

840 Longfellow, LLC v Triumph Constr. Corp.

2023 NY Slip Op 31966(U)

June 12, 2023

Supreme Court, New York County

Docket Number: Index No. 156144/2021

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

840 LONGFELLOW, LLC

Plaintiff,

- v -

TRIUMPH CONSTRUCTION CORP.,

Defendant.

-----X

INDEX NO. 156144/2021

MOTION DATE 05/31/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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, 20, 21

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff's motion for summary judgment is granted.

Background

In this commercial landlord-tenant action, plaintiff seeks summary judgment on its claim that defendant owes over \$325,000 in unpaid rent and late fees.

In opposition, a member of defendant (Carlos Cuzzi) claims that defendant's business was shut down in March 2020 due to Covid-19 and so defendant agreed to vacate the premises in May 2020 (the lease expired on March 31, 2022). Mr. Cuzzi insists that by surrendering the premises, it severed defendant's obligations under the lease and that plaintiff agreed to terminate any rental agreements. He insists that defendant does not owe plaintiff anything.

Defendant also characterizes the amounts demanded by plaintiff as exorbitant and questions why plaintiff has done nothing to move this case since it commenced this action in 2021. It also argues that a showing of defendant's rent payments to plaintiff will rebut plaintiff's

assertion that it is entitled to summary judgment. Defendant argues that plaintiff's computations are incorrect and that discovery is required.

In reply, plaintiff contends that Covid-19 did not absolve defendant of its obligation to pay rent nor did plaintiff submit any proof that the lease was amended or that plaintiff agreed to a surrender agreement.

Discussion

The Court grants the motion. As an initial matter, plaintiff met its burden to show that rent remains unpaid through the submission of the affidavit of Mr. Tempesta (a member of plaintiff) and the rent ledger.

And defendant failed to raise a material issue of fact in opposition. Defendant did not deny that it stopped paying the rent. Instead, it claims that there was some sort of agreement whereby it surrendered the premises and that plaintiff agreed to forgo any rent demands. Plaintiff disputes that there ever was such an agreement. Unfortunately, the Court observes that the lease contains a clause stating that "This agreement may not be modified except in writing subscribed by the parties hereto" (NYSCEF Doc. No. 10, ¶ 101). And defendant did not attach any agreement in writing to demonstrate that the premises were surrendered and that plaintiff absolved defendant of its obligation to pay rent. Without the submission of such a writing, the Court finds that defendant failed to raise an issue of fact to defeat this portion of plaintiff's motion.

To the extent that defendant asserts that Covid-19 shutdowns permitted it to stop paying rent, the Court observes that this argument has been rejected by the Appellate Division, First Department (*558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561, 149 NYS3d 55 [1st

Dept 2021] [observing that the pandemic did not justify the failure to pay rent under the doctrines of frustration of purpose or impossibility).

Moreover, defendant did not raise an issue of fact with respect to the amount demanded by plaintiff. Plaintiff presented its rent ledger in support of the motion and, in opposition, defendant did not submit anything that calls into question that amount. In fact, defendant claims that “a showing of Defendant’s rental payments to Plaintiff will rebut the statements of the Plaintiff and preclude the award of summary judgment in Plaintiff’s favor” (NYSCEF Doc. No. 16, ¶ 13). But defendant did not submit any proof about its rental payments, such as cancelled checks or bank statements to rebut the amount claimed by plaintiff. Those documents are within defendant’s possession. Defendant’s similar assertion that discovery is required is without merit as it did not sufficiently articulate what other discovery is necessary that would render the instant motion as premature. While defendant blames plaintiff for not moving this case, defendant could have filed an RJI (to assign this case to a judge) and made discovery demands. Instead, it waited for plaintiff to make the instant motion.


Finally, the Court severs and dismisses the affirmative defenses for lack of personal jurisdiction, that defendant owes nothing to plaintiff, that plaintiff breached the rental agreement and that plaintiff is precluded from recovering because it agreed to a surrender of the premises. Defendant did not meet its burden on any of these affirmative defenses.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted, defendant’s affirmative defenses are severed and dismissed and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$326,289.40 plus statutory interest from

March 31, 2022 along with costs and disbursements upon presentation of proper papers therefor;
and it is further

ORDERED that the issue of reasonable legal fees is severed and plaintiff shall make a
separate motion for such fees on or before June 28, 2023.

6/12/2023		
DATE		ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE