SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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50 WEST DEVELOPMENT LLC,
Plaintiff,

- v -

ANDREW AZOULAY,
Defendant.

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INDEX NO. 151905/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

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

In February 2021, plaintiff commenced this action by summons and complaint against defendant, seeking unpaid rent and other charges in the amount of $196,784.68, plus interest, relating to a residential lease for Apartment #16C at the building located at 50 West Street, New York, NY 10006. Plaintiff also seeks legal fees and disbursements, pursuant to paragraph 20A(iv) of the lease agreement between the parties (NYSCEF Doc. No. 1, *summons and complaint*).

Issue was joined on April 13, 2021, and defendant raised several affirmative defenses, including that plaintiff failed to mitigate damages (first affirmative defense) and that "[t]o the extent plaintiff is claiming legal fees or other charges are outstanding from a prior summary proceeding, such purported fees or charges have been fully paid and satisfied by [defendant]." Defendant also asserts a counterclaim for attorney's fees (NYSCEF Doc. No. 2, *answer*).

Plaintiff now moves, pursuant to CPLR 3212(b) for an order striking defendant's first and second affirmative defenses and first counterclaim as lacking in merit and, pursuant to CPLR 3212(b), granting summary judgment to plaintiff on its causes of action (NYSCEF Doc. No. 8, *notice of motion*). Defendant opposes the motion and cross-moves, pursuant to CPLR 3126(3), for an order striking the complaint for willful failure to disclose (NYSCEF Doc. No. 36, *notice of cross-motion*).

In support of its application, plaintiff submits, *inter alia*, the affidavit of James T. Morgan, who is employed as director of residential rents administration at Time Equities, Inc., the managing agent for plaintiff, who affirms that defendant took possession of the subject apartment on March 1, 2018, pursuant to a one-year lease dated February 15, 2018 (NYSCEF Doc. No. 16, *February 2018 lease*), which was renewed for an additional year in March 2019 and then again in March 2020 (NYSCEF Doc. No. 17-18, *lease renewals*). On July 28, 2020, defendant notified plaintiff that he had vacated the apartment. However, he did not notify anyone in the building or management that he had vacated the premises, nor had he returned the

keys to anyone. (NYSCEF Doc. No. 19, *e-mail*). Morgan asserts that, in July 2020, defendant was in arrears in the amount of $85,240.00, which included five (5) months of unpaid rent at $15,500.00 per month; $7,200.00 in late charges; and $540.00 in legal fees. Additionally, defendant failed to pay rent for August 2020 through February 2021, accruing a balance $108,500.00. A security deposit of $13,500.00 was held and applied to the account on March 1, 2021, leaving a total balance due of $172,500.00. Morgan also asserts that in February 2021, defendant had an outstanding balance of $2,804.68 for electrical charges. On or about August 2020, after it was confirmed that the apartment was vacant and the locks were changed, Morgan affirms the associate brokers started efforts to relet the apartment (NYSCEF Doc. No. 10, *Morgan's affidavit*).

Irina Lattanzio, an associate broker employed with Time Equities Inc, avers that it is Time Equities' customary practice not to list all available apartments for lease to the public at large if there are similarly sized apartments already marketed to the public since large number of vacancies may scare off prospective tenants as they may perceive that there are undisclosed problems in the building, or the rents are set too high. To this point, Lattanzio affirms that "[w]e had already listed with third party advertisers several other three-bedroom apartments in the building, including the 'C' line, the line in which the subject apartment is located." However, Lattanzio asserts that, without exception, apartment 16C was shown to all prospective tenants who responded to an ad for any available three-bedroom apartment listed for lease in the building. Lattanzio proffers an Outlook Schedule that lists the showings of apartment 16C and which reflects that it was shown forty-six (46) times between August 24, 2020, and March 7, 2021 (NYSCEF Doc. No. 25, *showing schedule*). Plaintiff also annexes an e-mail from September 9, 2020, demonstrating efforts to relet the subject apartment to a prospective tenant (NYSCEF Doc. No. 26, *e-mail*).

In opposition to the motion, defendant submits an affidavit wherein he affirms that, despite advising plaintiff of his vacatur of the premises and requesting that plaintiff relet or sublet the apartment (NYSCEF Doc. No. 40, *e-mails to plaintiff*), plaintiff failed to mitigate its own damages by admittedly failing to list and advertise the apartment in its own usual channels of listing, i.e., in the widely used publication for listing available residential units in New York City, called "StreetEasy." (NYSCEF Doc. No. 37, *defendant's affidavit*).

Defendant argues that plaintiff has failed to establish that it made a good faith effort to mitigate its damages by not listing and advertising the apartment to the public through StreetEasy or some other widely-known and used publication of such advertisement, especially considering that the subject apartment was ultimately listed on StreetEasy on February 22, 2021 and, based on data from the platform, was relet after only sixteen days on the market (NYSCEF Doc. No. 37, *list of apartments on StreetEasy*).

On or about May 12, 2021, defendant served plaintiff with a notice to produce documents, requesting, *inter alia*, documents confirming plaintiff's claim that it advertised or marketed the subject apartment shortly after defendant vacated same. However, defendant asserts that his demands were wholly ignored. He maintains plaintiff's refusal to respond to defendant's discovery demands warrants the striking of the complaint pursuant to CPLR 3123(3).

In reply, plaintiff contends that defendant has failed to raise an issue of fact sufficient to defeat its motion for summary judgment. As to the argument regarding the failure to mitigate damages, plaintiff argues: "what is in 'good faith' and 'reasonable customary actions' must be measured in the context of the rental environment in which the subject apartment is existing." (NYSCEF Doc. No. 48 ¶ 12). To this point, it contends that there was a mass exodus of New York City residents during the pandemic and that it is in this context that the court must assess whether the landlord's actions were in "good faith" and "reasonable and customary." Thus, plaintiff maintains that its decision not to list the apartment on StreetEasy was not only reasonable, but a sound one, given the effects of the COVID-19 pandemic.

Although defendant submits a sur-reply, he is not entitled to one as of right; thus, it shall not be considered in determining the instant application.

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

A landlord seeking summary judgment against a tenant for breach of rental obligations satisfies its *prima facie* evidentiary burden by proving the existence of a lease, landlord's performance under the lease, tenant's nonpayment of rent; the total debt due; and a description of how the amounts due were calculated (see *Thor Gallery At S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016]).

"Real Property Law § 227-e now clearly holds that the duty to mitigate damages applies to all residential leases in New York State. It also clarifies that the doctrine of mitigation of damages is not an affirmative defense to be asserted by a tenant, but rather the burden is on landlord to establish it took reasonable and customary actions to 'render the injury as light as possible'" (*14 E. 4th St. Unit 509 LLC v Toporek*, 203 AD3d 17, 23 [1st Dept 2022], quoting *Wilmot v State of New York*, 32 NY2d 164, 168 [1973]). This court finds that plaintiff has failed to sufficiently establish that it took reasonable and customary actions to mitigate its damages. While this court notes plaintiff's contention that it believed that not listing the apartment was the best strategic approach to relet the premises after defendant vacated the apartment, this raises issues of fact as to whether said strategy was reasonable and customary, especially in light of defendant's position that the premises was expeditiously relet after being listed on the StreetEasy website in February 2021 (*compare 14 E. 4th St. Unit 509 LLC v Toporek*, 203 AD3d at 24). Insofar as plaintiff has failed to satisfy its burden of showing that it fulfilled its duty to mitigate damages after defendant vacated the premises in July 2020, that branch of the motion seeking judgment against defendant for any amounts after July 2020 is denied.

Plaintiff, however, has established its *prima facie* entitlement to summary judgment on its claim for breach of contract relating to rent and charges due through July 2020, which amounts to $77,500.00. Insofar as defendant has failed to raise an issue of fact with respect to this outstanding balance, the motion is granted in this limited respect.

"Under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28, 39 [2012], citing *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). The subject lease provides in section 20(A)(iv), that "[tenant] must reimburse Owner for any of the following fees and expenses incurred by Owner", including:

> "[a]ny legal fees and disbursements for legal activity or proceedings brought by Owner against [tenant] because of a default by [tenant] for defending lawsuits brought against [o]wner because of the actions of [tenant], the [p]ermitted [o]ccupants of the [a]partment, persons who visit the [a]partment or work for [plaintiff]"

> "RPL § 234 provides that when, in any action or summary proceeding, an owner is permitted to recover legal fees from the tenant based upon the failure to perform any covenant or agreement of the lease, there is also an implied reciprocal obligation by the owner to pay the tenant's legal fees, if the tenant otherwise prevails in the dispute. While this reciprocal right will apply to actions commenced by the tenant against a landlord, either directly or by way of counterclaim, its scope is still limited to the rights afforded the landlord by the terms of the underlying lease." (*Garza v 508 West 112th Street, Inc.*, 2009 NY Slip Op 31265(U), **4 [Sup Ct, NY County 2009], citing *Gottlieb v Such*, 293 AD2d 267 [1st Dept. 2002]).

Given the issues raised above, the issue of legal fees shall await the outcome of this action and, thus, plaintiff's motion seeking summary judgment as to its legal fees is denied. That branch of the motion seeking dismissal of defendant's counterclaim for legal fees is also denied.

After consideration of the arguments advanced in support of the cross-motion for dismissal of the complaint pursuant to CPLR 3123, that request is denied. It has been held that dismissal is not a proper discovery sanction under CPLR 3126(3) where there is no finding of "willful and contumacious' conduct on plaintiff's part justifying dismissal of the complaint" (*Armstrong v B.R. Fries & Assoc., Inc.*, 95 AD3d 697, 698 [1st Dept 2012]). This court notes that no preliminary conference order has been entered into in this action, and, therefore, the parties shall appear for a discovery conference to discuss a discovery schedule in this case. Accordingly, it is hereby

ORDERED that plaintiff's motion is granted solely to the extent it seeks rent in the amount of $77,500.00 through July 31, 2020, together with interest from said date, and it is otherwise denied; and it is further

ORDERED that defendant's cross-motion is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order with notice of entry, upon defendant, as well as upon the Clerk of the Court, who shall enter judgment accordingly, and it is further

ORDERED that service upon the Clerk of the Court 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); and it is further

ORDERED that the parties in this action are directed to appear for a preliminary conference on October 18, 2023, details which shall be provided no later than October 16, 2023.

This constitutes the decision and order of this court.

September 14, 2023

HON. VERNA L. SAUNDERS, JSC

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**