

299 Broadway, LLC v James A. O'Malley, P.C.

2021 NY Slip Op 32374(U)

November 18, 2021

Supreme Court, New York County

Docket Number: Index No. 650930/2021

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

299 BROADWAY, LLC,

Plaintiff,

- v -

JAMES A. O'MALLEY, P.C., and JAMES O'MALLEY

Defendants.

-----X

INDEX NO. 650930/2021

MOTION DATE 10/13/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for

JUDGMENT - SUMMARY

The plaintiff landlord in this breach of contract action seeks to recover unpaid rent under a lease agreement for office space with the defendants, and contractual attorneys' fees. The plaintiff now moves pursuant to CPLR 3212 for summary judgment on the first and second causes of action in the sum of \$66,217.98 and on the third cause of action on the issue of liability. The plaintiff further seeks to strike and dismiss the defendants' affirmative defenses and to sever so much of the second cause of action as seeks unpaid rent accruing after August 31, 2021, through the expiration date of the lease. No opposition is submitted. For the following reasons, the motion is granted in part.

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 (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See 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, the plaintiff submits the pleadings, the subject lease and lease extension agreements, a rent ledger, property tax statements and calculations, and the affidavit of Steven Marvin, Executive Managing Director of Olmstead Properties, Inc., the registered managing agent for the plaintiff.. The plaintiff's proof establishes, *prima facie*, its entitlement to

relief on the first and second causes of action, seeking unpaid rent and additional rent through February 28, 2021, and unpaid rent and additional rent accruing after February 28, 2021, until December 31, 2022, the expiration date of the lease, respectively, in the total sum of \$66,217.98. Specifically, the plaintiff's proof with respect to the lease and lease extension agreements demonstrates (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). It is well-settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff'd 88 NY2d 716 (1996). The plaintiff's claim of entitlement to \$66,217.98 is supported by the record and represents the amount of rental arrears the defendants owe through August 31, 2021, less the "legal fee charges" also listed in the rent ledger the plaintiff submits.

The plaintiff further establishes its entitlement to judgment on the issue of liability on the third cause of action seeking attorneys' fees pursuant to Article 19 of the lease. However, the plaintiff is entitled to judgment only to the extent of fees incurred in recovering rent and additional rent due and owing through August 31, 2021.

Having failed to oppose the plaintiff's motion, the defendants have not raised any material issue of fact sufficient to rebut the plaintiff's *prima facie* showing. Accordingly, the branch of the plaintiff's motion seeking an award of summary judgment in the sum of \$66,217.98 on the first and second causes of action is granted and the branch of the motion seeking summary judgment on the issue of liability on the third cause of action is granted to the extent stated above. The plaintiff may submit supplemental documentation in support of any claimed damages under the third cause of action within 60 days of this Decision and Order.

The branch of the plaintiff's motion seeking to strike the defendants' affirmative defenses is likewise granted. Pursuant to CPLR 3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011). For the reasons discussed in the plaintiff's moving papers, the plaintiff meets this burden.

Finally, the branch of the plaintiff's motion seeking to sever and continue so much of its second cause of action as seeks unpaid rent accruing after August 31, 2021, through the future date of December 31, 2021, is denied. As a general matter, "no action can be brought for future rent in the absence of an acceleration clause." Beaumont Offset Corp. v Zito, 256 AD2d 372, 373 (2nd Dept. 1998); see also Islip U-Slip LLC v Gander Mtn. Co., 2 F Supp 3d 296, 303 (NDNY 2014) ("New York law states that absent an acceleration clause in a lease, the breach of a lease does not entitle a landlord to make a claim for all future rents under the lease.") The

lease at issue here contains a liquidated damages clause requiring the tenants to pay “any deficiency between the rent hereby reserved and or covenanted to be paid and the net 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.” Further, “Any such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in the lease...” The first page of the lease indicates that the “rent day” is the first day of each month. Thus, the lease requires the plaintiff to wait until future rents accrue on the first of each month in order to recover them.

The plaintiff cannot maintain an action on the remainder of the second cause of action insofar as it only seeks future rents. Therefore, the remainder of the second cause of action is dismissed without prejudice to assert new claims for rent due under the lease once those claims accrue, i.e., become due, in a new action.

Accordingly, it is


ORDERED that the plaintiff’s motion is granted, without opposition, to the extent that (1) the plaintiff is awarded summary judgment in the sum of \$66,217.98 on the first and second causes of action; (2) the plaintiff is awarded summary judgment on the issue of liability on the third cause of action only to the extent of attorneys’ fees incurred in connection with the plaintiff’s recovery of rent and additional rent through August 31, 2021; and (3) the defendants’ affirmative defenses are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants, jointly and severally, on the first and second causes of action in the sum of \$66,217.98, plus statutory interest from the date of judgment; and it is further

ORDERED the plaintiff may submit supplemental documentation in support of any claimed damages under the third cause of action, to the extent incurred in connection with the recovery of rent and additional rent under the subject lease through August 31, 2021, within 60 days of this Decision and Order, by filing the same on e-courts and e-mailing a copy to the Part 42 Clerk at SFC-Part42-Clerk@nycourts.gov, and failure to adhere to the foregoing deadline shall result in any such damages being waived; and it is further

ORDERED that the remainder of the plaintiff’s second cause of action, seeking future rent and additional rent that may become due under the subject lease after August 31, 2021, is dismissed without prejudice to the plaintiff’s bringing such claims, as well as any claim for attorneys’ fees arising from such claims, in a new action once such claims accrue.

This constitutes the Decision and Order of the court.



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

	<u>11/18/2021</u> DATE		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> OTHER
			<input type="checkbox"/>
			NON-FINAL DISPOSITION
			GRANTED IN PART
			SUBMIT ORDER
			FIDUCIARY APPOINTMENT
			REFERENCE