

**Empire State Bldg. Co. v National Action Network,
Inc.**

2006 NY Slip Op 30612(U)

February 6, 2006

Supreme Court, New York County

Docket Number: 603988/03

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

EMPIRE STATE BUILDING COMPANY,

Plaintiff,

-against-

NATIONAL ACTION NETWORK, INC.,

Defendant.
_____x

INDEX NO. 603988/2003

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	<u>PAPERS NUMBERED</u>
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 decided in accordance with the accompanying Decision and Order.

FILED

FEB 14 2006

Dated: February 6, 2006

COUNTY CLERK'S OFFICE
NEW YORK

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
EMPIRE STATE BUILDING COMPANY,

Plaintiff,

Index No. 603988/03

-against-

NATIONAL ACTION NETWORK, INC.,

Decision and Order

Defendant.

-----X

KARLA MOSKOWITZ, J.:

This lawsuit involves a landlord, plaintiff Empire State Building Company ("Empire State"), suing its former tenant, National Action Network, Inc. ("National"), for breach of a lease. By motion sequence number 003, plaintiff Empire State moves for an order pursuant to CPLR 3211 to dismiss four affirmative defenses in defendant's answer and for summary judgment pursuant to CPLR 3212.

FACTS

Plaintiff is the landlord of the building located at 350 Fifth Avenue, New York, N.Y. (the "building"). By written lease agreement, dated September 30, 1999 ("the Lease"), plaintiff leased rooms 4815, 4816 and 4817 on the seventh floor of the building (the "premises") to defendant for a term of ten years and one month. The Lease commenced on October 1, 1999 and will expire on October 31, 2009.

Pursuant to Article 46 of the Lease, defendant agreed to pay plaintiff rent as follows: (1) fixed annual rent of \$69,510.00 from October 1, 1999 through September 30, 2002; (2) fixed annual rent of \$73,482.00 from October 1, 2002 to September 30, 2006; (3) fixed annual rent of \$77,454.00 from October 1, 2006 to October 31, 2009. Defendant also agreed to pay additional

charges based on certain adjustments including cost of living charges, electricity charges and real estate tax escalation charges.

Because defendant failed to pay rent and additional charges from October 2001 through the end of June 2002, defendant defaulted under the Lease. On July 2, 2002, plaintiff evicted defendant for non-payment of rent and additional charges and re-entered the premises. In February 2004, plaintiff re-let the premises to a third party, Infomercial Funding Corp. ("IFC").

The Lease provides that, in the event of default, plaintiff may re-enter and re-let the premises. Article 5 of the Lease states that "[defendant] shall pay [plaintiff] any deficiency between the rent hereby reserved and the net amount of any rents collected by [plaintiff] for the remaining terms of this Lease, through such re-letting . . ." (Sullivan Aff., Exh. A). In addition, Article 27(A) provides:

[defendant] further agrees that if [defendant] vacates [the premises] or fails to conduct its business therein, at any time during the term of the Lease, without prior written consent of the [plaintiff], then all rent and additional rent reserved in this Lease from the date of such breach to the expiration date of this Lease shall become immediately due and payable to [plaintiff].

(Sullivan Aff., Exh. A).

In the first cause of action, Empire State seeks \$55,296.91 for rent arrears and other charges from October 2001 through the end of June 2002, including electric charges, real estate taxes, cost of living escalations and a portion of legal fees. In the second cause of action, Empire State seeks \$97,976.00. This represents the unpaid rent from July 2002 through December 2003, less the security deposit of \$12,247.00 that Empire State alleges it applied to National's arrears in March 2003. In the third cause of action, plaintiff seeks rent from January 2004 through the

remainder of the Lease term (October 2009) for \$98,307.00. In the fourth cause of action, plaintiff seeks attorneys fees.

DISCUSSION

Summary judgment is appropriate where there are no disputed issues of fact requiring a trial. The movant has the initial burden of proving the absence of any material issue of fact and entitlement to judgment as a matter of law. The non-moving party must then come forward with sufficient evidence to show there are material factual issues in dispute. (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

Defendant National raises five issues that it claims defeat summary judgment. However, none of these contentions raise any issues of fact to preclude summary judgment.

First, National contends there is an issue of fact about whether it is liable under the Lease. However, National does not dispute that it ceased making rental payments. Rather, National argues *force majeure*, in that following the September 11th attacks, National did not have the use or enjoyment of its office space. National's President, Rev. Al Sharpton, states in his affidavit that National was "denied substantial use of its office space as a result of the events surrounding the 9/11 terrorist attacks" and that "as a result of the continued national state of emergency and the fact that [the Empire State Building], a universal symbol of the New York city skyline, was perceived as a logical target for future terrorist attacks," National was unable to resume full time operations. (Sharpton Aff., ¶ 6).

Force majeure excuses nonperformance due to circumstances beyond the control of the parties because performance would be impossible or impracticable. (*See Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900 [1987]). However, the 9/11 attacks did not render

defendant's performance under the Lease impossible or impracticable. Thomas Sullivan, Vice President of Empire State's managing agent, Helmsley Spear, states in his affidavit that "hundreds of tenants and their guests and many thousands of tourists" entered the building every day, without incident, after September 11, 2001. (Sullivan Aff., ¶ 6). Rather than raising an issue of fact, National's argument is only that it was unable to resume normal business operations after the 9/11 attacks, without a factual underpinning. The premises clearly remained intact and readily accessible to National after the 9/11 attacks. Thus, the attacks did not constitute *force majeure* and defendant's argument does not present an issue of fact. Consequently, as a matter of law, National breached the Lease terms by failing to pay rent and additional charges.

National also argues that Empire State's disposal (without an accounting) of National's office furniture and equipment creates an issue of fact about whether Empire State's acts breached the Lease. However, the Lease deems any of Nationals' remaining property "abandoned" once Empire State re-enters the premises. More specifically, Article 5 of the Lease states:

if [plaintiff] re-enters the premises for *any cause*, or if [defendant] abandons or vacates the premises, or after the expiration of the term of this Lease, any property left in the premises by [defendant] shall be deemed to have been abandoned by [defendant], and [plaintiff] shall have the right to retain or dispose of such property in any manner without any obligation to account therefor to [defendant].

(emphasis added) (Sullivan Aff., Exh. A). Contrary to National's argument that this provision does not apply to evictions, the phrase "for any cause" includes the possibility that plaintiff would re-enter the premises upon default of the Lease or eviction. Therefore, Empire State had the right to dispose of National's possessions in accordance with the terms of the Lease. Thus,

there are no genuine issues of fact as to whether Empire State violated the terms of the Lease by failing to account for disposal of defendant's property.

Next, National disputes the amount of rent it owes Empire State under the Lease in the first cause of action. National contends that Empire State miscalculated the amount of rent due for October 2001 because National paid Empire State \$13,439.68 and Empire State never credited this amount. However, Sullivan's affidavit refers to a "Tenant Detail History" balance sheet to prove that Empire State used defendant's payment of \$13,439.68 to satisfy "all rent and additional rent owed through September 2001." (Sullivan Aff., Exh. C). The "Balance" column reflects that National paid \$13,439.68 in October 2001, but that Empire State applied this amount to rent that National already owed through September 2001. (Sullivan Aff., Exh. C). The "Balance" column also reflects that even after defendant paid \$13,439.68, defendant still had an outstanding balance of \$1,191.42 for October 2001. (Sullivan Aff., Exh. C). Thus, no issue of fact exists as to the amount that National owes Empire State for the period from October 2001 through June 2002, except for that part where plaintiff seeks \$347.50 in "legal fees." (See Sullivan Aff., ¶ 8[iii]).

In addition, National argues there is an issue of fact as to whether Empire State deducted the security deposit from the arrears it seeks in the second cause of action. Sullivan states that the sum includes:

- i) the unpaid monthly installments of fixed rent in the sum of \$6,123.50 per month multiplied by the eighteen (18) month period of July 2002 through December 2003 (which totals \$110,223.00),
less ii) the security deposit in the sum of \$12,247.00 applied to Defendant's arrears in March 2003.

(emphasis added). If plaintiff had not applied the security deposit to the sum it seeks, the claim

would have been for \$110,223.00. Instead, plaintiff seeks \$97,976.00 plus interest for the period of July 2002 through December 2003. (*See* Amended Complaint, ¶ 22[b]). Thus, there are no issues of fact as to whether plaintiff applied the security deposit.

Finally, National contends there is an issue of fact as to whether Empire State credited National with any payments that IFC made under its 2004 lease. Empire State argues that it “has fully credited Defendant [with] all payments made, or due to be paid, by IFC under its Lease with Plaintiff.” (Plaintiff’s Statement Pursuant to Rule 19-a). Sullivan shows that he calculated the rent plaintiff seeks in its third cause of action using the *difference* between the monthly rent under the Lease with National (at the rate of \$6,454.50 per month) and the monthly rent under the new lease with IFC (at the rate of \$5,709.75 per month). (Sullivan Aff. ¶ 15). This calculation already credits National with the amounts that Empire State received, or will receive, from IFC under the 2004 lease. Thus, no genuine issues of material fact remain. Accordingly, the court grants plaintiff’s motion for summary judgment on the first, second and third causes of action.

Because the court grants plaintiff’s motion for summary judgment on the first, second and third causes of action, it need not address plaintiff’s motion to dismiss defendant’s affirmative defenses. Moreover, if the court were to address the affirmative defenses, they would fail, as defendant does not make any legal argument to support them in response to plaintiff’s motion.

Plaintiff contends that pursuant to paragraph six of the Lease, Empire State is entitled to “recover all its costs and expenses incurred in connection with [National’s] breach of the Lease, including but not limited to attorneys’ fees.” (Complaint, ¶ 20). Generally, attorneys’ fees are not recoverable as an item of damages in the absence of contractual or statutory liability. (*Tucker v*

Toia, 64 AD2d 826 [1st Dept 1978]). “When a landlord has a right to recover attorneys’ fees pursuant to a lease provision, the recoverable fees are those that are reasonable.” (*Solow Mgmt Corp. v Tanger*, 19 AD3d 225, 226 [1st Dept 2005]). Although Empire State contends that paragraph six of the Lease provides for attorneys’ fees, it fails to attach a copy of that page containing paragraph six to its moving papers. Thus, there is no contractual basis for the court to award attorneys’ fees. Therefore, the court denies summary judgment on the fourth cause of action for attorneys fees with leave to renew on complete and proper papers. Additionally, that part of plaintiff’s first cause of action that seeks \$347.50 for “legal fees incurred by the Plaintiff prior to the commencement of this action” is also denied. (Sullivan Aff., ¶ 8[iii]).

Accordingly, it is

ORDERED that the motion of plaintiff Empire State Building Company, LLC for summary judgment on the first, second and third causes of action is granted; and it is further

ORDERED that the Clerk is directed to enter Judgment in favor of plaintiff and against defendant in the amounts of \$54,949.41 on the first cause of action, \$97,976.00 on the second cause of action and \$98,307.00 on the third cause of action, together with interest to be computed by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that that part of the motion of plaintiff Empire State Building Company, LLC for summary judgment on the fourth cause of action for attorneys’ fees is denied with leave to renew on complete and proper papers.

Dated: February 6, 2006

ENTER:

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