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| Bexin Realty Corp. v Ezroni |
| 2020 NY Slip Op 33058(U) |
| September 16, 2020 |
| Supreme Court, New York County |
| Docket Number: 653243/2019 |
| Judge: Arlene P. Bluth |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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BEXIN REALTY CORP.

Plaintiff,

- v -

DROR EZRONI,

Defendant.

-----X

INDEX NO. 653243/2019
MOTION DATE 09/15/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for summary judgment by plaintiff is granted in part.

Background

This action arises out of a lease between plaintiff (the landlord) and Fulton Fashion Specialist, Inc. ("Fulton") that started in June 2015. This lease contained a guaranty signed by defendant. Plaintiff contends that Fulton vacated the premises in December 2018 with arrears that totaled \$39,096.39. Plaintiff insists it found a new tenant that took over the premises in April 2019 but that the new tenant was provided a rent concession. It seeks damages including the arrears, rent from January to March 2019, the rent concession provided to the new tenant and attorneys' fees.

In opposition, defendant argues that he was forced to vacate the premises in part due to the conditions in the commercial unit, including a leak from the ceiling. He insists that Fulton's property was damaged and had to be repaired or replaced. Defendant acknowledges that he attempted to arrange a surrender of the premises but plaintiff refused to accept it.

Defendant argues that the instant motion is premature and he had conversations with an agent from plaintiff (apparently named Claudia) who allegedly negotiated the surrender and wants discovery about this issue. He also wants discovery about what repairs were done to the ceiling. Defendant concludes that he had substantial reason to rely upon the statements of plaintiff's agents regarding a potential waiver of contractual provisions requiring full payment.

In reply, plaintiff claims that there are no issues of fact present here. It argues that the alleged issues about leaks do not explain Fulton's refusal to pay its rent and its premature vacatur of the premises. Plaintiff also stresses that the lease prohibits oral modifications of the guaranty and points out that the guaranty is unconditional.

Discussion

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

There is no dispute that Fulton breached the lease and that the guaranty signed by defendant is unconditional. There is also no question that the guaranty could not be changed except in writing by plaintiff. Although defendant attempts to argue that discovery is necessary, the facts in this case are clear. Fulton stopped paying its rent and eventually moved out without reaching an agreement with plaintiff regarding a surrender of the premises. Plaintiff eventually

found another tenant a few months later and now it seeks the arrears plus money from a rent concession to the new tenant.

Defendant's reference to a leak does not raise an issue of fact because he failed to cite a sufficient justification for why he stopped paying rent or moved out before the lease terminated. In fact, the affirmation in opposition states "That due to conditions in the Subject Premises that assisted in eroding the business, Fulton Fashion was forced to vacate the Subject Premises" (NYSCEF Doc. No. 25, ¶10). This assertion implies that the business had other problems.

Relying on discussions with alleged agents of plaintiff is not a basis to modify an unconditional guaranty, especially where defendant admits plaintiff never consented to a surrender of the premises. An assertion that discovery demands were ignored is not a basis to defeat a motion for summary judgment where plaintiff can clearly demonstrate it is entitled to summary judgment. Moreover, defendant did not offer detailed opposition to the amount plaintiff seeks. The Court also finds that the attorneys' fees requested are reasonable.

However, the Court denies the motion to the extent it sought to dismiss defendant's counterclaim seeking redress for damage to its property. Plaintiff failed to meet its burden to dismiss the counterclaim; even if it had met its prima facie case, defendant clearly raised an issue of fact by submitting photographs and invoices that purportedly show damage to his inventory. That claim is severed and this case will proceed on the counterclaim only.

Accordingly, it is hereby

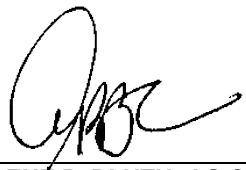
ORDERED that the motion for summary judgment by plaintiff is granted to the extent that plaintiff prevails on its causes of action, defendant's affirmative defenses are dismissed and the Clerk shall enter a judgment when practicable in favor of plaintiff and against defendant in the amount of \$95,158.51 (which includes the requested \$6,300 in legal fees) plus interest from

July 1, 2019 (after the three-month rent concession) along with costs and disbursements after presentation of proper papers therefor; and it is further

ORDERED that the counterclaim by defendant remains as the only claim and the case shall proceed with respect to this cause of action.

Remote Conference: December 18, 2020.

9/16/2020
DATE


ARLENE P. BLUTH, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |