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

PRESENT: MELISSA A. CRANE Justice PART 15

HON. MELISSA CRANE

TRUMP PARK AVENUE LLC,

INDEX NO. 650799/2018
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

- v -

FAISAL BIN ABDUL MAJEED AL SAUD a/k/a FAISAL BIN ABDUL MAJEED BIN ABDUL AZIZ AL-SAUD,

The following papers, numbered _ to _ were read on this motion to/for_____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits …	
Answering Affidavits — Exhibits	
Replying Affidavits	

CROSS-MOTION: YES NO

Plaintiff, Trump Park Avenue LLC, moves pursuant to CPLR 3212 and CPLR 3211 (b) for summary judgment and to dismiss all of defendant FAISAL BIN ABDUL MAJEED AL SAUD a/k/a FAISAL BIN ABDUL MAJEED BIN ABDUL AZIZ AL-SAUD's affirmative defenses. Previously, on September 26, 2018 this court heard oral argument on defendant's motion to dismiss and plaintiff's cross motion for summary judgment. The court, on the record, denied defendant's motion to dismiss but reserved decision on plaintiff's motion. This decision now addresses that motion.

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

Background

On or about July 2013, defendant entered into a written lease agreement with plaintiff for the condominium located at 502 Park Avenue, New York, New York ("Premises"). The lease was originally for a term of seventeen (17) months and was to commence on August 1, 2013 and expire on December 31, 2014. The parties later stipulated to extend the lease of the premises to June 30, 2019 after signing a Lease Extension (Miller Aff., p. 2). The lease extension provided the following breakdown for rental payments of the premises:

- July 1, 2016 through June 30, 2017: $1,323,000.00 payable in equal monthly installments of $110,250.00;
- July 1, 2017 through June 30, 2018: $1,389,150.00 payable in equal monthly installments of $115,762.50;
- July 1, 2018 through June 30, 2019: $1,458,607.50 payable in equal monthly installments of $121,550.62.

In October 2015, defendant's authorized agent and plaintiff's authorized agents discussed relinquishing the premises (Miller Aff., pg. 3). After it was established, by plaintiffs agent, that a cancellation was not possible, the parties began discussing the possibility of subleasing. Defendants originally used Corcoran as the broker for the initial lease, and plaintiffs did not object to the defendants listing the premises with them.

In January 2016, defendant and its real estate broker, Corcoran, entered into an Exclusive Listing Agreement to offer the premises for rent (Miller Aff. Exh. I). However, in April 2016, after extensive efforts had been taken to rent out the premises, plaintiff demanded that defendant terminate the Exclusive Listing Agreement with Corcoran (Miller Aff., pg. 3). Plaintiff further advised defendant that it could only use Trump International Realty ("TIR") as a broker to rent out the premises and that no sublet would be approved otherwise. Defendant's agent and an employee of Corcoran later memorialized this requirement in an email correspondence dated April 4, 2016 (Miller Aff. Exh. J).

On April 8, 2016, plaintiff's agent sent defendant an Exclusive Listing Agreement to be entered into between TIR and Mr. Al Saud and a Form of Consent to Sublease. Days later, on April 13, 2016, defendant conclusively terminated the prior Exclusive Listing Agreement with Corcoran and proceeded to list the premises with TIR pursuant to plaintiff's direction (Miller Aff. Exh. K).

Six months passed. TIR was unable to rent out the premises, leaving it vacant and still in defendant's possession (Miller Aff., pg. 4). In the Fall of 2016, after failing to rent out the

premises as planned, defendant's agent first inquired whether plaintiff would be interested in taking back the vacant premises (Miller Aff., pg. 5).

Meanwhile, defendant continued making rent payments for the premises in October 2016 and December 2016. Both these payments were applied to the unpaid rent for September 2016 rent and October 2016 rent. Following these rental payments, plaintiff did not receive further payments from defendant, leaving November 2016's rent outstanding and unpaid (Talesnik Aff., pg. 3, fn. 1). By January 2017, defendant completely ceased paying rent (Talesnik Aff., pg. 2, fn. 1). In light of defendant's failure to pay rent, on August 11, 2017, plaintiff sent a three (3) day rent demand that requested defendant's payment of all outstanding rent by August 21, 2017. This deadline was later extended, on consent of both parties, until August 28, 2017 (Talesnik Aff., p. 3).

In September of 2017, following service of the rent demand, plaintiff's and defendant's counsels began negotiations for defendant to surrender the Premises. While numerous versions of the proposed surrender agreements were circulated amongst the parties, they never executed any of the proposed agreements. Nevertheless, all fifteen versions of the surrender agreement contemplated defendant being responsible for rent arrears and repair costs (Talesnik Aff., p.4).

Throughout December of 2017, plaintiff and defendant counsel engaged in further negotiations for the surrender of the Premises. The parties were unable to agree upon the estimated costs of repair for the premises. On December 27, 2017, defendant's authorized agent communicated to plaintiff's authorized agent, via email, about an intention to transfer the unit back to the landlord that day (Miller Aff., p. 3). Defendant's agent later sent a letter, dated January 12, 2018, stating that her client had vacated and surrendered the unit, and left the keys to the premises with the building's concierge (Miller Aff., Exh. M). The January 12, 2018 correspondence also acknowledged that plaintiff was to use a portion of the $200,000 security

deposit to repair items within the Premises (*see* NYSCEF Doc. No. 28). Plaintiff received this January 12th dated correspondence on January 24, 2018 and responded with a reservation of all rights by letter dated February 2, 2018. Plaintiff also included a demand of repayment in full of all sums due and owing.

Throughout the lease term, defendant was permitted to make numerous alternations to the premises pursuant to paragraph 53(f) of the lease (*see* NYSCEF Doc. No. 20). Pursuant to paragraph 55 of the lease, defendant was also required to return the premises in the condition in which it was delivered, subject to reasonable wear and tear. Defendant made various alterations, but subsequently failed to restore the premises to its original condition at the end of the lease (Talesnik Aff., p. 9). Plaintiff addressed this issue in an email dated December 13, 2017 where defendant's agent stated that defendant consented to the costs and the deduction from the security deposit (*see* NYSCEF Doc. No. 24, p. 3).

Plaintiff then commenced this action on February 16, 2018 asserting four causes of action for breach of contract, future rent, added rent, and attorneys' fees. In the alternative, defendant has asserted six affirmative defenses in their answer, dated October 15, 2018 (*see* NYSCEF Doc. No. 39). Discovery is incomplete.

Discussion

When a party moves for summary judgment, the movant seeking the judgment must make a prima facie case showing that it is entitled to the judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). When a movant fails to make this showing, the motion for summary judgment must be denied (*id).*

Moreover, in determining whether to grant or deny a motion for summary judgment, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary

judgment if there is any doubt as to the existence of a material issue of fact (*Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v. Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v. Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). Further, conclusory or unsupported allegations cannot defeat a motion for summary judgment. Only evidentiary proof in admissible form can. (*see S.J. Capelin Assocs., Inc. v. Globe Mfg. Corp.*, 34 NY2d 338, 343 (1974)). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient to raise genuine triable issues of fact on a motion for summary judgment as is reliance upon surmise, conjecture or speculation" (*see Smith v. Johnson Products Company,* 95 AD2d 675, 676 (1st Dept 1983)). In the present case, plaintiff has failed to demonstrate prima facie entitlement to summary judgment on its second, third and fourth causes of action.

First Cause of Action - Past Rent

Plaintiff's first cause of action seeks a money judgment for past rent arrears in the sum of $1,811,400.79 for the months of November 2016 through February 2018 (*see* NYSCEF Doc. No. 2, ¶ 13). Plaintiff argues that defendant failed to pay rent and added rent for this period of the lease (*see* NYSCEF Doc. No. 41). It is undisputed that defendant ceased paying rent for the premises (*see* NYSCEF Doc. No. 42, pg. 2, fn. 1). It is also undisputed that the lease explicitly defined the rental payments and required defendant to pay these sums to plaintiff (*see* NYSCEF Doc. No. 20). The parties' dispute with respect to this cause of action, rather, arises over the calculation of the past rent arrears, the total balance presently due, and whether plaintiff is barred from bringing this action due to the notice and cure requirements in the lease.

Defendant argues that plaintiff's failure to adhere to the notice and cure requirements in the lease bars plaintiff from receiving summary judgment on this cause of action (*see* NYSCEF

Doc. No 78, Pg. 16). This argument is unavailing. On defendant's previous motion to dismiss, this court, on the record, on September 26, 2018 already determined that plaintiff adhered to the notice and cure provisions. The court specifically stated that:

> Here, it's undisputed that the tenant vacated the unit. So the notice provision doesn't apply to this situation. And also, it makes sense because if the tenant leaves, how is the landlord supposed to find them to serve notices.
> (*see* Goldman Aff., Exh. L, Pg. 20, Lines 10-14)

Defendant did not appeal from this decision. Defendant, in this motion, now advances the very same arguments as in the previous motion in an attempt to raise a genuine issue of fact. Thus, the law of the case doctrine applies (*see, e.g., GG Managers, Inc. v Fidata Trust Co. New York,* 215 A.D.2d 241, 241 (1st Dept 1995) [barring litigation of denial of CPLR 3211 motion to dismiss for statute of limitations grounds under a subsequent CPLR 3212 summary judgment motion]).

The parties also dispute whether the past rent arrears were properly calculated and whether credit for the first and last month's rent has been properly applied to the lease's outstanding balance. Defendant argues that the past rent arrears were not properly calculated based on plaintiff's failure to provide credit for the security deposit and two months of rent (*see* NYSCEF Doc. No. 78, Pg. 8). Specifically, defendant contends that plaintiff failed to credit the remaining balance of the $44,636.00 of defendant's $200,000.000 security deposit to the alleged past rent arrears. *Id.* Defendant also contends that plaintiff failed to credit defendant in the sum of $205,000 for the first and last month's rent at the outset of the lease (*see* NYSCEF Doc. No. 58, Exh. Q). To support its argument, defendant points to an email addressed to Ms. Talesnik, dated July 8th, 2013, "enclosing one check for $200,000 for the security deposit, and another check for $205,000 for the 'first and last month rent'"(*see* Miller Aff., pg. 8, fn. 8). Defendant also states that these credits are noticeably absent from plaintiff's rent ledger provided as "empirical documentary evidence" (*see* NYSCEF Doc. No. 78. pg. 16).

On the other hand, plaintiff contends that the arrears are properly calculated and that the credits were properly applied to the outstanding balance. Plaintiff claims that the first month of rent was already due and owing, was paid for and credited, and is not a part of the past rent (*see* NYSCEF Doc. No. 79, Pg. 5). Plaintiff also contests that the last month of rent has not become due and owing, and that defendant is not entitled to a credit for this amount. Plaintiff also provides, as empirical documentary evidence, a tenant rent ledger totaling all past rent arrears. Defendant disputes this ledger as erroneous and inaccurate (*see* NYSCEF Doc. No. 78, Pg. 8).

Thus, at a minimum, there seems to be an issue of fact as to whether the first and last months of rent were properly credited towards the outstanding balance of the premises/lease. Plaintiff claims these amounts were already calculated, credited and accounted for (*see* NYSCEF Doc. No. 79 ¶ 16). Defendant disputes this point, saying it never received credit for these payments and that the provided calculations omit the alleged credit (*see* NYSCEF Doc. No. 59, pg. 58, ¶ 39; *see also* NYSCEF Doc. No. 78, pg. 16).

Notwithstanding these contentions, plaintiff is still entitled to summary judgment on this cause of action. Discrepancies as to the amount one party owes to another do not present issues of fact that would preclude a party's motion for summary judgment (*see Matter of Moskowitz v. Jorden,* 27 AD3d 305 [1st Dept 2006]) [holding that possible discrepancies in the amount owed did not present issues of fact precluding summary judgment under CPLR 3212].

Second Cause of Action- Future Rent

Plaintiff also alleges a second cause of action for future rent in the sum of no less than $1,921,657.44 for rent from March 1, 2018 through the balance of the lease term. Plaintiff primarily relies on sections 23(C), 23(D)(1) and 23(D)(5) of the lease to justify demand for future rent. Section 23(C) provides in relevant part:

> If (1) the Lease is cancelled; or (2) rent or added rent is not paid on time; or (3) Tenant vacates the Unit, Landlord may in addition to other remedies take any of

> the following steps: (a) enter the Unit and remove Tenant and any person or property; and (b) use eviction or other lawsuit method to take back the Unit. (*see* NYSCEF Doc. No. 20)

Additionally, Section 23(D)(1) allows the landlord to receive rent and added rent for the unexpired Term "[i]f the lease is cancelled, or landlord takes back the unit" (*see* NYSCEF Doc. No. 20). Paragraph 23(D)(5) also provides that if the landlord takes back the premises, "Tenant must continue to pay rent, damages, losses, and expenses without offset" (*see* NYSCEF Doc. No. 20, pg. 2).

Plaintiff states that its rights were triggered, pursuant to the aforementioned terms of the lease, when defendant vacated the premises prior to the end of the term and transferred possession of the premises back to the plaintiff. This argument fails to address a key issue of fact regarding the potential tortious interference with defendant's Exclusive Listing Agreement and the defendant's use, and subsequent forced termination of its real estate broker, Corcoran.

Although plaintiff was not contractually obligated to permit or deny a sublease, conflicting evidence is reported concerning the plaintiff's involvement in the subleasing process. Eventually, according to the defendant, this involvement became so excessive and entangled that it reached a point where the defendant was allegedly forced to terminate its broker, Corcoran, in favor of using plaintiff's in-house brokerage, TIR (Miller Aff., ¶s 7-21). Implicit in this arrangement are factual issues concerning whether this arrangement, if successful, would terminate the tenant's lease obligations and ultimately affect the total amount of future rent due.

Moreover, Acceleration Clauses may be enforceable under certain circumstances, (*Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc.*, 46 NY2d 573 [1979]). However, the record contains conflicting evidence regarding potential issues of overreaching or interference on the part of the landlord (*Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc.*, 46 NY2d 573 [1979], *172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528

[2014], *Chanukka 26 LLC v Do Denim, Inc.*, 2011 WL 11075154, (N.Y. Sup. Ct. 2011). Here, the parties have not engaged in any sort of discovery regarding the potential tortious interference with and termination of the relationship between defendant and Corcoran. Moreover, plaintiff, in its affirmation dated December 7, 2018 acknowledges the issue of facts stemming from the sublet and brokerage events (*see* NYSCEF Doc. No. 79, pg. 6, ¶ 22).

Regardless, even if this court were to disregard the issue of the brokerage change, other issues of fact exist that would bar the granting of summary judgment on this cause of action. For instance, plaintiff and defendant also patently disagree whether a surrender by operation of law took place. Plaintiff states that its prompt response dated February 2, 2018 shows that it did not accept defendant's unilateral attempt at a surrender (*see* NYSCEF Doc. No. 43 ¶32). On the other hand, defendant contends that plaintiff's delay in responding to defendants surrender evinced plaintiff's intent to accept the surrender, thereby constituting a surrender by operation of law (*see* NYSCEF Doc. No. 59 ¶ 29). The factual circumstances surrounding the surrender need exploring before the court can determine whether a formal surrender took place. Therefore, plaintiff's motion for summary judgment on its second cause of action is denied without prejudice.

Third Cause of Action- Added Rent

Plaintiff also moves for summary judgment on its third cause of action for added rent and a money judgment in an amount for the court to determine (*see* NYSCEF Doc. No. 2, ¶ 24). Paragraphs 23(D)(1), 23(D)(2) and 23(D)(3) of the lease address added rent and repair costs for the premises. Paragraphs 23(D)(1) and 23(D)(3), when read together, state that if the lease is cancelled or if the landlord takes back the premises, the tenant must also pay the landlord's expenses that include "the costs of getting possession and re-renting the [premises], including but not only, reasonable legal fees, brokers fees, cleaning and repair costs, decorating costs and

advertising costs" (*id.* at ¶ 22; *see also* Goldman Aff., pg. 5, fn. 2). Further, paragraph 23(D)(2) provides:

> "The landlord may, at Tenant's expense, do any work Landlord feels is needed to put the [P]remises in good repair and prepare it for renting. Tenant remains liable and is not released in any manner."

(*see* NYSCEF Doc. No. 19, pg. 11, ¶ 39; *see also* NYSCEF Doc. No. 2, ¶ 24).

It is indisputable that Plaintiff retained $155,364.00 of the defendant's security deposit in light of the condition of the premises and the lease provision (*see* Miller Aff., pg. 8, ¶ 35). Plaintiff has submitted ample documentary evidence that evinces defendant's failure to restore the premises to its prior condition (*see* Talesnik Aff. Pg. 9). Plaintiff has also demonstrated that Defendant, through its agent, admitted liability to the repair costs in an email correspondence dated December 13, 2017. Defendant stated that "[it] accepts Owner doing the repairs using [its] numbers and deducting the cost from the security deposit." (*see* NYSCEF Doc. No. 56, pg. 15). Defendant also repeatedly agreed to make repairs in other communications between the two parties (Goldman Aff., pg. 5, ¶ 21).

Plaintiff argues that it has incurred expenses and will continue to incur expenses due to defendants breach of the lease (*see* NYSCEF Doc. No. 2, ¶ 23). Plaintiff also contends that "defendant is liable to Plaintiff for all costs and expenses incurred by Landlord in restoring and/or reletting the Premises, including, but not limited to, repair costs" (Goldman Aff, ¶ 21).

Defendant disputes this aspect, contending that plaintiff, "pursuant to the parties' agreement…[has] already indisputably and fully reimbursed itself for any and all such damage by taking and applying $155,364 of Tenant's $200,000 security deposit for this very purpose (Wiener Aff., ¶ 47). Defendant also states that plaintiff has failed to claim any additional property damage to the premises in order to justify receiving judgment on this cause of action (Wiener Aff., ¶ 48).

Based on the foregoing, there are material issues of fact that the court cannot determine without additional information. While the defendant, in numerous communications, has conceded it's liability to the premises' repair costs totaling $155,364.00, an issue of fact exists as to whether plaintiff has already been fully reimbursed itself for all repair costs related to the lease of the premises. The nature of this dispute is fact specific and therefore require discovery prior to the court making a decision. The motion for summary judgment on plaintiff's third cause of action is denied.

Fourth Cause of Action- Legal Costs and Attorney's Fees

Finally, plaintiff also seeks partial summary judgment as to liability on its fourth cause of action for attorneys' fees (*see* NYSCEF Doc. No. 2, ¶ 26). In support, plaintiff points to paragraph 58 of the lease signed by both parties, that provides for recovery of plaintiff's legal fees from defendant arising out of the enforcement of the lease's terms. Paragraph 58 specifically provides:

> "If landlord incurs any legal fees, costs, expenses, or disbursements, in any action or proceeding of any type or nature whatsoever, whereby Landlord seeks to enforce any term, covenant or condition of this lease, including without limitation, Tenant's obligation to surrender possession at the end of the lease term and provided that Landlord prevails, such legal fees, costs, expenses and disbursements shall constitute additional rent and Landlord shall have the right to recover the same from Tenant notwithstanding the expiration or termination of this Lease."
> (*see* NYSCEF Doc. No. 20).

When looking at the language of the provision, it is clear that plaintiff may only recover legal fees if it prevails in litigation and is deemed the prevailing party. At this point in this case, plaintiff's motion for summary judgment on all attorney's fees and the determination of the "prevailing party" status is premature in light of the numerous outstanding issues before this court (*see Matter of Moskowitz v. Jorden,* 27 AD3d 305, 307 [1st Dept 2006] citing to *Solow v. Wellner,* 205 A.D.2d 339, 340, 613 N.Y.S.2d 163 [1994]). Plaintiff has only proven successful

on its first cause of action for past rent arrears. As a result, plaintiff is only entitled to those attorney's fees attributable to its first cause of action for past rent arrears.

Dismissal of Affirmative Defenses

In addition to its motion for an order pursuant to CPLR 3212 (a) granting summary judgment on all causes of actions, plaintiff also seeks an order pursuant to CPLR 3211 (b) dismissing all six affirmative defenses interposed in defendant's answer dated October 15, 2018. Defendant's affirmative defenses specifically contend that plaintiff: (1) failed to comply with the notice and cure provisions of paragraph 23 of the lease; (2) is not entitled to recover any alleged rent arrears and any future rent by reason of the fact that a surrender by operation of law occurred; (3) is not entitled to $2 million in undiscounted accelerated future rent because it constitutes an enforceable penalty; (4) is not entitled to any "re-letting costs" by reason of plaintiffs unconditional acceptance of defendant's surrender; (5) is not entitled to recover for property damage to the premises because of a prior deduction from defendant's $200,000 security deposit; and (6) is not entitled to attorney's fees because no determination has been made by this court.

CPLR 3211 (b) provides that "a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". In determining whether to dismiss a party's affirmative defenses, the court must consider "whether there is any legal or factual basis for the assertion of the defense" *In re Liquidation of Ideal Mutual Ins. Co.*, 140 A.D.2d 62, 532 N.Y.S.2d 371, 374 (1st Dep't 1988).

As previously stated, plaintiff has demonstrated a prima facie entitlement to summary judgment only on its first case of action for past rent. In light of plaintiff's partial success on its motion, the court dismisses only defendants first affirmative defense, with prejudice.

Accordingly, it is

ORDERED that the court grants that part of plaintiff's motion seeking summary judgment on its first cause of action for past rent and dismissal of defendant's first affirmative defense and otherwise denies the motion; and it is further

ORDERED that plaintiff's request for attorney's fees is granted as for those fees attributable to the recovery of past rent, with leave to renew for additional fees at the outcome of this case; and it is further

ORDERED that the parties are to appear for a status conference on September 26, 2019 at ten am.

DATED: 8.29, 2019

MELISSA A. CRANE, J.S.C

HON. MELISSA A. CRANE
J.S.C.