

215 W. 91st St. LLC v Liberty House Two, Inc.
2008 NY Slip Op 33178(U)
November 25, 2008
Supreme Court, New York County
Docket Number: 602597/07
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PRESENT: _____

PART 85

Justice

Index Number : 602597/2007
215 WEST 91ST STREET LLC
 VS.
LIBERTY HOUSE TWO
 SEQUENCE NUMBER : 005
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 10/6/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-5
6-9
10-12

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 annexed memorandum decision and order.

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

FILED

NOV 26 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/25/08

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
215 WEST 91ST STREET LLC,

Plaintiff,

Index No.: 602597/07

-against-

DECISION AND ORDER

LIBERTY HOUSE TWO, INC. and
CATHY HAWKINS,

Defendants.

-----x
SOLOMON, J.

FILED
NOV 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

FACTUAL BACKGROUND

Plaintiff landlord moves for summary judgment against former tenant Liberty House Two, Inc. (Liberty House) and the former tenant's shareholder and personal guarantor Cathy Hawkins (Hawkins), seeking rent and additional rent due under a commercial lease. Defendants cross-move for partial summary judgment to have Liberty House's security deposit used as a set-off against the back rent due.

On or about March 26, 2003, plaintiff and Liberty House entered into a ten-year commercial lease, personally guaranteed by Hawkins. Pursuant to the lease, rent was due on the first of each month, with a ten-day grace period. When Liberty House failed to pay rent in a timely manner for July, 2007, plaintiff sent Liberty House a three-day default notice, as provided for in the lease, on July 12, 2007. On July 13, 2007, Liberty House responded with a letter purporting to reject the default notice,

stating that it was in the process of negotiating a surrender of the lease. On July 20, 2007, plaintiff instituted a commercial holdover proceeding in the civil court.

On August 17, 2007, Liberty House sent a notice to plaintiff, pursuant to paragraph 81 of the lease, stating that it intended to surrender the lease and deliver vacant possession back to the landlord by August 31, 2007. According to paragraph 81, commonly known as a "good guy" lease provision, if Liberty House provided the landlord with not less than two months written notice that it was going to surrender possession of the premises, at the termination of that two month period, provided that possession was actually surrendered by that date, the guarantor would be released from her obligations. Liberty House delivered the keys to the subject premises to plaintiff on August 30, 2007.

On September 9, 2007, plaintiff withdrew its holdover petition in the civil court because defendants had delivered possession of the premises. The civil court dismissed the proceeding, without prejudice to plaintiff to institute a plenary action for the rent due, and preserved all defenses for defendants. The instant suit was commenced as the plenary action resulting from the withdrawal of the holdover proceeding.

Prior to the instant motion, plaintiff submitted a similar motion that was found defective by the court because it failed to include copies of the pleadings.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

The court may entertain the instant motion filed by plaintiff despite the fact that its earlier motion was denied for failing to include copies of the pleadings. "The single motion rule (CPLR 3211 [e]) has no application where [movants] promptly refiled their dismissal motion after initial denial on procedural grounds for failure to attach a copy of the amended complaint." *767 Third Avenue LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 (1st Dept 2004).

According to the undisputed facts, the subject lease terminated on July 15, 2007, at the end of the cure period

specified by the notice of default. *Grand Liberty Cooperative, Inc. v Bilhaud*, 126 Misc 2d 961 (1st Dept App Term 1984) (tenancy terminates when default is not cured pursuant to a notice of termination, and a holdover proceeding may commence after that date to regain possession). Once the lease had terminated, the parties were incapable of asserting any rights thereunder. See generally *Bennies Buddies, Inc. v Lazarian Society for Animals of the Congregation Brothers of Saint Lazarus*, 40 AD3d 1330 (3d Dept 2007). Consequently, Hawkins's attempt to limit her liability by sending plaintiff a written notice of surrender on August 17, 2007, after the tenancy had terminated, and after a holdover proceeding was instituted, is ineffective.

Defendants do not contest that they failed to meet the rent obligations mandated under the lease on July 1, 2007, but merely contend that they should not be deemed in default because they were in the process of negotiating a surrender of the premises. However, this statement is self-serving and conclusory, is not supported by any other evidence in admissible form, and is therefore insufficient to defeat a motion for summary judgment. *Bouras v Corsell*, 301 AD2d 426 (1st Dept 2003).

"Once the tenant has abandoned the premises prior to the expiration of the lease, . . . the landlord was within its rights under New York law to do nothing and collect the full rent

due under the lease." *Holy Properties Limited, L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130, 134 (1995). Therefore, plaintiff is entitled to the rent due under the lease even though defendants have vacated the property.

Finally, plaintiff does not oppose the argument proffered as a prayer for relief in defendants' cross-motion that Liberty House's security deposit should be used as an offset against the rent and additional rent due. Based on the foregoing, it hereby is

ORDERED that plaintiff's motion for summary judgment is granted with respect to the liability of defendants; and it is further

ORDERED that the issue of the amount due to plaintiffs is referred to a Special Referee to hear and report with recommendations, except that, in the event of an 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

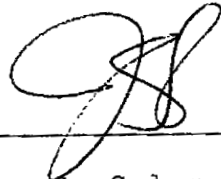
ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that defendants' motion for partial summary judgment is granted to the extent that the security deposit held under the lease is an offset to the sum owed to plaintiff by Liberty House, and otherwise is denied; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Referee Clerk in the Motion Support Office (Room 119) to arrange a date for the reference to a Special Referee.

Dated: November 25, 2008

ENTER:



Jane S. Solomon, J.S.C.

JANE S. SOLOMON

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