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

**PRESENT:** HON. LOUIS L. NOCK **PART** IAS MOTION 38EFM

*Justice*

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TRINITY CENTRE LLC,

Plaintiff,

- v -

SUN BROADCAST GROUP, INC.,

Defendant.

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**INDEX NO.** 650281/2018

**MOTION DATE** 3/14/2019

**MOTION SEQ. NO.** 001

**DECISION AND ORDER**

Upon e-filed documents numbered 1 through 35, plaintiff's motion for summary judgment is granted per the following memorandum.

BACKGROUND

Plaintiff is the owner and landlord in connection with two suites of commercial office space known as 111 Broadway, Suites 1803 and 1804, New York, New York. Suite 1804 was the first suite to be leased by defendant – a business corporation – by written lease agreement dated May 3, 2013 (NYSCEF Doc. No. 3). Suite 1803 was the second suite to be leased by defendant, by written amendment to lease dated October 10, 2013 (NYSCEF Doc. No. 4). The lease term for Suite 1803 expired August 31, 2018; and the lease term for Suite 1804 expired March 31, 2019.

Paragraph 38 of the lease rider for Suite 1804 sets out six years of gradually increasing levels of annual rent. For year five (lease year 2017) – base annual rent was fixed at $131,296.24, or $10,941.36 monthly. For year six (lease year 2018) – base annual rent was fixed at $135,235.12, or $11,269.60 monthly.

Paragraph 3 of the lease amendment for Suite 1803 similarly sets out six years of gradually increasing levels of annual rent. For year five (lease year 2017) – base annual rent was

fixed at $115,477.21, or $9,623.11 monthly. For year six (lease year 2018) – base annual rent was fixed at $118,941.53, or $9,911.80 monthly. The complaint alleges that defendant is in default in payment of base rent for both suites, as well as payment of various additional charges for both suites.

Pursuant to the lease documents, plaintiff served a 15-day notice to cure dated June 2017, citing defaults in "Base Rent and other Rent, costs and charges," in an amount of $53,897.09, for both suites (NYSCEF Doc. No. 21). Thereafter, pursuant to the lease documents, plaintiff served a 5-day notice of cancellation of commercial office lease dated July 19, 2017, for both suites (NYSCEF Doc. No. 22). Thereafter, defendant executed an "Agreement for Temporary Suspension of Termination Date of Commercial Lease" dated July 27, 2017 (NYSCEF Doc. No. 23), openly acknowledging the lease; the lease amendment; the 15-day notice to cure; the 5-day notice of cancellation; and a default in rent and additional rent in an amount "in excess of" $75,000.00 (*id.*). That agreement allowed defendant to remain in the suites till August 31, 2017, on condition of a $35,000.00 payment (*id.*). That agreement expressly provides that it is without prejudice to any of plaintiff's rights under the lease and amended lease, and that nothing provided for in that agreement "shall be deemed or construed to reduce, limit or otherwise modify" defendant's obligations to plaintiff under the lease and amended lease (*id.*). That proviso is found repeatedly throughout that agreement (*id.*).

A first and a second and a third amendment of the foregoing agreement to suspend termination date were executed by defendant, pushing off the termination date each time – and each containing the same preservation of rights and non-waiver provisions contained in the first agreement to suspend termination date (*see*, NYSCEF Doc. Nos. 24-26). All of them contain

open acknowledgments by defendant of defaults in rent and additional rent in amounts "in excess of" $45,000.00, $55,000.00, and $50,000.00, respectively.

The moving affidavit (NYSCEF Doc. No. 13) attests that defendant is in default of rent and additional charges accruing as of October 1, 2017, for Suite 1803, and accruing as of November 30, 2017, for Suite 1804, and exhibits copies of rent statements sent to defendant, and the history of non-payment (NYSCEF Doc. No. 20). Plaintiff seeks the entire amounts due for both suites – even to the extent accruing subsequent to defendant's November 30, 2017, vacatur from the suites – accruable through the natural expiration dates of the lease and amended lease (August 31, 2018, for Suite 1803 and March 31, 2019, for Suite 1804) based on acceleration and no-duty-to-mitigate clauses found in the lease documents. The aggregate total of all sums alleged as due and owing, taking into account arrearages accruing prior to vacatur and obligations accruable through the respective lease terms, is alleged at $335,568.67.

Defendant in opposition argues, *inter alia*, that plaintiff should not be entitled to post-vacatur damages (notwithstanding the acceleration and no-duty-to-mitigate clauses) because, it claims, that plaintiff could have accepted a ready, willing, and able replacement tenant, but did not – unreasonably. Defendant also asserts – indeed, as a primary argument – that discovery is still necessary before the court can be ready to dispose of the action on summary judgment.

DISCUSSION

Courts routinely grant summary judgment to commercial landlords upon a showing of failure to pay rent and related charges (*e.g., 11 Park Place Assocs. v Barnes*, 202 AD2d 292 [1st Dept 1994], *appeal dismissed* 86 NY2d 887 [1995]; *Sage Realty Corp. v Kenbee Mgt.-N.Y., Inc.*, 182 AD2d 480 [1st Dept 1992]). On a motion for summary judgment based on a commercial tenant's breach of lease, a commercial landlord establishes a *prima facie* case by showing a

binding lease agreement and breach by the tenant due to failure to pay rent (*e.g., Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once that *prima facie* case is met, the burden shifts to the commercial tenant, to demonstrate facts in admissible form establishing genuine and material triable issues (*e.g., Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]).

Paragraph 18 of the lease contains an express acceleration clause providing that any default by defendant will give rise to liquidated damages in the amount of the rent amount accruable "for each month of the period which would otherwise have constituted the balance of the term of this lease" (NYSCEF Doc. No. 3 ¶ 18). That paragraph also contains a clause relieving plaintiff of any duty to re-let the premises, keeping the defendant responsible for rent accruals contemplated by the lease agreement for the entire duration of the lease term, even post-vacatur (*see, id.*). Such provisions are entirely enforceable in New York (*Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130 [1995]; *Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc.*, 46 NY2d 573, *rearg denied* 47 NY2d 801 [1979]; *Ring v Printmaking Workshop, Inc.*, 70 AD3d 480 [1st Dept 2010]; *85 John St. Partnership v Kaye Ins. Assocs., L.P.*, 261 AD2d 104 [1st Dept 1999]). Plaintiff's affiant attests that plaintiff did not re-let the suites after defendant's vacatur (NYSCEF Doc. No. 13 ¶ 21). Plaintiff was completely free to not re-let the suites, pursuant to the following holding by the Court of Appeals:

> The law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury. Leases are not subject to this general rule, however, for, unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property. Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages.
>
> When defendant abandoned these premises prior to expiration of the lease . . . it could do nothing and collect the full rent due under the lease . . . .

(*Holy Properties Ltd., L.P., supra,* at 133 [citations omitted; emphasis added].)

Defendant in opposition seeks to avoid the aforenoted Court of Appeals policy involving post-vacatur liability for the remainder of the lease term, by asserting that:

> Sun worked diligently to secure a tenant for the premises and was able to present to Trinity a number of proposals, all of which Trinity declined to accept. Sun sought to assign its lease to credit worthy third parties, however Trinity flatly turned them down. Trinity acted arbitrarily and without cause. It would not and did not consider Sun's reasonable and sensible proposals and capriciously forced Sun to vacate the premises without allowing it to relet the premises to a third party.

(Opposition Memorandum at 2.) The position taken by defendant's counsel in the above-quoted excerpt runs contrary to the law, as clearly articulated by the Court of Appeals and other appellate authority cited hereinabove. Paragraph 18 of the lease expressly relinquishes plaintiff from any duty to re-let the suites during the lease term, and expressly obligates defendant to bear responsibility for the continued payments obligated under the lease for the lease term. Moreover, paragraph 11 of the lease requires any assignment of lease to be subject to "the prior written consent" of plaintiff, without restriction. No language is found in the lease that would require plaintiff to not withhold consent in the event of a possible assignee introduced by the defendant. Thus, defendant's assertion of defense based on plaintiff's withholding of consent to an assignment of lease is, altogether, of no consequence.

Essentially, all that remains is defendant's concern that the suites might have been re-let during the post-vacatur period, despite the affidavit assertions that there was no re-letting of the suites (*see*, Opposition Memorandum at 1). But in order for that to be of any consequence, plaintiff would have to "accept the tenant's surrender, reenter the premises and relet them for its own account . . . or . . . notify the tenant that it was entering and reletting the premises for the tenant's benefit." (*Holy Properties Ltd., L.P., supra,* at 134.) This renders defendant's assertion about necessary discovery on this point, completely irrelevant. If plaintiff accepted defendant's

surrender, defendant would have that proof; and if plaintiff notified defendant that it was reentering and reletting for defendant's benefit, defendant would have that proof, as well.

Defendant asserts a need for further discovery as to "the alleged charges it claims Sun is liable for" (Opposition Memorandum at 3). The lease does contain additional-rent provisions for real estate tax proportionate share (¶ 40), electricity (¶ 41), heating and air conditioning expense (¶ 42), late charges (¶ 51), and additional charges (¶ 58) (*see also*, amended lease). And plaintiff's bills and nonpayment history do include such additional-rent items (*see*, NYSCEF Doc. No. 20). But, in the absence of any dispute as to the *fact* of unpaid obligations, the issue of their precise quantum can be referred to a damages hearing, and need not impede a grant of summary judgment on the basic fact of plaintiff's entitlement to a judgment on liability (*e.g., Paulson v Kotsilimbas*, 124 AD2d 513 [1st Dept 1986] [summary judgment on liability may be granted preparatory to damages assessment]).

Plaintiff also seeks an award of attorneys' fees pursuant to paragraph 19 of the lease. As a prevailing party, plaintiff is entitled to its reasonable attorneys' fees incurred in this action, to be assessed at an attorneys' fees hearing.

For all these reasons, plaintiff's motion for summary judgment is granted as to liability for all elements of unpaid obligations under the lease and amended lease, including post-vacatur accruals, with interest thereon from the date of plaintiff's last bill – December 1, 2017 (*see*, CPLR 5001 [b]; *Hanover Data Servs., Inc. v Arcata Natl. Corp.*, 115 AD2d 403 [1st Dept 1985], *appeal denied* 68 NY2d 602 [1986]), plus its reasonable attorneys' fees incurred in this action. The amounts of said obligation will be referred to a Special Referee to hear and determine.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted as to defendant's liability to pay plaintiff rent and additional rent arrearages that accrued prior to defendant's vacatur of the office suites underlying this matter, as well as rent and additional rent accruals for the balance of the lease terms for said suites coming into being subsequent to said vacatur; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the issue of the quantum of said rent and additional rent arrearages and accruals; and it is further

ORDERED that interest shall accrue upon the principal amount found by the Special Referee, from December 1, 2017, through the date of satisfaction of judgment, plus the statutory costs and disbursements of this action; and it is further

ORDERED that plaintiff shall be entitled to its reasonable attorneys' fees incurred in this action, to be determined by the aforesaid Special Referee; and it is further

ORDERED that plaintiff shall have judgment against defendant for said: principal; interest; costs and disbursements; and reasonable attorneys' fees, and that plaintiff shall have execution therefor; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part, shall

assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

This shall constitute the decision and order of the court.

ENTER:

5/22/2019
DATE

LOUIS L. NOCK, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | [X] | NON-FINAL DISPOSITION | |
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| APPLICATION: | | SETTLE ORDER | | | [ ] | SUBMIT ORDER | |
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