Ironton Realty, LLC v Upper Breast Side Corp.
2020 NY Slip Op 33681(U)
October 29, 2020
Supreme Court, New York County
Docket Number: 656892/19
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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IRONTON REALTY, LLC,

Plaintiff

- v - DECISION AND ORDER

UPPER BREAST SIDE CORPORATION and FELINA RAKOWSKI-GALLAGHER

Defendants. Index No. 656892/19

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking $234,727.23 in damages for an alleged breach of a commercial lease and guaranty, the plaintiff-landlord, Ironton Realty LLC (Ironton), moves (1) for summary judgment on the complaint as against defendant the defendants, Upper Breast Side Corporation (UBS), the former tenant, and Felina Rakowski-Gallagher (Rakowski-Gallagher), guarantor on the lease,(2) to dismiss the defendants' affirmative defenses and (3) for contractual attorneys' fees. The defendants oppose the motion and cross-move for partial summary judgment on damages. The defendants seek to limit the plaintiff's recovery to either the amount owed at the time the defendants surrendered the premises, $33,775.06, or the amount purportedly agreed to during settlement discussions, $55,000.00, and, in essence, seek summary judgment on their counterclaim

seeking the return of their security deposit. The motion is granted and the cross-motion is denied.

II. BACKGROUND

UBS entered into a 10-year commercial lease with Ironton for a term running from July 1, 2014 to June 30, 2024 for the retail space located at 510 Amsterdam Avenue in Manhattan. Rakowski-Gallagher was a guarantor under the lease. The monthly base rent started at $6,250.00 per month and increased each year pursuant to a rider to the lease.

Section 18 of the lease, regarding damages upon the tenant's default, provides:

> "In the case of... default, reentry, expiration and/or dispossess by summary proceedings or otherwise, (a) the rent, and additional rent, shall become due thereupon... (b) Owner may re-let the demised premises...which may at Owner'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 or charge higher rental than that in this lease, and (c) Tenant or the legal representatives of Tenant shall also pay Owner, as liquidated damages, for failure of Tenant to observe and perform said Tenant's covenants contained herein, any deficiency between the rent hereby reserved and/or covenanted to be paid and the amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease."

Section 73(1) of the rider to the lease also includes a guaranty by Rakowski-Gallagher which provides that: "Guarantor

hereby unconditionally, absolutely and irrevocably guarantees to landlord: (i) the full, due and timely payment of all fixed rental, additional rental, use and occupancy charges and other sums which shall be payable by tenant to landlord at any time and from time to time pursuant to this lease, and performance of all obligations of tenant under this lease, for the full term of this lease..."

Section 73(2) of the lease allows for Rakowski-Gallagher to escape liability for any future payments under the lease:

> "Provided that Landlord has received no less than ninety (90) days advance written notice specifying the Surrender Date (as hereinafter defined) and upon receipt by Landlord of an executed and acknowledged Surrender Declaration which shall be a Blumberg form Surrender Agreement (and is not required that Landlord countersign), together with all rents and other monies due from tenant through the surrender date, all keys to the premises, and Tenant having left the Premises in broom-clean vacant condition, free of subtenants occupants and or any claims to possession or occupancy by third parties and otherwise in the condition required by the Lease (the date all of the foregoing are fully satisfied and complied with being the "Surrender Date"), then Guarantor shall be released from all individual liability with respect to any obligations arising or accruing after the surrender date."

Section 19, regarding attorney's fees, provides:

> "If Owner... in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but, not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding, and prevails in any such action or proceeding,

such sums so paid or obligations incurred with interest - and costs shall be deemed to be additional rent hereunder."

During the term of the lease UBS failed to make all rent payments and on September 26, 2017 Rakowski-Gallagher surrendered the keys to the premises and provided Ironton with a proposed surrender agreement. As of October 1, 2017, UBS had accrued $33,775.06 in unpaid rent. Following Rakowski-Gallagher's surrender, Ironton informed her that pursuant to the terms of the lease and guaranty she remained liable. Shortly after, Ironton re-entered the premises, taped up the windows, and hung a sign stating that the premises were available for lease. Approximately a year later, in October 2018, Ironton re-let the premises at a lower value than UBS' lease.

According to UBS and Rakowski-Gallagher, their counsel emailed counsel for Ironton to settle UBS' outstanding obligations under the lease. UBS and Rakowski-Gallagher maintain that on July 13, 2018, Ironton agreed to settle this matter for $55,000, consisting of a $30,000 payment and Ironton's retention of UBS' $25,000 security deposit. Ironton denies that there was any settlement agreement.

This action ensued.

In its complaint, the plaintiff alleges two causes of action - for breach of the lease and breach of the guaranty

agreement. The defendants answered and asserted several affirmative defenses and a counterclaim seeking the return of or credit for the security deposit paid to the plaintiff.

This motion and cross-motion ensued.

Ironton moves for summary judgment on the complaint, seeking the full amount due under the lease, dismissal of the affirmative defenses asserted by UBS and Rakowski-Gallagher, and contractual attorney's fees. UBS and Rakowski-Gallagher oppose Ironton's motion and cross-move move for partial summary judgment on damages. The defendants argue that Ironton's summary judgment motion is premature as discovery is not complete. In the alternative, they argue that Rakowski-Gallagher's surrender and Ironton's re-entry into the property constitutes a surrender by operation of law, limiting Ironton's recovery to the outstanding rent at the time of surrender, $33,775.06. The argue the alternative that the proper amount of damages should be $55,000.00, the amount purportedly agreed to during settlement discussions. Finally, they move, in effect for summary judgment on their counterclaim seeking return of the security deposit paid by UBS to the plaintiff, on the ground that it was improperly commingled with Ironton's personal or other funds in violation of General Obligations Law §7-103[(1).

III. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra.

B. The Plaintiff's Motion and the Defendants' Cross-Motion

In support of the portion of its motion for summary judgment, Ironton submits, *inter alia*, the lease, the guaranty, a tenant profile report of UBS showing all amounts owed by UBS, the lease entered into after UBS surrendered the premises, and the affidavit of Ilyse Rohlman, the assistant vice president of Pine Management, managing agent for Ironton, who details how she computed the amount claimed in this action. Rohlman explains that she credited all payments made by UBS - including its

security deposit - as well as all rent received when Ironton re-let the premises.

It is undisputed that UBS defaulted under the lease and was $33,775.06 in arrears on the date Rakowski-Gallagher surrendered the premises. Pursuant to Section 18 of the lease, such a default entitles Ironton to re-let the premises and to any unpaid rent plus liquidated damages totaling the remaining rent due under the balance of the lease term less any rent collected by re-letting the premises.

UBS' tenant profile report reflects that from October 2017, when Rakowski-Gallagher surrendered the premises, through October 2018, when Ironton re-let the premises, UBS' rent arrears accrued to $132,749.00. The subsequent lease demonstrates that Ironton re-let the premises at a lesser value than what would have been collected under UBS' lease. In her affidavit, Rohlman avers that the difference in rent under the two leases was $125,786.33, bringing the total amount owed to $258,535.33. The Rohlman affidavit and the calculations therein also show that, crediting UBS with the total amount of security deposits paid, the amount owed comes to $232,012.83. The difference between this amount and the $234,727.23 claimed by Ironton is the result of a $2,714.40 'special assessment' charged to UBS in December 2018.

As Section 73(2) of the lease also requires that all rent arrears due from the tenant be paid at the time of the surrender date in order for the guarantor to be released from liability under the guaranty, and that did not happen, Rakowski-Gallagher is also liable. "Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991). Here, the terms of the subject guaranty agreement are clear, unambiguous, absolute and unconditional and the defendants fail to allege any fraud, duress, or wrongful act in its inducement.

These submissions demonstrate, *prima facie*, Ironton's entitlement to summary judgment under the lease and guaranty and damages of $234,727.23. The defendants' arguments in opposition and in support of their cross-motion for partial summary judgment fail to raise a triable issue of fact or establish the defendants' entitlement to any relief sought in their motion. As such, the plaintiff's motion for summary judgment is granted and the defendants' cross-motion is denied.

i. There Was No Surrender by Operation of Law

The court finds unpersuasive the defendants' argument in opposition and cross-motion for partial summary judgment limiting Ironton's damages to $33,775.06, as there was a surrender by operation of law. A surrender by operation of law occurs only where "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, 691 (1986) (citations omitted). Here, Ironton accepted the keys from Rakowski-Gallagher, but informed her that her surrender did not excuse any ongoing liabilities under the lease. That Ironton later re-entered the premises and attempted to re-let it for the benefit of the tenant is wholly consistent with Ironton's rights under the law and lease, such that there is no surrender by operation of law. See Ctr. for Specialty Care, Inc. v CSC Acquisition I, LLC, 187 AD3d 46 (1st Dept. 2020); Riverside Research Inst. V KMGA, Inc. supra.

ii. There Is No Enforceable Settlement Agreement

The defendants' contention that the parties entered an enforceable settlement agreement which now limits Ironton's damages to $55,000 is without merit. "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent,

and an intent to be bound (22 N.Y. Jur. 2d, Contracts § 9)." Kowalchuk v Stroup, 61 AD3d 118, 121 (1st Dept. 2009). It is well settled that where parties merely execute an informal agreement which contemplates a subsequent formal agreement, "there is nothing which the court has any jurisdiction to enforce." Nichols v Granger, 7 App Div 113 (1st Dept. 1896). Such a stipulation is an "unenforceable agreement to agree." Weksler v Weksler, 163 AD3d at 432 (1st Dept. 2018) *citing* IDT Corp. v Tyco Group, S.A.R.L., 13 NY3d 209 (2009); see Lazard Freres & Co. v First Natl. Bank of Maryland, 268 AD2d 294 (1st Dept. 2000). For that reason, an exchange of e-mails may constitute an enforceable agreement but only if the writings include all of the agreement's essential terms. See Kasowitz, Benson, Torres & Friedman, LLP v Reade, 98 AD3d 403(1st Dept. 2012) affd 20 NY3d 1082 (2013).

Here, the defendants rely solely upon an email chain wherein counsel for Ironton wrote to UBS' counsel inquiring whether a previous offer by UBS to pay Ironton $30,000 and surrender its security deposit was still being proposed, and counsel for UBS' replied "We have a deal. Please send over paperwork." This does not amount to a binding settlement agreement, as the communication from Ironton's attorney was not an offer, but rather an inquiry into whether an old offer was still available for discussion. Furthermore, on the same email

chain, counsel for both parties continue to discuss the terms of settlement and exchange documentation and were ultimately unable to reach a settlement agreement. As such, the email chain relied upon by the defendants does not constitute a binding settlement agreement.

Moreover, the purported settlement is barred by Section 20 of the lease, which provides that "any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of [the lease] in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement...is sought." Here, the defendants fail to establish that there was any signed settlement agreement with Ironton which may have terminated or modified their liability under the lease.

iii. There Was No Commingling of the Defendants' Security Deposit

The defendants' cross-motion seeking a return of its security deposit based upon Ironton's commingling of the deposit (see General Obligations Law §7-103[1]) is also without merit. Specifically, the claim is belied by the affidavit of Ilyse Rohlman, the plaintiff's managing agent, stating that the security deposit was segregated and maintained in a separate account and the M&T Bank statement, also submitted by the

defendants, showing the separate tenant account number for UBS' deposits, and a balance of $26,522.50.

iv. Summary Judgment is Not Premature

The defendants' contention that Ironton's motion should be denied as premature under CPLR 3212(f) is meritless. Although this motion was made before discovery was commenced, the defendants "fail[] to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421 423 (1st Dept. 2015). Here, the defendants have failed to do so and it is well settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Kent v 534 East 11th Street, supra; Flores v City of New York, 66 AD3d 599 (1st Dept. 2009). Moreover, by also moving for summary judgment, the defendants undercut their own argument that discovery is required.

v. The Liquidated Damages Clause is Valid

To the extent that the defendants may also be arguing that accelerated rent due under the lease is an invalid and

unenforceable penalty, it is well settled that "absent some element of fraud, exploitative overreaching or unconscionable conduct on the part of the landlord to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties." Fifty States Mgmt. Corp. v Pioneer Auto Parks, Inc., 46 NY2d 573, 578 (1979); see generally Van Duzer Realty Corp. v Globe Alumni Assistance Assn., Inc. 24 NY3d 528 [2014]; Krodel v Amalgamated Dwellings, Inc., 166 AD3d 412 [1st Dept. 2018]). Here, the defendants make no allegations of fraud, exploitative overreaching or unconscionable conduct that would warrant a deviation from the clear terms of the lease.

C. The Defendants' Affirmative Defenses Are Without Merit

The portion of Ironton's motion seeking to dismiss the defendants' affirmative defenses is also granted. In moving to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the 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). The court should not dismiss a defense where there remain questions of fact requiring a trial. Id.

The first, second, fifth, sixth, seventh, eighth, eleventh and twelfth affirmative defenses all assert that the defendants are not required to pay the amount sought by Ironton based on their surrender of the premises, their purported settlement agreement, or Ironton's commingling of its security deposit. As these arguments have already been found to be meritless, dismissal of these affirmative defenses is warranted.

Of the remaining affirmative defenses, the defendants third and fourth affirmative defenses seeking a setoff are not proper affirmative defenses. See 1350, LLC v Cogswell Realty, LLC, 2018 NY Slip Op 31630(U) (Sup Ct, NY County 2018); Alpha Holding Corp. v Brescio, 2009 NY Slip Op 30936(U) (Sup Ct, NY County 2009). The ninth and tenth affirmative defenses for latches and unclean hands are also dismissed as they are not supported by any factual allegations or proof. See Commissioners of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009).

D. The Plaintiff is Entitled to Attorneys' Fees

The court finds that the plaintiff's submissions support the award of attorney's 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); see also Goldberg v Mallinckrodt, Inc., 792 F2d 305 (2nd Cir. 1986); Rich v Orlando, 108 AD3d 1039 (4th Dept. 2013). There is a contractual provision in the subject sublease. Section 19 of the lease expressly provides that, upon a default by the tenant, the owner may recover any attorney's fees expended "in instituting, prosecuting or defending any actions or proceeding, and prevails in any such action or proceeding." As Ironton has demonstrated its entitlement to summary judgment under the lease it is undisputedly the prevailing party and an award of contractual attorneys' fees is proper, with the amount due to be determined at a hearing.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for summary judgment on the complaint and dismissal of the defendant's affirmative defenses and counterclaim, and for contractual attorney's fees is granted in its entirety, and the defendants' cross-motion is denied, and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against defendants The Upper Breast Side

Corporation and Felina Rakowski-Gallagher, jointly and severally, in the amount of $234,727.23, representing unpaid rent and additional rent, with statutory interest from October 1, 2018; and it is further,

ORDERED that 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 it incurred within 24 days from the date of this order and the defendants 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: October 29, 2020

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