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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WORLD GOLD TRUST SERVICES LLC

Plaintiff,

- v -

CLINTON GROUP, INC.,

Defendant.

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INDEX NO. 652026/2020

MOTION DATE 12/02/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISS.

The motion by plaintiff to dismiss defendant's counterclaim and affirmative defenses, and for partial summary judgment on its breach of contract claim is granted in part and denied in part.

Background

Plaintiff is a tenant on the ninth floor of a building located in Manhattan. It claims that defendant is a subtenant and it entered into a sublease with defendant dated August 31, 2015 pursuant to which defendant leased the entire premises from September 1, 2015 until December 30, 2021. Plaintiff claims that defendant began to fall behind on rent in November 2018 and stopped paying altogether in June 2019. Plaintiff admits that it terminated the sublease due to defendant's default but that this does not absolve defendant of its obligation to make rent payments until the end of the sublease.

Plaintiff now seeks damages including unpaid, rent, additional rent, and liquidated damages totaling $1,668,860.29. It also moves to dismiss the 2 counterclaims and 22 affirmative defenses asserted by defendant.

In opposition, defendant claims that in the spring and summer of 2019 it entered into negotiations with the landlord (a non-party) and plaintiff in which defendant tried to surrender the premises to the landlord and defendant would seek a different space to rent from the landlord. Defendant admits that this deal was never finalized. Defendant then details negotiations with plaintiff in the fall of 2019 concerning a reduction in rent and an additional security deposit.

However, according to defendant, plaintiff repeatedly sought to delay and prevent a renegotiation of the terms of the sublease. Defendant claims that these "bad faith negotiations" prevented it from finding another subtenant, which it was permitted to do under the terms of the sublease. Defendant claims that plaintiff continuously created a "moving target" as it negotiated with potential subtenants and that this improperly denied defendant the chance to find a resolution.

In reply, plaintiff stresses that at the time defendant sought to find a new subtenant, it was already in default and had no rights under the sublease. It also emphasizes that negotiations about a possible resolution after defendant defaulted cannot form the basis of a claim against plaintiff. Plaintiff says it explored the possibility of reducing the rent in exchange for increased security but the negotiations ultimately proved unsuccessful.

Counterclaims and Affirmative Defenses

"In moving to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. The

allegations set forth in the answer must be viewed in the light most favorable to the defendant, and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481, 19 NYS3d 13 [1st Dept 2015] [internal quotations and citations omitted]).

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

Defendant asserts counterclaims for promissory estoppel and for breach of the implied obligation of good faith and fair dealing. With respect to the first counterclaim, defendant claims that it relied upon certain promises made by plaintiff and its reliance on these promises prevented it from finding a subtenant before it was forced to vacate.

"In order to prevail on a theory of promissory estoppel, a party must establish (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance"(*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411, 46 NYS3d 99 [1st Dept 2017]).

Here, defendant failed to meet any of the elements. It did not adequately articulate what promise plaintiff made. Certainly, defendant showed that plaintiff and defendant engaged in negotiations *after* defendant had stopped paying rent. But that does not form the basis of a promise upon which defendant could recover. Once defendant defaulted, plaintiff was under no obligation to find a resolution. Section 13.5 of the original lease between plaintiff and the

landlord provided that the landlord could not unreasonably withhold or delay consent to a sublease as long as the tenant was not in default (NYSCEF Doc. No. 2). The sublease expressly provides that the subtenant is bound by the terms of the original lease, including the provisions regarding subleasing (NYSCEF Doc. No. 3 at 1-4).

In other words, defendant cannot state a claim for promissory estoppel based on a promise plaintiff was not obligated to give, even assuming it made a cognizable promise. Nor can the defendant show that it had reasonable reliance on a promise or that it suffered any damages. It merely speculates that it could have found another subtenant and that plaintiff would have agreed to this arrangement, thereby releasing defendant from the sublease. Again, as stated above, plaintiff did not have to agree to renegotiate.

The second counterclaim for breach of the implied duty of good faith and fair dealing is also dismissed. "Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389, 639 NYS2d 977 [1995] [internal quotations and citations omitted]).

While defendant is clearly unhappy with the way that plaintiff engaged in negotiations surrounding a potential resolution, that does not state a cognizable counterclaim. Defendant had long been in breach of the sublease by the time the purported breach of this implied duty occurred. And the allegations as asserted by defendant merely show that an agreement could not be reached. Simply because defendant could not convince plaintiff to renegotiate a contract that both parties had previously entered into does not state a breach of this duty. In fact, the timeline suggests plaintiff waited a long time and gave defendant ample opportunities before it sought

relief based on defendant's default. That plaintiff may not have been willing to agree to all of the concessions that defendant desired does not support this counterclaim.

Similarly, the affirmative defenses must be dismissed. While plaintiff articulated why the affirmative defenses should be dismissed (NYSCEF Doc. No. 22 at 10-15), defendant did not specifically address why any of its affirmative defenses should remain and instead offered a generalized theory in support of its version of events. Defendant insists that plaintiff was a "bad actor" in that plaintiff strung defendant along and this prevented defendant from finding a workable solution to its inability to pay rent. But those alleged facts do not support any of its affirmative defenses and the Court declines to speculate as to why certain affirmative defenses should remain where defendant did not articulate any specific arguments.

Partial Summary Judgment

Plaintiff also moves for summary judgment on its first cause of action for breach of contract. Defendant does not deny that it breached the contract but it takes issue with the liquidated damages calculation.

"As a general matter, parties are free to agree to a liquidated damages clause provided that the clause is neither unconscionable nor contrary to public policy" (*Trustees of Columbia Univ. in City of New York v D'Agostino Supermarkets, Inc.*, 2020 NY Slip Op 06937 [2020] [internal quotations and citation omitted]).

Here, defendant is correct that plaintiff has not established as a matter of law that it is entitled to the liquidated damages amount it demands. The lease provides a cumbersome and complicated formula for calculating the liquidated damages (NYSCEF Doc. No. 2, ¶ 19.4). It involves computation of the "discounted present value, at a discount rate of six percent (6%) of

the Annual Fixed Rent, Additional rent, and other charges which would have been payable by Tenant under this Lease for the remainder of the Lease Term if Tenant had fulfilled all of its obligations hereunder, over and above (ii) the discounted present value, at a discount rate of six percent (6%) of the Annual Fixed Rent, Additional Rent, and other charges that would be received by Landlord (after deducting all reasonably estimated costs of reletting, including, without limitation, brokerage fees, advertising, required tenant improvements and concessions and attorney's fees)" (*id*.).

The dispute appears to be plaintiff's calculation of the liquidated damages based on what it claims to be a fair market value of $50 per square foot (NYSCEF Doc. No. 4 [Notice of Election to Assess Liquidated Damages]). As defendant correctly points out, the Court cannot conclude as a matter of law that this is amount is the fair market value or that plaintiff is entitled to the entire amount it seeks. Plaintiff must prove the basis for its calculation. And there are other issues to consider, including how to incorporate reletting costs. Defendant also argued in opposition that plaintiff double-counted the amount of additional rent due, a claim that plaintiff did not sufficiently rebut in reply.

However, that does not prevent the Court from granting plaintiff's motion for partial summary judgment as to liability only. It demonstrated that defendant breached the contract and defendant did not raise an issue of fact in opposition to this point. Although plaintiff asks for an immediate trial on the issue of damages, plaintiff only moved for summary judgment on one of its causes of action.

Accordingly, it is hereby

ORDERED that the motion by plaintiff is granted to the extent that defendant's counterclaims and affirmative defenses are severed and dismissed and plaintiff is awarded

summary judgment on its first cause of action on liability only and denied to the extent it sought to recover the specific amount of liquidated damages requested.

Remote Conference: March 15, 2021.

12/3/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE