

Tanenbaum v Panzik

2008 NY Slip Op 31035(U)

April 2, 2008

Supreme Court, Nassau County

Docket Number: 8887-06/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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**JOSEPH TANENBAUM and PAT PESCATORE,
d/b/a LANDOME ASSOCIATES,**

TRIAL TERM PART: 48

Plaintiffs,

-against-

INDEX NO.: 008887/06

**MOTION DATE: 1-14-08
SUBMIT DATE: 3-19-08
SEQ. NUMBER - 001**

**STEVEN PANZIK d/b/a POWERHOUSE
PILATES,**

**MOTION DATE: 2-6-08
SUBMIT DATE: 3-19-08
SEQ. NUMBER - 002**

Defendants.

-----X

The following papers have been read on this motion:

- Notice of Motion, dated 12-27-07.....1**
- Memorandum of Law, dated 12-17-07.....2**
- Notice of Cross Motion, dated 2-4-08.....3**
- Affirmation in Opposition, dated 2-22-08.....4**
- Reply Affirmation, dated 3-17-08.....5**

Defendant's motion for summary judgment dismissing the complaint pursuant to CPLR §3212 is granted and the complaint is dismissed. Plaintiff's motion for summary judgment on its complaint is denied. To the extent that defendant's motion seeks summary judgment on its counter-claim for a return of defendant's security deposit, it is denied and the case shall continue as an action by defendant against plaintiff for a return of defendant's security deposit of \$18,750.00.

Plaintiff, as landlord and defendant as tenant entered into a two year commercial lease of street level space in plaintiff's building for the operation by defendant of a health club and gym. Defendant was also given the right to obtain municipal approval for use of the basement of the building for the same purpose and if successful, within a six month period, the parties would enter into a new 10 year lease for the first floor space and the basement. This approval was not obtained. However, several months before the scheduled lease termination, defendant's attorney sought to discuss with plaintiff's attorney the notion of extending this arrangement beyond the scheduled April 22, 2005 expiration date. Although these negotiations did not result in a new agreement when the scheduled expiration date arrived, defendant continued to pay and plaintiff continued to accept the same monthly rent. On or about November 30, 2005, with still no new agreement, defendant moved out and gave up the keys.

Plaintiff initiated this action to recover rent computed at triple the monthly rent set forth in the lease and previously accepted, relying on a paragraph of the lease which states in substance that if at the expiration date of the lease defendant does not surrender the leased premises, defendant is required to pay as liquidated damages for each month during which defendant holds over triple the rent. The provision is quoted as follows:

“(2) Tenant therefore agrees that if possession of the premises is not surrendered to owner upon the expiration date or sooner termination of the lease, in addition to any other rights or remedies owner may have hereunder or at law, tenant shall pay to owner, as liquidated damages, for each month and for each portion of any month during which tenant holds over in the premises after the expiration date or sooner termination of this lease, a sum equal to three times the aggregate of that portion of the base annual rent and additional rent that was payable under this lease during the last month of the term.”

Defendant contends, without disagreement, that except for the amount that would be due by reason of the tripling of rent, it does not owe anything further and that as to the tripled rent, plaintiff should be denied recovery thereof as it constitutes not liquidated damages but an unenforceable penalty. Plaintiff disagrees. Neither party addresses the legal effect, if any, of the payment and acceptance of rent following the lease expiration date.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief (*Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993)).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Ciccione v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for

summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. See *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

Here, the defendant has made a *prima facie* showing of entitlement to summary judgment dismissing plaintiff's claim, and plaintiff has failed to make a *prima facie* showing of entitlement to relief. Summary judgment thus is granted to defendant dismissing plaintiff's claim. However, defendant has not made a *prima facie* showing of entitlement to relief with respect to its counterclaim for the return of its security deposit. The vague and conclusory statement that the leased premises were in good condition when defendant vacated does not demonstrate the absence of an issue of fact, and defendant's failure to allege that it properly terminated its tenancy are fatal to defendant's request for summary judgment regarding the security deposit. Hence, it is not even necessary to consider plaintiff's papers in opposition to that portion of defendant's motion. *Warrington v. Ryder Truck Rental, Inc.*,

35 AD3d 455 (2d Dept. 2006).

Whether a contractual provision constitutes an enforceable liquidation of damages or an unenforceable penalty is a question of law to be determined by reference to the nature of the agreement and relevant circumstances, and the burden is on the challenger to demonstrate that the damages were readily ascertainable at the time or that the liquidated damages are conspicuously disproportionate to the foreseeable losses. *Bates Advertising USA, Inc., v. 498 Seventh, LLC*, 7 NY3d 115, 120 (2006).

The Court agrees that here the quoted provision is an unenforceable penalty which does not provide just compensation to plaintiff as an injured contracting party. *Pyramid Centres and Company, Ltd, v. Kinney Shoe Corporation*, 244 AD2d 625 (3rd Dept. 1997). Among the factors considered here are: the short duration of the lease, only two years; the absence of any indication that the rent payable was less than market value for those two years; the lack of evidence of extensive alterations; the acceptance of rent at the existing rate; the percentage of purported increase (*i.e.*, triple); the lack of any evidence that a replacement tenant was denied possession by reason of the holdover; the retroactive nature of the request following the cessation of negotiations; and the illogic of requiring the defendant to have removed from the premises while at the same time discussing renewal and expansion of the leased premises, *i.e.*, the plaintiff did not expect vactur at the end of the lease term. To enforce the provision in the manner requested would require the defendant to choose between moving out or paying the triple rent while negotiating for a renewal, and giving the plaintiff landlord the option of collecting triple rent while refusing to renew. *Cf Truck Rent-A-Center, Inc., v. Puritan Farms 2nd Inc.*, 41 NY2d 420 (1977); *Thirty Third Equities*

Company, LLC v. Americo Group, Inc., 294 AD2d 222 (1st Dept. 2002).

Courts should hesitate to interfere with agreements of parties in the absence of some element of fraud, exploitive overreaching or unconscionable conduct to exploit a technical breach. *JMD Holding Corp., v. Congress Financial Corp.*, 4 NY3d 373, 380 (2005). However, judicial intervention is justified here because in the context of this case, the damage clause, as invoked, does give the plaintiff an unfair overreaching advantage. The plaintiff was in a position to opt, in effect, for a new lease or the triple rent, while at the same time pocketing the bargained for contract rent. This meant that the defendant was confronted with the choice of moving out while negotiating its new lease or exposure to triple rent if renewal efforts were unsuccessful. No contract could fairly be said to express such an absurd result as constituting the expectation of the parties.

Rather, by payment and acceptance of rent during the period following the scheduled expiration date of the lease the plaintiff and defendant created a new month to month tenancy which replaced the expired lease RPL §232-c; *Logan v. Johnson*, 34 AD3d 758 (2d Dept. 2006). *International Business Machines Corp., v. Joseph Stevens & Co., L.P.*, 300 AD2d 222 (1st Dept. 2002).

The Court is aware that it has been held that even where a month to month tenancy is created by a holding over, a landlord plaintiff may nevertheless recover liquidated damages of 150% of the monthly rent. *Elite Gold, Inc. v. TT Jewelry Outlet Corp.*, 31 AD3d 338 (1st Dept. 2006). In that case, however, the defendant tenant had a renewal option with only a 5% increase and the tenant therefore had the option of renewing for an additional two years or the flexibility of remaining in possession on a month to month basis, (with no two year

commitment) albeit at a higher monthly rent. Unlike this case, the issue of whether such a clause was a penalty was not present. This was an arrangement that was fair and balanced, with neither a windfall reward nor a harsh penalty at stake. The tenant was in control of its options and the landlord was the beneficiary of either its bargained for renewal (at a higher rent) or its bargained for (even higher) monthly holdover rent.


A month to month tenancy outside of New York City may be terminated by either the landlord or the tenant upon prior notice to the other of one month. RPL §232-b. Because the record here does not disclose whether such notice was given - and as noted above there is no evidence as to the condition of the leased premises when defendant vacated - defendant has not made a *prima facie* showing of entitlement to the full return of the security deposit. Defendant's claim for the security deposit shall remain, the counterclaim continues and the reply is plaintiff's answer.

All counsel are reminded that they are to appear in DCM on April 17, 2008, for trial.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 2, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
APR 04 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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