

231/239 W. 39 St. Assoc. v Ulu, Inc.

2011 NY Slip Op 30702(U)

March 4, 2011

Sup Ct, NY County

Docket Number: 601534/09

Judge: Jeffrey K. Oing

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

PRESENT: Hon. Jeffrey K. Oing
Justice

PART 48

Index Number : 601534/2009
231/249 WEST 39 STREET
vs.
ULU
SEQUENCE NUMBER : 001
DISMISS DEFENSE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

~~is granted with costs to the moving party.~~

This motion is decided in accordance with the annexed decision and order of the Court.

FILED

MAR 07 2011

NEW YORK COUNTY CLERKS OFFICE



Dated: 3/4/11

JEFFREY K. OING J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDGE SETTLE ORDER/ JUDGE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x
231/239 WEST 39 STREET ASSOCIATES,

Plaintiff,

-against-

ULU, INC. and MEHMET ULU,

Defendants.
-----x

Index No.: 601534/09

Mtn Seq. No. 001

DECISION AND ORDER
FILED

MAR 07 2011

JEFFREY K. OING, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, 231/239 West 39 Street Associates, moves, pursuant to CPLR 3211 and 3212, for an order dismissing defendants' affirmative defenses and counterclaim, and granting it summary judgment on the first and second causes of action.

Background

Plaintiff and defendant, Ulu, Inc. ("defendant corporate tenant"), executed a lease agreement, dated September 9, 2008, for the commercial premises located in room 901 in the Manhattan building known as 231 West 39th Street ("the premises"). In addition, defendant Mehmet Ulu ("defendant guarantor") executed a guaranty of the lease on September 10, 2008 (the "guaranty"). The lease term commenced on October 1, 2008 and was set to expire on September 30, 2013. The rent for the years at issue was \$7,496.67 per month from October 1, 2008 to September 30, 2009, and \$7,759.05 per month from October 1, 2009 to September 30, 2010. Plaintiff contends that by December 2008 defendant

corporate tenant was in rent and additional rent arrears and in January 2009 it commenced a summary non-payment proceeding against defendant tenant in New York County Civil Court (Gethard Aff., 8/2/10, ¶ 7). Plaintiff also claims that defendant never paid the arrears due at the time, but eventually vacated the premises on April 30, 2009 (Gethard Aff., 8/2/10, ¶ 8).

Subsequent to defendant corporate tenant's vacatur, plaintiff commenced the instant action to recover damages based on defendant corporate tenant's breach of the lease agreement, and the guaranty.

In September 2009, plaintiff entered into a modification agreement with non-party tenant Heaven Sent Too, LLC ("Heaven Sent"), an existing tenant in the building (Reply, Ex. A). Pursuant to the modification agreement, Heaven Sent agreed to modify its lease with plaintiff to include the premises at issue in this litigation. According to the modification agreement, Heaven Sent's lease term for the premises commenced on November 1, 2009 and expires on October 31, 2014 (Reply, Ex. A). Further, the rent schedule was amended to \$5,088.75 per month from November 1, 2009 to June 30, 2010, at \$2,670.30 less than the monthly rent defendant corporate tenant had agreed to pay (Reply, Ex. A). Plaintiff provides a breakdown of what it claims are defendant corporate tenant's rent arrears from January 2009 to August 1, 2010, for a total of \$85,437.15 (Gethard Aff., 8/2/10,

¶ 13). Plaintiff seeks \$85,437.15 in rent and additional rent, plus \$13,368.78 in legal fees and disbursements on its first cause of action against defendant corporate tenant, and \$31,980.42 in rent and additional rent and \$13,368.78 in legal fees and disbursements against defendant guarantor on its second cause of action.

In their answer, defendants assert six affirmative defenses and a counterclaim: 1) the Court lacks personal jurisdiction over defendant guarantor because he was not served; 2) the complaint fails to state a cause of action; 3) breach of implied covenant of good faith and fair dealing; 4) failure to credit defendants with their lease security deposit in the amount of \$35,000; 5) unclean hands; and 6) unjust enrichment; and a counterclaim to recover its security deposit in the amount of \$35,000.

Discussion

As for the first affirmative defense, that defendant Mehmet Ulu was not served, it is unavailing. The principal is well established that a proper affidavit of service constitutes prima facie evidence of proper service which can only be sufficiently challenged by a sworn non-conclusory denial of service (NYCTL 1998-1 Trust v Rabinowitz, 7 AD3d 459 [1st Dept 2004]). "Mere denials of receipt are insufficient to rebut the presumption of proper service created by a properly executed affidavit of service". (De La Barrer v Handler, 290 AD2d 476 [2nd Dept 2002]).

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Here, plaintiff proffers a properly executed affidavit of service showing service of the summons and verified complaint upon a person of suitable age and discretion (Moving Papers, Ex. A). Defendant guarantor provides nothing more than a mere denial of receipt. Further, as plaintiff points out, under CPLR 3211(e), defendant guarantor waived this defense by failing to move on that ground within sixty days following service of the answer (Wiebusch v Bethany Memorial Reform Church, 9 AD3d 315 [1st Dept 2004]).

As for the remaining affirmative defenses, the record shows that there is no merit to them. In addition, defendant guarantor's argument that plaintiff secured a new temporary tenant approximately one or two weeks following defendant corporate tenant's vacatur is unfounded. Plaintiff asserts that the premises were occupied in connection with a sample sale on July 8, 9, and 10, 2009, and that plaintiff was not paid rent or a license fee in connection with those three days (Gethard Aff., 10/14/10, ¶ 7). Further, for commercial premises, plaintiff was under no duty to mitigate damages (Sage Realty Corp. v Kenbee Management-New York, Inc., 182 AD2d 480 [1st Dept 1992]).

Regarding defendants' counterclaim for return of its security deposit, the record shows that plaintiff applied the security deposit to the outstanding arrears (Gethard Aff., 8/2/10, ¶ 13).

Based on the foregoing, that branch of plaintiff's motion to dismiss the affirmative defenses and counterclaim is granted, and they are hereby dismissed.

As for that branch of plaintiff's motion for summary judgment, it is granted. Defendants fail to raise a triable issue of fact as to their liability under the lease agreement and the guaranty. Further, this Court finds that plaintiff's calculation of the arrears and brokerage commission due and owing is proper and that defendants fail to raise an issue of fact as to those damages. This Court awards plaintiff summary judgment on its first cause of action in the amount of \$85,437.15, with interest from May 27, 2009, and on its second cause of action in the amount of \$31,980.42, with interest from May 21, 2009.

That branch of plaintiff's motion for legal fees and disbursements is granted to the extent of directing plaintiff to submit on notice to this Court an attorney affirmation setting forth the time expended in this matter and the hourly rate on or before April 25, 2011. Defendants may interpose an objections within thirty (30) days of receipt of plaintiff's attorney affirmation.

Accordingly, it is

ORDERED, that that branch of plaintiff's motion to dismiss the affirmative defenses and counterclaim is granted, and they are hereby dismissed; and it is further

ORDERED, that that branch of plaintiff's motion for summary judgment on its first cause of action against defendant Ulu, Inc. is granted, and plaintiff shall have judgment against it in the amount of \$85,437.15, with interest from May 27, 2009; and it is further

ORDERED that that branch of plaintiff's motion for summary judgment on its second cause of action against defendant Mehmet Ulu is granted, and plaintiff shall have judgment against him in the amount of \$31,980.42, with interest from May 21, 2009; and it is further

ORDERED that that branch of plaintiff's motion for legal fees and disbursements is granted to the extent of directing plaintiff to submit on notice to this Court an attorney affirmation setting forth the time expended in this matter and the hourly rate on or before April 25, 2011. Defendants may interpose an objections within thirty (30) days of receipt of plaintiff's attorney affirmation.

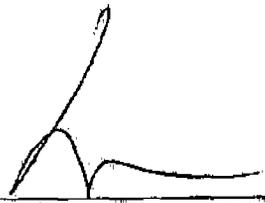
This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/4/11

FILED

MAR 07 2011

NEW YORK
COUNTY CLERK'S OFFICE


HON. JEFFREY K. OING, J.S.C.