

3859 Tenth Ave. Corp. v La Mina Bar Rest. Inc.

2022 NY Slip Op 33323(U)

September 30, 2022

Supreme Court, New York County

Docket Number: Index No. 154519/2021

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ALEXANDER TISCH PART 18

Justice

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3859 TENTH AVENUE CORP.

INDEX NO. 154519/2021

MOTION DATE 06/04/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

LA MINA BAR RESTAURANT INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

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

Upon the foregoing documents, plaintiff moves pursuant to CPLR 3212 and 3025 (c) for summary judgment against defendant on its first and second causes of action for a judgment in the sum of \$ 131,730.36, for basic rent and additional rent due through June 1, 2021, for summary judgment on its third cause of action pursuant to CPLR 3212 declaring that defendant is and continues to be liable to plaintiff for basic rent and additional rent for continued use of the premises, and pursuant to CPLR 3212 granting plaintiff summary judgment on its fourth cause of action against defendant for attorneys' fees, and dismissing all of defendant's affirmative defenses pursuant to CPLR 3211 (b).

This action arises out of a written commercial lease that began on July 1, 2017, by and between defendant as tenant, and plaintiff as landlord and owner of the building located at 3859 10th Avenue, New York, New York 10034 (NYSCEF Doc. No. 7, ¶ 8). The term of the lease expires on June 30, 2024, and according to the lease, defendant is required to pay basic rent and additional rent through and including the expiration date (*id.* at ¶ 10). Plaintiff argues that it is entitled to \$ 131,730.36, plus unpaid basic rent in the amount of \$ 7,574.83 and \$ 1,415.72 for real

estate taxes. Plaintiff also argues that it is entitled to attorneys' fees pursuant to section 19 of the lease, which obligates defendant to pay plaintiff reasonable attorneys' fees and other expenses incurred in connection with any suit commenced based on nonpayment of rent or for the violation of any lease covenant or provision.

Pursuant to CPLR 3212, a motion for summary judgment may be granted when the moving party demonstrates that a genuine issue of material fact does not exist. A party seeking summary judgment must make a prima facie showing that they are entitled to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). To successfully oppose a motion for summary judgment, the opposing party must present “facts sufficient to require a trial of any issue of fact” (Zuckerman v City of New York, 49 NY2d 557, 562 [1980], quoting CPLR 3212[b]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to withstand dismissal (id. at 562).

The Court finds that plaintiff has met its prima facie burden entitling it to summary judgment on its first cause of action for unpaid basic rent and additional rent through June 2021, in the amount of \$ 131,730.36. The Court finds that a binding commercial lease was entered into between plaintiff and defendant on July 1, 2017, as the lease clearly demonstrates occupancy of the leased premises for a monthly monetary amount. Furthermore, defendant does not deny that it was in a binding contractual relationship with plaintiff, for defendant suggests in opposition to plaintiff's third cause of action for declaratory judgment, that other remedies besides declaratory judgment are available for plaintiff to pursue, which is a concession by defendant that a contractual relationship was active (see NMC Residual Ownership L.L.C. v U.S. Bank Nat. Ass'n, 153 AD3d 284, 290 [1st Dept 2017] [“The declaratory judgment claim ‘is unnecessary and inappropriate’ since plaintiffs have ‘an adequate, alternative remedy in another form of action, such as breach of

contract”] quoting Apple Recs., Inc. v Capitol Recs., Inc., 137 AD2d 50, 54 [1st Dept 1988]). Moreover, contrary to defendant’s argument, plaintiff has established the applicable amount of late charges that are due under the lease. For the ledger attached to plaintiff’s motion as exhibit D shows the charges accrued, the payments submitted by defendant, if any, and the remaining balance for the time period of May 2019 – June 2021. Said ledger calculates when defendants were to make a payment, and if defendant did not make such a payment, a late charge equal to ten (10) percent of the amount overdue was added to the remaining balance, as stated and agreed to within the governing lease at ¶ 51. In accordance with motion sequence 1, and at the time this motion was submitted, defendant owed \$ 119,754.88 through June 2021. This overdue amount multiplied by ten (10) percent totals \$ 11,975.48, and when added to the aforesaid amount of \$ 119,754.88, the total amount due is \$ 131,730.36. Therefore, the Court finds that plaintiff is entitled to \$ 131,730.36 for basic rent and additional rent through June 2021.

As for its second cause of action, plaintiff requests damages for quantum meruit, for the value of the use and occupancy of the premises. Plaintiff also requests a declaratory judgment as a third cause of action, that defendant is and continues to be liable to plaintiff for basic rent and additional rent for the continued use of the premises *pendente lite* in accordance with the lease. However, given the binding contract between the parties, the claim for quantum meruit cannot be maintained (see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987]). “Similarly, plaintiff may not seek a declaratory judgment when other remedies are available, such as a breach of contract action” (Singer Asset Fin. Co., LLC v Melvin, 33 AD3d 355, 358 [1st Dept 2006]). For these reasons plaintiffs second and third causes of action for quantum meruit and declaratory judgment are denied.

Lastly, plaintiff moves pursuant to CPLR 3212 on its fourth cause of action against defendant for attorneys' fees. Section 19 of the lease states that plaintiff is entitled to attorneys' fees in the connection with any suit commenced on the nonpayment of rent or for the violation of any lease covenants or provisions. Therefore, the Court finds that plaintiff is entitled to attorneys' fees and the fourth case of action is granted.

It is hereby ORDERED that plaintiff's motion for summary judgment as to the first cause of action for a breach of contract is granted, and plaintiff is entitled to a judgment amount of \$ 131,730.36, for basic rent and additional rent due through June 1, 2021; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff against defendant in the sum of \$131,730.36, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED that plaintiff's second and third causes of action for quantum meruit and declaratory judgment are denied and dismissed, and it is further

ORDERED that plaintiff's fourth cause of action that seeks attorneys' fees is granted, and that claim shall be severed and continue, and the determination of the amount of attorneys' fees is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

¹ Available on the Court's website at www.nycourts.gov/supctmanh under the "References" link on the navigation bar.

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



9/30/2022

DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE