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

PRESENT: BARBARA R. KAPNICK PART 12

Index Number : 603814/2004

345 PARK AVE. SOUTH PARTNERS

VS

BARBOUNIA NYC, LLC

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 603814/04

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED
JUL 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/07

BARBARA R. KAPNICK J.S.C.
J.S.C.

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

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: PART 12

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345 PARK AVENUE SOUTH PARTNERS LLC,

Plaintiff,

-against-

BARBOUNIA NYC, LLC, MATTHEW JOHNSON, and SHIMON BOKOVZA,

Defendants.

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DECISION/ORDER
Index No. 603814/04
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

In this action, plaintiff 345 Park Avenue South Partners LLC ("345 Park") seeks to recover damages from defendants Barbounia NYC, LLC ("Barbounia"), Matthew Johnson and Shimon Bokovza ("Johnson and Bokovza") for Barbounia's breach of a commercial Lease for portions of the ground floor and basement of plaintiff's building located at 345 Park Avenue. Johnson and Bokovza are sued as guarantors of the Lease.

There is no dispute that plaintiff as landlord and non-party Olympic Entertainment, LLC ("Olympic") as tenant entered into a Lease dated December 19, 2002, pursuant to which plaintiff was to lease to Olympic portions of the ground floor and basement of its building at 345 Park Avenue at a monthly rate of $43,750 with subsequent increases as set forth in the Lease. Defendants Johnson and Bokovza simultaneously signed a Guaranty of Lease. Olympic was also obligated to pay additional rent, late charges and attorneys' fees incurred in the enforcement of the Lease.

Plaintiff and Olympic then entered into a First Amendment of the Lease on July 24, 2003 and a Second Amendment to the Lease on November 25, 2003. On that same day, Olympic also entered into an Assignment and Assumption of the Lease with Barbounia pursuant to which Barbounia assumed "all right, title and interest of the Assignor [Olympic] under [the] Lease" as amended.

Defendants Johnson and Bokovza executed another Guaranty of Lease dated November 25, 2003 in connection with the execution of the Second Amended Lease and the Assignment and Assumption of Agreement of Lease, whereby Johnson and Bokovza became Barbounia's guarantors upon Barbounia's assumption of Olympic's Lease.

Barbounia then took possession of the space.

By letter dated May 26, 2004, Barbounia gave notice of its intent to vacate the space (i.e., the Vacation Notice) pursuant to Section 2.1(a) of the Guaranty and vacated in August 2004. Plaintiff claims that rent pursuant to the Lease for October 2003 and February, June, July, August, September and October 2004 was left unpaid.

Plaintiff now moves for an order:

(1) granting summary judgment in its favor in the amount of $99,226.37 for rent and additional rent, plus late charges pursuant to the Lease in the amount of $2,976.79, plus interest at the Lease

rate of 24% per annum from the date each month's rent became due through the date of entry of judgment and attorneys' fees;

(2) striking defendants' answer for refusing to respond to plaintiffs' First Notice for Discovery and Inspection;

(3) alternatively, prohibiting defendants from offering evidence at the trial of this matter for refusing to respond to plaintiff's First Notice for Discovery and Inspection.

Defendants oppose the motion and cross-move for summary judgment dismissing all of plaintiff's claims against the individual defendants Johnson and Bokovza.

Defendants argue that summary judgment is precluded on plaintiff's claims because genuine issues of material fact exist as to whether plaintiff first breached the lease agreement, thereby discharging Barbounia's obligations thereunder.

Specifically, defendants contend that plaintiff acted in bad faith by unreasonably failing and refusing to sign various documents which were required to be filed with the Department of Buildings in order for certain alteration work to proceed to convert the space to a restaurant, and otherwise prevented Barbounia from completing its construction, all in violation of Section 6.1(A) of the Lease, which provides in relevant part that "[t]enant shall not make or permit to be made any Alterations

without Landlord's prior written consent, which consent shall not be unreasonably withheld or delayed,... (underlining supplied)."

Plaintiff, however, argues that a commercial landlord's breach of a covenant in its lease is a breach independent of a tenant's covenant to pay rent.

> A tenant's duty to continue to pay rent is not suspended, even if the landlord breaches its obligations under the lease, unless there is an express provision in the lease declaring the circumstances under which the tenant may withhold his rent (citations omitted).

Westchester County Industrial Development Agency v. Morris Industrial Builders, 278 A.D.2d 232 (2nd Dep't 2000); lv to app. dism. 96 N.Y.2d 792 (2001).

Accordingly, breach by a landlord of particular covenants - including covenants to approve building plans - is not a defense to an action for rent by the landlord against the tenant, and does not excuse the tenant from its obligation to pay rent. 56-70 58th Street Holding Corp. v. Fedders-Quigan Corp., 5 N.Y.2d 557, 563 (1959).

Further, pursuant to Section 40.5 of the Lease, even if the Landlord is determined to have unreasonably withheld or delayed any consent or approval requested by Tenant, the Tenant agreed that "its sole remedy shall be an action or proceeding to enforce any

related provision or for specific performance, injunction or declaratory judgment." Thus, even if plaintiff did first breach the lease, Barbounia was not excused from its obligation to pay rent.

Defendants further argue that summary judgment in favor of plaintiff is precluded because plaintiff's breach of the Lease was no mere breach, but rather frustrated the very purpose of the Lease, which was to redesign and construct the leased space to be used as a restaurant, thereby discharging Barbounia's obligation to pay rent. In support of this argument, defendants rely on Kipsborough Realty Corp. v. Goldbetter, 81 Misc.2d 1054 (Civil Ct., N.Y. Co. 1975); 2814 Food Corp. v. Hub Bar Building Corp., 59 Misc.2d 80 (Sup. Ct., N.Y. Co. 1969); and 119 Fifth Avenue, Inc. v. Taiyo Trading Co., Inc., 190 Misc. 123 (Sup. Ct., N.Y. Co. 1947). Each of these cases supports the proposition that when a landlord's breach frustrates the purpose of the lease, the tenant's duty to pay rent under the lease is discharged. However, these cases are distinguishable from the case at bar since none of the leases in those three cases contained a clause similar to Section 40.5, which limits the tenant's remedy upon plaintiff's breach to specific performance, injunction or declaratory judgment.

Defendants next argue that summary judgment in favor of plaintiff is precluded because there are material issues of fact concerning whether plaintiff has sustained any damages as a result of Barbounia's alleged breach. Defendants first argue that prior to

Barbounia's notice to vacate the premises, plaintiff had already negotiated another lease with Bank of America for the space for either the same or a greater amount of rent than that required from Barbounia. However, defendants contend that discovery has not yet taken place and that the documents and information necessary to establish this fact are in plaintiff's sole possession and control.

Defendants additionally argue that given credit for rent abatements in the first and second amended leases and additional written agreements, the total amount that could be due to plaintiff would be $21,875 after the application of Barbounia's security, rather than the $99,226.37 sought by plaintiff.

None of defendant's arguments concerning damages acts as a defense to plaintiff's claim. Pursuant to CPLR § 3212(c), where "the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, ... the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper." "If on the assessment of damages it turns out that the plaintiff is unable to prove any damages, the complaint can still be dismissed..." Northway Mall Associates v. Bernlee Realty Corp., 90 A.D.2d 739 (1st Dep't 1982).

Finally, defendants argue that the individual defendants, Johnson and Bokovza, are entitled to summary judgment dismissing plaintiff's claims against them since, according to Section 2.1(a) of their guaranties, they are only liable for the Tenant's obligation for rent accruing under the Lease "with respect to the period prior to the date ("the Liability Date") which is the later to occur of (A) the date which is 90 days after the date Tenant delivers to Landlord notice (the "Vacation Notice") that Tenant intends to vacate the Premises and surrender possession of the Premises to Landlord, or (B) the Vacation Date..." Thus, the individual defendants claim that they would only be liable for rent through August 2004, which is 90 days from the Vacation Date, in the total amount of $153,125.00 after the agreed upon abatements. They further argue that after applying the security deposit in the amount of $218,750.00 plaintiff would be left with a surplus of $65,625.00.

However, pursuant to Section 2.1(b) of the Guaranty, plaintiff is not required to resort to Barnounia's security deposit at all before proceeding on the Guaranty:

> Guarantor further agrees that this Guaranty constitutes an absolute, unconditional, present and continuing guarantee and waives any right to require that any resort be had by Landlord to (i) Landlord's rights against any other person, including Tenant, or (ii) any other right or remedy available to Landlord by contract, applicable law or otherwise. It is the intent of this Guaranty that Landlord shall have the right to resort to Guarantor without making any demand upon Tenant.

Even if plaintiff was required to apply Barbounia's security to the debt, plaintiff is entitled to first apply the security deposit to the rents which last became due after the Vacation Date and were, therefore, arguably, not covered by the Guaranty. There is no requirement that the security be applied in the manner most beneficial to the guarantors. See, Weiner v. Tae Han, 291 A.D.2d 297 (1st Dep't 2002).

For the reasons stated above, plaintiff is entitled to summary judgment on the issue of liability against all of the defendants. The other portions of plaintiff's motion are denied, as is defendants' cross-motion for summary judgment dismissing all of plaintiff's claims against defendants Johnson and Bokovza.

Counsel are directed to appear for a conference in IA Part 12, 60 Centre Street, Room 341 on August 8, 2007 at 10:00 a.m. to schedule any discovery necessary before this case is sent out for a hearing on damages.

This constitutes the decision and order of this Court.

FILED
JUL 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 9, 2007

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.