SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
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SAGE REALTY CORPORATION

Plaintiff, DECISION AND ORDER

Index No. 654897/2018

- v -

MOT SEQ 002

ERG PROPERTY ADVISORS LLC,

Defendant.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking to recover for breach of a commercial lease and for attorneys' fees, the defendant-tenant, ERG Property Advisors LLC, moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff-landlord, Sage Realty Corporation, opposes the motion and cross-moves pursuant to CPLR 3212 for summary judgment dismissing the defendant's affirmative defenses and on its first and second causes of action for breach of contract and attorneys' fees. The motion is denied and the cross-motion is granted.

II. BACKGROUND

On May 14, 2014 the plaintiff and defendant entered into a commercial lease for a portion of the 27th floor of the building located at 777 Third Avenue in Manhattan for the term May 14,

2014 to March 31, 2025. In 2017, the defendant began having financial difficulties and defaulting on its rent obligations under the lease. By email dated May 31, 2017 the plaintiff requested that the defendant advise it of the status of the May rent under the lease. A similar email was sent on June 20, 2017 with regard to the June rent. By email dated August 1, 2017 the defendant wrote to the plaintiff to request a phone call which occurred on August 3, 2017. During the phone call, the defendant advised the plaintiff that it did not have the financial ability to remain on the premises, and would be vacating the premises.

On August 9, 2017 the defendant notified the plaintiff that it would be vacating the premises by October 31, 2017. By email dated September 5, 2017, the plaintiff advised the defendant that it had not received rent for either August or September. On September 6, 2017, the plaintiff confirmed that it had received August rent from the defendant, and requested information relating to the September rent. On October 17, 2017, the defendant notified the plaintiff that it anticipated vacating the premises on November 30, 2017. The plaintiff accepted the new date to vacate the premises. On December 6, 2017, the defendant notified the plaintiff that it intended to vacate the premises on December 31, 2017, and sought a statement of sums due through that date. The defendant then followed up specifying December 21, 2017 as its move out date and sought confirmation

from the plaintiff that the move out date was acceptable. On December 13, 2017, the plaintiff responded to the plaintiff approving the December 21, 2017 move out date. On December 21, 2017 the defendant vacated the premises, and on December 31, 2017 the plaintiff resumed control over the premises.

After the defendant vacated the premises, the plaintiff ceased sending any communications to the defendant regarding any of its remaining rent obligations under the lease. On October 3, 2018 the plaintiff filed the instant complaint. On November 30, 2018 the defendant answered the complaint, asserting ten counterclaims alleging, *inter alia*, that the email communications between the plaintiff and defendant constitute documentary evidence demonstrating that the defendant surrendered the premises by operation of law, thereby vitiating any further rent obligations under the lease. The plaintiff re-let the premises to a new tenant for the term December 1, 2018 to February 29, 2024.

III. DISCUSSION

It is well settled that the movant on 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 issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985).

The motion must be supported by evidence in admissible form, and the pleadings and other proof such as affidavits, depositions, and written admissions. See Zuckerman v City of New York, 49 NY2d 557 (1980); CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., *citing* Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of its motion for summary judgment, the defendant submits, *inter alia*, four series of email communications between the defendant and the plaintiff or agents thereof. The defendant argues that these email communications demonstrate that it surrendered the premises and the plaintiff accepted the surrender, discharging the defendant of liability under the lease. Specifically, the defendant claims that the emails submitted constitute undisputed documentary proof that the plaintiff routinely demanded monthly rent, that the plaintiff ceased making such demands once the defendant vacated the premises, that the defendant advised the plaintiff in the emails that upon the defendant vacating the premises the lease would terminated, and that the plaintiff did not dispute the terms of the letter, and accepted the terms of the surrender.

These submissions wholly fail to establish the defendants' *prima facie* burden to demonstrate the absence of a triable issue of fact. Each of the emails relied upon the by defendant expressly state that they are being sent with respect to the Good Guy Guaranty executed by non-party James Guarino, and do not mention that the defendant ERG Property Advisors LLC would be released from any obligations under the lease. As such, the defendant's motion for summary judgment is denied.

Furthermore, in opposition to the defendant's motion and in support of its own cross-motion for summary judgment, the plaintiff submits, *inter alia*, the lease between the plaintiff and the defendant. The lease provides that:

> "In case of any such default, re-entry, expiration and/or dispossess by summary proceeding or otherwise, (i) the rent shall become due thereupon and be paid up to the time of such re-entry, dispossess and/or expiration together with such expenses as Landlord may incur for legal expenses, attorney's fees, brokerage and/or putting the Demised Premises in good order, or for preparing the same for re-rental; (ii) Landlord may re-let the Demised Premises or any part or parts thereof, either in the name of Landlord or otherwise, for a term or terms, which may at Landlord's option be less than or exceed the period which would otherwise have constituted the balance of the Term of this Lease and may grant concessions or free rent; and/or (iii) Tenant or the legal representatives of Tenant shall also pay Landlord as liquidated damages for the failure of Tenant to observe and perform Tenant's covenants herein contained, at the election of Landlord, either: (a) a sum which at the time of such termination of this Lease or at the time of any re-entry by Landlord, as the case may be, represents the then value of the excess, if any, of (1) the aggregate of the installments of Fixed Rent and the additional rent (if any) which would have been payable

> hereunder by Tenant, had this Lease not so terminated, for the period commencing with such earlier termination of this Lease or the date of any such re-entry, as the case may be, and ending with the date hereinbefore set for the expiration of the full term hereby granted pursuant to Articles 1 and 2 hereof."

The lease also expressly provides that any agreement between the landlord and tenant which is intended to terminate the tenant's obligations under the lease must be in writing and signed by the party against which enforcement is sought to be effective, providing in relevant part that:

> "This Lease with the schedules annexed hereto, if any, contains the entire agreement between Landlord and Tenant, and any executory agreement hereafter made between Landlord and Tenant shall be ineffective to change, modify, waive, release, discharge, terminate, or effect an abandonment of this Lease, in whole or in part, unless such executory agreement is in writing and signed by the party against which enforcement of the change, modification, waiver, release, discharge, termination or the effecting of the abandonment is sought."

The plaintiff also submits the affidavits of Boris Katsman, the plaintiff's chief financial officer averring that after the defendant stopped paying rent, the plaintiff applied the remaining balance of the defendant's security deposit to the amounts due under the lease, and did not commence this action until the deposit was depleted, Michael Lenchner, the plaintiff's vice-president and director of leasing, detailing the amounts remaining under the lease, and Grace Sperrazza,

averring that two of the emails chains that the defendant argues demonstrate an acceptance of their intention to surrender the premises were only related to scheduling the defendant's use of the freight elevator to vacate the premises.

These submissions not only defeat the defendant's motion for summary judgment, but also establish, *prima facie*, the plaintiff's entitlement to summary judgment on its cross-motion to dismiss the defendant's affirmative defenses and on its first and second causes of action for breach of contract and attorneys' fees.

In moving to dismiss an affirmative defense pursuant a plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541 (1st Dept. 2011). Here, the plaintiff demonstrates that of the defendant's ten affirmative defenses, the first, sixth, and eighth affirmative defenses concern the defendant's defense of surrender which is without merit as a matter of law inasmuch as it is barred by provisions of the lease requiring that any executory agreement be in writing and signed by the party against which enforcement of the change, modification, waiver, release, discharge, or termination is sought. See Park Ave.

Holdco, LLC v Kurzman Karelsen & Frank, LLP, 124 AD3d 477 (2015). The defendant's remaining affirmative defenses (the second, third, fourth, fifth, seventh, ninth and tenth) are also insufficient as a matter of law because they are conclusory and unsupported by any factual allegations. See Board of Mgrs. Of Ruppert Yorkville Towers Condominium v Hayen, 169 AD3d 569 (1st Dept. 2019). As such, the portion of the plaintiff's motion seeking to dismiss the defendant's counterclaims is granted.

The plaintiff further establishes its entitlement to judgment as a matter of law on its first cause of action for breach of contract by demonstrating (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Specifically, the plaintiff establishes that the parties entered into the May 14, 2014 commercial lease, that the plaintiff met all of its obligations under the lease, that the defendant failed to timely pay rent and vacated the premises prior to the end of the lease, thereby breaching it, and damages.

With regard to damages, the plaintiff's submission of the lease agreement and the affidavits of Boris Katsman, and Michael Lenchner demonstrate that pursuant to Section 17.02 of the

lease, the plaintiff is entitled to recover the value of the excess of the aggregate of the installments of fixed rent and additional rent which would have been payable by defendant had the lease not been terminated, in the sum of $3,435,067.00, plus the costs of re-letting in the sum of $977,354.00, for a total of $4,412,421.00 less the aggregate rental value of the demised premises for the same period, which is $2,178,141.00, for a total of $2,234,280.00.

In opposition, the defendant merely argues that the plaintiff accepted the its surrender of the premises, thereby absolving it of any further requirements under the lease. For the reasons stated herein, this position is without merit. Thus, the defendant fails to raise a triable issue of fact. Therefore, the plaintiff's motion for summary judgment on its first cause of action for breach of contract is granted.

The plaintiff also establishes its entitlement to summary judgment on its second cause of action seeking attorneys' fees. Attorneys' fees that are merely incidents of litigation are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). Here, the plaintiff submits the May 14, 2014 lease which states that "[i]n case of any

default, re-entry, expiration and/or summary proceeding or otherwise, (i) the rent shall become due thereupon and be paid up to the time of such re-entry, dispossess and/or expiration together with such expenses as Landlord may incur for legal expenses, attorney's fees." As such the plaintiff's motion for summary judgment on its second cause of action is granted, with the amount of attorneys' fees due to be determined at a hearing.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the defendant's motion for summary judgment is denied, and the plaintiff's cross-motion for summary judgment is granted in its entirety; and it is further,

ORDERED that the Clerk is to enter judgment in favor of the plaintiff and against the defendant in the amount of $2,234,280.00 plus statutory interest as of December 31, 2017; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the plaintiff for an award of contractual attorneys' fees; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report 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 email, an Information Sheet (which can be accessed 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 of the costs and attorneys' fees he incurred 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 at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the plaintiff may enter an amended judgment adding

the award of attorneys' fees and costs to the amount recovered, if any; and it is further,

ORDERED that the plaintiff shall serve a copy of this order upon the defendant within 15 days of the entry of this order.

This constitutes the Decision, Order, and Judgment of the court.

Dated: June 8, 2020 ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON