SRI Eleven 1407 Broadway Operator LLC v Infinity Equity Ventures LLC
2021 NY Slip Op 32557(U)
December 3, 2021
Supreme Court, New York County
Docket Number: Index No. 654166/2020
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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SRI ELEVEN 1407 BROADWAY OPERATOR LLC

Plaintiff,

- v -

INFINITY EQUITY VENTURES LLC,

Defendant.

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INDEX NO. 654166/2020

MOTION DATE 11/29/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for SANCTIONS.

The motion by defendant to dismiss based on plaintiff's spoliation of certain evidence is denied. The cross-motion by plaintiff to strike the verified answer or to compel defendant to produce certain documents is granted without opposition.

Background

In this landlord-tenant dispute, plaintiff (the landlord) seeks to recover unpaid rent and other charges from defendant (the tenant). Plaintiff contends that defendant has not occupied the premises since at least June 8, 2020 and that it sent a five-day notice of termination pursuant to the lease on July 28, 2020. Plaintiff contends the lease terminated on August 3, 2020.

Defendant's Spoliations Motion

In this motion, defendant complains about a Jackson affidavit submitted during discovery by Ronnie Ragoff, plaintiff's Vice President. Defendant points out that Ms. Ragoff admitted that plaintiff has a 90-day retention policy for all emails in both the inbox and sent folders. It argues

that Ms. Ragoff did not explore whether a litigation hold was placed on emails in anticipation of this case. Defendant speculates that Ms. Ragoff does not know whether any emails were deleted prior to her search in connection with the September 3, 2021 Jackson affidavit.

Defendant argues that plaintiff should have placed a litigation hold starting in November 2019—the earliest date from which plaintiff seeks to recover amounts it is allegedly owed. It also maintains that at the very least, plaintiff should have instituted a litigation hold when defendant failed to pay the base rent in April 2020.

In opposition, plaintiff contends that it preserved emails and documents relevant to this action and produced these records to defendant. It also argues that its obligation to preserve emails cannot be triggered every time a tenant fails to pay rent—that would be tantamount to requiring that every landlord preserve every email given how often tenants miss a payment. Plaintiff emphasizes that defendant failed to communicate with plaintiff about leaving the premises before it vacated on June 8, 2020.

Plaintiff maintains that the emails defendant seeks are not relevant and that plaintiff could not have reasonably anticipated the substantial number of affirmative defenses raised by defendant. Plaintiff argues that it preserved documents it thought would be relevant for this case and it points out that it does not need email to prove its case—a straightforward breach of lease.

"A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed. On

the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-48, 26 NYS3d 218 [2015] [internal quotations and citations omitted]).

The Court denies defendant's motion. Here, there is no basis to find that the emails (if any were destroyed) were destroyed intentionally. Plaintiff admits it had a 90-day retention policy. Moreover, it is unclear from this record what documents plaintiff destroyed or how those records would be relevant to the anticipated litigation. In other words, plaintiff's theory of the case is that defendant did not pay rent. Proving that case does not necessarily require emails; a landlord has to show that there was a valid lease and that defendant did not make the required payments under that lease.

Instead, the discovery sought by defendant that forms the basis of defendant's spoliation motion relates to affirmative defenses that defendant raises relating to various protests that occurred during 2020. Defendant points to documents *produced by plaintiff* concerning instances when public and common areas in the building were closed off in May 2020, restrictions on using building entrances, and plaintiff's alleged decision to prop open lobby doors to potentially allow "violent offenders" to enter the building.

However, plaintiff attaches the affidavit of Michael Brady, the general manager of the building, who claims that plaintiff has no records regarding police reports, incident reports about theft in 2020 or anything about vandalism or violent acts from January 1, 2020 through June 30, 2020 (NYSCEF Doc. No. 55).

The Court finds that the allegedly destroyed documents (if any relevant documents were actually destroyed) could not have been reasonably anticipated by plaintiff to be relevant to a

breach of lease case and spoliations sanctions are inappropriate. To be clear, defendant is asking this Court to dismiss a case where defendant admits it has not made various rent payments because plaintiff did not allegedly preserve every conceivable document about the building in 2020. That is not the purpose of seeking sanctions based on spoliation. It is not a shield used to help a tenant avoid paying the rent.

Cross-Motion

The Court grants plaintiff's cross-motion to strike the verified answer as defendant failed to offer opposition. The Court observes that defendant waited until 3:51 p.m. on the return date of the instant motion to request an adjournment. This request did not state whether counsel for defendant had reached out to counsel for plaintiff for an adjournment, why an adjournment was requested or even how long an adjournment was sought (NYSCEF Doc. No. 85).

Although this part routinely permits adjournments, even ones requested at the last minute, the Court cannot overlook these glaring errors especially where plaintiff objects to the adjournment (NYSCEF Doc. No. 86). Counsel for defendant observes that plaintiff's attorney did not contact him about an adjournment (*id.*). The fact is that the motion was initially adjourned from October 27, 2021 to a return date of November 29, 2021 and plaintiff filed a cross-motion on November 19, 2021; this gave defendant more time than the CPLR required and defendant had more than enough time to oppose or to request an adjournment. Instead, it waited until the last minute and ignored a host of Part 130 rules about adjournments. The Court cannot condone those types of tactics. Play games elsewhere; litigate pursuant to the CPLR here.

Accordingly, it is hereby

ORDERED that the motion by defendant for spoliations sanctions is denied; and it is further

ORDERED that the cross-motion by plaintiff to strike defendant's answer and its affirmative defenses is granted without opposition and plaintiff is directed to file a note of issue for an inquest on or before December 15, 2021.

12/3/2021
DATE

ARLENE BLUTH, J.S.C.

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