court did not grant Plaintiff leave to make a second summary judgment motion in this action, and thus Plaintiff's cross-motion is denied.

Accordingly, it is ORDERED, that Defendants' motion for summary judgment pursuant to CPLR §3212 and Plaintiff's cross-motion for summary judgment pursuant to CPLR §3212, are denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: January 23, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE