[*1] E1 10-1-07 ae

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

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 117157/2006

195 BROADWAY, LLC

VS

THINKPATH INC.

Sequence Number : 001

DISMISS DEFENSE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for dismiss aff. defenses & for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits Supplemental aff	4 5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion by plaintiff to dismiss defendant's affirmative defenses & for summary judgment is granted in accordance with the attached memorandum decision. (issue of damages referred to Sp. Referee)

FILED
OCT 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/26/07

_____ 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: PART 36

----------X

195 BROADWAY, LLC,

Plaintiff,

-against-

Index № 117157/06

THINKPATH, INC.,

Motion Seq 001

Defendant.

----------X

DORIS LING-COHAN, J.:

This is a motion by plaintiff 195 Broadway, LLC (195 Broadway) for an order, pursuant to CPLR 3211 (a) (7) and 3211 (b), dismissing the affirmative defenses of defendant Thinkpath, Inc. (Thinkpath), and for an order, pursuant to CPLR 3212, granting summary judgment in plaintiff's favor.

By summons and complaint, dated November 14, 2006, 195 Broadway commenced this action against Thinkpath sounding in breach of contract. 195 Broadway is the owner and landlord of premises located at 195 Broadway (the Building) in the Borough of Manhattan. By written lease agreement (the Lease), dated January 20, 1995, 195 Broadway's predecessor in interest, 195 Property Company (195 Property) leased certain space on the 20th floor of the Building to an entity known as ObjectArts, Inc. (ObjectArts). By first amendment of lease, dated July 23, 1996, the leasing parties agreed that ObjectArts would vacate the space on the 20th floor and relocate to the 18th floor, effective as of August 15, 1996. By letter, dated February 7, 2001, ObjectArts provided written notification to 195 Property that, as of January 1; 2001, it had changed its name to "Thinkpath, Inc.," and asked that the records be marked to reflect this change. It is undisputed that "Thinkpath, Inc." was the entity leasing the space as of January 1, 2001.

It is also undisputed that 195 Broadway purchased the Building from 195 Property in or about March 2005, and that the Lease for the subject premises expired, by its own terms, on August 31, 2006. On or about June 30, 2006, the then-current occupants of the premises, non-

party Thinkpath Training, LLC (Thinkpath Training), vacated the premises.

195 Broadway commenced this action against Thinkpath in November 2006 to recover rent and other related fees and expenses which, according to 195 Broadway, had not been paid for the period of October 2005 through August 2006. The complaint consists of seven causes of action which itemize, or breakdown into the separate causes of action, the amounts claimed to be due for that period of time. The first cause of action demands payment of rent totaling $258,587.12. The second cause of action demands payment for operating expenses associated with the use and occupancy of the premises, totaling $63,853.47. The third cause of action demands payment for real estate taxes totaling $41.58. The fourth cause of action demands payment for water charges totaling $477.40. The fifth cause of action demands payment for electricity charges totaling $13,502.69. The sixth cause of action alleges that, pursuant to Article 30, section .01 (b) (ii) of the Lease, defendant is responsible for the payment of interest in the event that it is more than 10 days late in the payment of rent, with interest being calculated at the greater of 1.25% or 2% over the prime interest rate, and that based upon the defendant's failure to timely pay rent during the above period, plaintiff demands payment of interest in the amount of $21,277.51. In its seventh cause of action, plaintiff seeks attorneys' fees, expenses and disbursements associated with the prosecution of this action, totaling not less than $20,000.00.

Issue was joined by service of defendant's answer on or about January 10, 2007. Defendant's answer asserts the following affirmative defenses: (1) plaintiff failed to state a cause of action upon which relief may be granted; (2) plaintiff failed to include a necessary party; (3) the claims are barred by laches, estoppel, waiver, ratification, and lack of good faith; (4) plaintiff failed to mitigate its purported damages; (5) to the extent that plaintiff suffered any damages, those damages are not attributable to defendant; and (6) the Lease expressly provides that the instant matter should be resolved by arbitration. Plaintiff responded by service of the instant

motion for an order dismissing the affirmative defenses and for an order granting summary judgment in plaintiff's favor.

Thinkpath opposes the motion based on a lack of discovery. The opposition papers attach the affidavit of Declan French (French), Thinkpath's chairman and chief executive officer, plus a series of exhibits which include a statement (invoice) reflecting Thinkpath's most recent rent payment, copies of two rent checks, and a copy of an agreement between Thinkpath Training and 195 Property. Thinkpath contends that it has had neither an opportunity to review plaintiff's documents, nor an opportunity to conduct discovery concerning possible offsets to plaintiff's claims for overdue rent and other costs and expenses.

195 Broadway's reply to defendant's opposition papers reiterates the arguments for the dismissal of Thinkpath's affirmative defenses, and takes issue with the adequacy of French's affidavit. Specifically, plaintiff asserts that the affidavit is defective because it was taken outside of New York State and does not contain a certification or a stamp of a notary public.

However, contrary to these assertions, French's affidavit meets the statutory mandates set forth in New York's CPLR 2309 and Real Property Law (RPL) § 298, and an additional certificate is not required. CPLR 2309 (c) states that "[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation." RPL § 298 provides that "[t]he acknowledgment or proof, within this state, of a conveyance of real property situated in this state may be made: (1) At any place within the state, before . . . (d) a notary public." Inasmuch as the stamp of a notary public is sufficient for the recording of a deed, no more is mandated with respect to defendant's affidavit; upon examination of the affidavit, it is clear that French did have his signature properly notarized.

French's affidavit contains the stamp of a notary public which states that it was sworn to on the 23rd day of April 2007 before John Wolfgang Joseph Pazulia, notary public, in Ontario, Canada. Accordingly, plaintiff's stated objection to the affidavit is meritless. Moreover, subsequent to the filing of the initial affidavit by French, an affidavit was submitted which was signed and notarized in New York.

Turning to the portion of plaintiff's motion which seeks an order dismissing the first affirmative defense, the First Department has long recognized that the defense of failure to state a cause of action is deemed to be harmless surplusage and the assertion of it "in an answer should not be subject to a motion to strike or provide a basis to test sufficiency of the complaint" (Riland v Frederick S. Todman & Co., 56 AD2d 350, 352 - 353 [1st Dept 1977].

Plaintiff next seeks an order dismissing the second affirmative defense, namely, plaintiff's failure to include a necessary party, Thinkpath Training. According to defendant, Thinkpath Training is a necessary party because 195 Property knew that Thinkpath Training was occupying the space on the 18th floor and treated Thinkpath Training as its tenant. Therefore, defendant argues, plaintiff should be seeking the unpaid balance from Thinkpath Training, and points out that when monthly rent was delinquent during the time that Thinkpath Training occupied the subject premises, the landlord entered into a written settlement with Thinkpath Training with respect to the outstanding rent, rather than with Thinkpath. However, 195 Broadway maintains that, regardless of which entity was occupying the rented space, Thinkpath was a party to the Lease with specific obligations to plaintiff, including the obligation to pay rent and other related expenses. Furthermore, 195 Broadway contends that since Thinkpath Training was not a party (tenant) to the Lease, it will not be affected by a judgment in this action, and is not a necessary party to this action.

Pursuant to CPLR 1001 (a): "[p]ersons who ought to be parties if complete relief is to be

accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Despite defendant's assertion to the contrary, plaintiff denies being notified that Thinkpath Training was occupying the premises. Moreover, plaintiff asserts that Thinkpath failed to obtain the landlord's written consent before allowing Thinkpath Training to use or occupy the space, and there was no assignment of the lease to Thinkpath Training. Section 9.01 of the Lease provides, in relevant part:

> [t]enant, for itself, its heirs, distributes, executors, administrators, administrators, legal representatives, successors and assigns, expressly covenants that it shall not assign, mortgage or encumber this agreement, nor underlet, nor suffer, nor permit the Demised Premises or any part thereof to be used or occupied by others, without the prior written consent of Landlord in each instance.

Plaintiff also points out that, even if there had been compliance with section 9.01, and even if rent had been accepted from another entity [Thinkpath Training], such acceptance would not alter the express terms of the Lease under which defendant would, nevertheless, remain liable to plaintiff. Section 9.12 of the Lease specifically states:

> [a]ny assignment or transfer, whether made with Landlord's consent pursuant to Section 9.01 or without Landlord's consent pursuant to Section 9.11, shall be made only if, and shall not be effective until, the assignee shall execute, acknowledge and deliver to Landlord an agreement in form and substance satisfactory to Landlord whereby the assignee shall assume the obligations of this lease on the part of the Tenant to be performed or observed and whereby the assignee shall agree that the provisions in Section 9.01 shall, notwithstanding such assignment or transfer, continue to be binding upon it in respect of all further assignments and transfers. Original named Tenant covenants that, notwithstanding any assignment or transfer, whether or not in violation of the provisions of this lease, and notwithstanding the acceptance of fixed rent and/or additional rent by Landlord from an assignee, transferee, or any other party the original named Tenant shall remain fully liable for the payment of the fixed rent and additional rent and for the other obligations of this lease on the part of Tenant to be performed or observed.

Defendant fails to rebut or refute plaintiff's assertions with evidence that prior written consent had been obtained, or that any sort of assignment or transfer had been made in

accordance with the terms of the Lease. The clear, unequivocal terms of the Lease confirm plaintiff's contention that Thinkpath Training is not a necessary party to this action as it was neither a signatory to the Lease, nor the original tenant, nor a successor-in-interest pursuant to the terms of the Lease. Without evidence tending to show that Thinkpath Training is an interested party whose rights or interests could be adversely affected by the resolution of this contract dispute (see Matter of Martin v Ronan, 47 NY2d 486, 490 [1979]), the second affirmative defense must be dismissed.

The third affirmative defense asserts that the claims are barred by laches, estoppel, waiver, ratification, and lack of good faith. According to defendant, plaintiff should be estopped from denying that Thinkpath Training was its tenant, since, without discovery, it is impossible to determine whether plaintiff knew, at the time that it purchased the Building, that Thinkpath Training had taken over the Lease. Defendant also contends that plaintiff should be estopped from denying that Thinkpath Training was its tenant because plaintiff accepted rent from Thinkpath Training. To this end, Thinkpath submits a copy of two rent checks which 195 Property received, accepted, and deposited without objection from Thinkpath Training, as well as a copy of an agreement between Thinkpath Training and 195 Property, dated May 13, 2005, which identifies Thinkpath Training as "Tenant" and which states that Thinkpath Training acknowledges that "it is the legal successor-in-interest to Thinkpath, Inc. and is justly indebted to Landlord under the Lease in the amount of $96,599.37 (the "Debt")." However, defendant's attempt to be considered a successor-in-interest, and to claim responsibility for the subject rent does not alter the express terms of the Lease which, as stated above, holds Thinkpath, as the original, named tenant, fully liable for the payment of the rent and for other financial obligations under the Lease. Defendant's third affirmative defense is therefore dismissed.

The fourth affirmative defense states that plaintiff, as the non-breaching party, had an

obligation to mitigate its purported damages in this breach of lease/contract action and that it failed to do so. While a duty to mitigate damages is the general rule in breach of contract actions, no such duty exists in circumstances where the contract at issue is a written lease (Clark Oil Trading Co. v Aron & Co., 256 AD2d 196, 198 [1st Dept 1998], lv dismissed 93 NY2d 953 [1999]).

> [F]or, unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property. Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages

(Holy Props. v Cole Prods., 87 NY2d 130, 133 [1995] [internal citations omitted]).

There is no dispute that the premises were abandoned prior to the expiration of the Lease. Under these circumstances, the landlord had the following three options:

> (1) it could do nothing and collect the full rent due under the lease, (2) it could accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the tenant's benefit. If the landlord relets the premises to the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and reletting and then to pay the tenant's rent obligation. Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease

(Holy Props. at 134 [internal citations omitted]). 195 Broadway, apparently, followed option number one, and defendant's reliance on the fourth affirmative defense is misplaced as plaintiff had no obligation to mitigate its damages; thus, the fourth affirmative defense is dismissed.

To the extent that the fifth affirmative defense seeks to blame plaintiff for any damages it may have sustained as a result of Thinkpath or Thinkpath Training's actions or inactions, the defense is duplicative of its fourth affirmative defense, and for the reasons stated above, it is similarly dismissed.

As its sixth affirmative defense, Thinkpath asserts that the Lease mandates resolution of

the dispute through arbitration. 195 Broadway disagrees, and asserts that a correct reading of the Lease reveals that arbitration is optional, not mandatory. "[T]he rule is clear that unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute, a party cannot be compelled to forego the right to seek judicial relief and instead submit to arbitration" (Bowmer v Bowmer, 50 NY2d 288, 293-94 [1980]). Article 34, subsection 34.01 of the Lease provides, in relevant part: "[e]ither party may request arbitration of any matter in dispute wherein arbitration is expressly provided in this lease as the appropriate remedy." Although the contracting parties apparently agreed to offer arbitration as a preferred forum for resolution, the language of the Lease fails to provide that arbitration is mandatory; nor does the language of the lease "expressly" provide for arbitration. Accordingly, defendant's sixth affirmative defense is dismissed.

In considering that portion of plaintiff's motion which seeks summary judgment, this Court has examined the record to determine whether plaintiff has established its prima facie case and whether a genuine issue of material fact exists (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067 [1979]). The probative evidence reveals that Thinkpath, not Thinkpath Training, is the tenant named in the Lease, and that the Lease was breached when payment was not made in accordance with the terms clearly stated in the Lease.

What is abundantly clear from the parties' submissions is that Thinkpath's description of Thinkpath Training as a wholly unrelated business entity, which operates in an entirely different industry, is disingenuous at best. Among the documents attached to the pleadings is a copy of Thinkpath's "Interim Consolidated Financial Statements as of September 30, 2006" which states, under the section entitled Summary of Significant Accounting Policies, at subsection "(b) . . . the Company [Thinkpath] owns 100% . . . of the following companies which are currently inactive: .

. . Thinkpath Training Inc. (formerly ObjectArts Inc.)." The nexus between Thinkpath and Thinkpath Training is not simply, as stated by defendant, a similarity in their corporate names or the fact that Thinkpath's president, Declan French, is the father of Thinkpath Training's president, Michele French. Rather, as revealed by the annexed financial documents, Thinkpath Training is a wholly owned subsidiary of Thinkpath, and Thinkpath's attempt to avoid responsibility under the Lease, by attributing liability to Thinkpath Training, is unavailing.

As a matter of law, 195 Broadway has made a prima facie showing of entitlement to judgment (CPLR 3212 [b]) on the issue of liability, and in response, Thinkpath has failed to demonstrate the existence of a triable issue of fact with respect to its defenses, denials, and unsupported assertions (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Thinkpath failed to substantiate its claim that discovery might yield material facts which would warrant the denial of summary judgment. Its claim for needed discovery amounts to nothing more than the mere hope of uncovering some evidence of a defense to plaintiff's showing of liability (see, Jefferies v New York City Hous. Auth., 8 AD3d 178, 179 [1st Dept 2004]). However, discovery issues which relate to the proper assessment of damages are reserved for determination by the Special Referee to whom this matter will be assigned.

Accordingly, it is

ORDERED that the motion by plaintiff 195 Broadway, LLC for an order dismissing the affirmative defenses is granted to the extent that the second, third, fourth, fifth, and sixth affirmative defenses are dismissed; and it is further

ORDERED that the motion by plaintiff 195 Broadway, LLC for an order granting summary judgment on the complaint is granted as to liability; and it is further

ORDERED that the issue of damages is referred to a Special Referee to hear and report

with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that *within 30 days of entry*, plaintiff shall serve a copy of this order with notice of entry upon defendant and upon the Clerk of the Judicial Support Office to arrange a calendar date for the reference to a Special Referee; a note of issue shall be filed, if appropriate; failure to follow such directives shall be deemed an abandonment of the claim, and the case dismissed; it is further

ORDERED that **this matter is scheduled for January 10, 2008, at 10 o'clock a.m., to check status and ensure compliance with the terms of this order**.

Dated: 9/26/07

Hon. Doris Ling-Cohan, J.S.C.

G:\Supreme Court\Summary Judgment\195 Broadway.thinkpath.wpd