2 W. 45th St. LLC v Charlex, Inc.
2022 NY Slip Op 31983(U)
June 24, 2022
Supreme Court, New York County
Docket Number: Index No. 652500/2021
Judge: Arlene Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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2 WEST 45TH STREET LLC,

Plaintiff,

- v -

CHARLEX, INC., CHRIS BYRNES

Defendant.

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INDEX NO. 652500/2021

MOTION DATE 06/21/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 58, 59, 60, 61, 62, 63

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

The motion by plaintiff for summary judgment against defendant Charlex, Inc. ("Charlex") is granted.

Background

In this action about unpaid rent, plaintiff moves for summary judgment and to dismiss defendant Charlex's affirmative defenses. Previously, the Court dismissed the fourth cause of action for tortious interference, which was the only cause of action against defendant Byrnes. Plaintiff contends it is entitled to recover against Charlex for base annual rent and additional rent under the lease for the 9th floor, the 7th and 8th floors, the basement and Suite 305. Plaintiff claims that $1,810,914.15 is owed.

Plaintiff also seeks to dismiss Charlex's affirmative defenses. Plaintiff claims that the seven, eighth and ninth affirmative defenses are pandemic-related defenses (frustration of purpose, impossibility, and force majeure) that have been rejected by the courts. With respect to

the third and fourth affirmative defenses, which relate to the date of the surrender of the 7th and 8th floors (as well as the basement), plaintiff claims that emails show Charlex did not vacate or surrender these spaces by July 31, 2020 as provided for in the lease.

In opposition, Charlex takes issue with the ledgers attached by plaintiff to prove the amount of the unpaid rent and additional rent. It claims that plaintiff failed to lay the appropriate foundation to establish the admissibility of this evidence. Charlex also claims that plaintiff improperly tried to recover real estate taxes or electric charges because these are bills that are issued by third parties rather than plaintiff.

Charlex also claims that there is a material issue of fact about the surrender of the 7th and 8th floors. It claims that Charlex notified plaintiff that it did not intend to renew the lease or remain in possession of these spaces (as well as the basement) prior to the pandemic. Charlex insists that emails show that plaintiff already had possession of these spaces.

In reply, plaintiff maintains that it did lay the proper foundation for the admissibility of its ledgers, the real estate taxes, and the electric charges. With respect to the issue of when Charlex vacated and surrendered certain spaces, plaintiff points out that Charlex did not claim when it actually vacated the subject spaces. Plaintiff also details how the emails show that it did not vacate the premises prior to July 31, 2020 as alleged by Charlex and references discussions in September 2020 and October 2020 that show Charlex was still in possession of these spaces.

Discussion

"A party moving for summary judgment must demonstrate that the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in the moving party's favor. Thus, 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. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833, 988 NYS2d 86 [2014] [internal quotations and citations omitted]).

As an initial matter, the Court observes that Charlex only offers opposition with respect to two issues. First, Charlex claims that plaintiff did not meet is prima facie burden to establish how much is due. This Court disagrees. In support of its motion, plaintiff attached the affidavit of Craig Berman (an agent of plaintiff), who details how the amount of Charlex's arrears was calculated and points to the ledgers (NYSCEF Doc. No. 29). Mr. Berman also explains the percentage of the real estate taxes used to calculate Charlex's share (*id*.).

The Court finds that plaintiff established its prima facie case through Mr. Berman's affidavit and the exhibits he references, including the ledgers. "Admissible evidence may include affidavits by persons having knowledge of the facts and reciting the material facts. Certain affidavits and documents submitted in support of a motion for summary judgment may be deemed admissible where those documents meet the requirements of the business records exception to the rule against hearsay under CPLR 4518" (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508, 14 NYS3d 283 [2015] [internal quotations and citations omitted]). Mr. Berman has actual knowledge of the facts at issue here and properly established the admissibility of the key records (the ledgers). After all, Mr. Berman is an agent for plaintiff and was entitled to submit plaintiff's business records.

That some of the calculations came, at least initially, from third parties (such as Charlex's share of the real estate taxes), does not compel the Court to deny the motion. Charlex does not challenge the accuracy of these calculations or insist that the records themselves are inaccurate. Plaintiff was entitled to submit ledgers and real estate tax records to prove how much Charlex owes.

Second, Charlex argues that there is an issue of fact with respect to when it vacated the premises and whether it surrendered prior to July 31, 2020. This Court disagrees. Plaintiff attached an email from Charlex's CFO (Richard Kellner) dated October 1, 2020 in which he states that "While the pandemic and its ramifications has delayed the process Charlex has, in good faith, been making consistent progress on moving our power and HVAC from 7 and 8 onto the 9th floor. That is still a work in progress and we need the consistent uninterrupted power to conduct our business" (NYSCEF Doc. No. 47 at 1). He added that he was available to discuss the work plaintiff needed to do so Charlex "won't hinder your plan" (*id*. at 2).

Clearly, this email shows that Charlex was still in possession of the premises after July 31, 2020. It wanted to work together with plaintiff on "logistics" regarding plaintiff's effort to install a sprinkler system in October 2020. The email is definitive proof that Charlex had not sufficiently vacated or surrendered the premises before July 31, 2020. Otherwise, plaintiff would not have had to reach out to Charlex about access to these floors and Charlex would not have offered a response indicating it still occupied these spaces.

And that email is not the only evidence demonstrating that Charlex was still in the premises after the expiration date of July 31, 2020. An email sent by Chris Byrnes of Charlex dated July 29, 2020 stated that Charlex would not be entirely vacated by July 31 and that Charlex would require "ongoing access and power to sustain operations as a business" (NYSCEF Doc.

No. 46). In other words, Charlex indicated it would remain in these specific spaces past the deadline and then did, in fact, continue to occupy them.

Because these are the only two items contested by defendant, the Court grants the balance of the motion including the specific amount sought by plaintiff. Moreover, plaintiff is entitled to reasonable legal fees and, if it seeks such fees, it must make a motion on or before July 26, 2022.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment against defendant Charlex, Inc. is granted and the Clerk shall enter judgment in favor of plaintiff and against defendant Charlex, Inc. in the amount of $1,810,914.15 plus interest from March 10, 2022 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that plaintiff is entitled to reasonable legal fees under the terms of the lease, that issue is severed, and plaintiff must make a motion for such fees on or before July 26, 2022; and it is further

ORDERED that the single cause of action against defendant Chris Byrnes was dismissed in a previous motion and so this defendant is severed and dismissed from this case.

6/24/2022
DATE

ARLENE BLUTH, J.S.C.

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