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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 30

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AIMCO COLUMBUS AVE., LLC.,

Index No.: 102718/06

Plaintiff,

DECISION AND ORDER

-against-

BIVOU RESTAURANT CORP. d/b/a
CAPRICE CAFÉ and VASILIOS KATEHIS,

Defendants.

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SHERRY KLEIN HEITLER, J.

FACTUAL BACKGROUND

This action started as a commercial landlord-tenant non-payment proceeding in the Civil Court. Plaintiff landlord was awarded a default judgment against defendant Bivou Restaurant Corp. (Bivou), granting plaintiff only possession of the premises. Defendant Vasilios Katehis (Katehis), the guarantor of the tenant, alleged improper service of process. After a traverse hearing and appeals, service on Katehis was ruled effective, and a default was entered against him, once again limited only to possession. Plaintiff then instituted this action in Supreme Court, seeking a monetary judgment against Bivou and Katehis for non-payment of rent pursuant to the lease.

Plaintiff moves for summary judgment on nine of its causes of action, and for dismissal of defendants counterclaim for an offset. Defendants have cross-moved for summary judgment.

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).

First Cause of Action Against Bivou for Rent and Additional Rent Due Until the Warrant of Eviction Was Issued.

Bivou stopped paying base rent after October, 2004, and the warrant of eviction was issued at the end of January, 2005. According to the lease, the base rent was $23,565.42, and at the time the warrant was issued three months' rent was due, for a total of $70,696.26.

As part of the Additional Rent, Bivou was responsible for a portion of the real estate taxes, for which it was billed on a monthly basis as part of the rent bill. These taxes were $1,182.69 per month, for a total due at the time the warrant was issued of

$3,548.07.

Also as part of the Additional Rent, Bivou was responsible for a portion of the water bill. According to plaintiff, these amounts were: $1,274.42 (October 13, 2004); $876.54 (November 16, 2004); $619.61 (December 20, 2004); and $453.85 (January 18, 2005).

Based on the foregoing, plaintiff alleges that Bivou owes it a total of $77,468.67, plus statutory interest.

Bivou does not dispute the amount of the base rent claimed, but in its opposition indicates that, pursuant to court order, it paid to the Commissioner of Finance $75,761.37 with respect to this amount, and therefore it should not be responsible to pay this amount again. In positing this argument, Bivou neglects plaintiff's statement in its motion that Bivou has paid to the Commissioner of Finance a total of $126,761.37. However, plaintiff seeks to have these funds distributed to it (Ninth Cause of Action discussed below), and credited to Bivou with respect to this cause of action. Therefore, Bivou's argument is unpersuasive as plaintiff is not seeking to recover twice for the same monies owed. Further, since the earlier proceeding in Civil Court only awarded possession, to recover these sums, plaintiff must seek a judgment in its favor.

Bivou also argues that plaintiff failed to provide evidence of the amount of water charges or real estate taxes it is claiming. However, as part of its motion papers, plaintiff includes a copy of its real estate tax bill for the period in question, and the

amounts allegedly due and owing appeared on each monthly rent statement sent to Bivou by plaintiff, which statements were not challenged by Bivou at the time.

Bivou never offered any defense to the amount of rent due in the underlying civil court non-payment proceeding, and cannot now challenge the amounts claimed. "A default judgment in a summary proceeding for non-payment of rent is conclusive between the parties as to any facts alleged in the petition or affidavit that are required to be alleged as a basis for the proceeding [internal citation omitted]." *The Gallery at Fulton Street, LLC v Wendnew LLC*, 30 AD3d 221, 222 (1st Dept 2006).

Based on the foregoing, plaintiff's motion for summary judgment on its first cause of action is granted.

Second Cause of Action Against Katehis as Guarantor for Rent and Additional Rent Due Until the Warrant of Eviction Was Issued.

Katehis unconditionally and irrevocably signed a guaranty guaranteeing Bivou's performance under the lease, and therefore is liable to plaintiff for the amount of rent and additional rent Bivou owes under the lease. Therefore, plaintiff's motion for summary judgment on its second cause of action in granted.

Third Cause of Action Against Bivou for Use and Occupancy Accrued for February, 2005, Through October, 2005.

Pursuant to ¶52 of the lease, Bivou is obligated to pay use and occupancy at the rate of twice the base rent for all periods in which it remains on the premises as a holdover tenant. Bivou first asserts that it is not required to pay use and occupancy as a "holdover tenant" because the warrant of eviction terminates the landlord-tenant relationship, so Bivou is no longer a "tenant."

As Aimco correctly points out, the term "holdover tenant" is a universally applied term of art used to describe the situation in which a tenant remains in possession after the tenancy has been terminated. *See generally 99 Commercial Street, Inc. v Llewellyn*, 240 AD2d 481 (2d Dept 1997)(action to eject a "holdover tenant"). Further, the term "holdover tenant" is used in the subject lease to describe this precise situation. Consequently, Bivou's first argument is found to be without merit.

Bivou then asserts that the imposition of a rate of use and occupancy at twice the base rent is an improper liquidated damages provision. This assertion is contrary to judicial precedent. In *Thirty-Third Equities Company, LLC v Americo Group, Inc.* (294 AD2d 222 [1st Dept 2002]), the court held that the use and occupancy provision in a commercial lease calling for the use and occupancy to be 250% of the base rent was neither unreasonable nor an impermissible liquidated damages provision. Therefore, the court

finds the use and occupancy provision of the subject lease to be valid and enforceable.

Bivou also contends that, since it vacated the premises on October 3, 2005, it should not have to pay use and occupancy for the entire month. This argument also fails, since the lease calls for payment on the first of each month for the month in question, and so the use and occupancy became due and payable on October 1, 2005, while Bivou was still in possession.

Bivou argues that, because it tendered payment of the base rent as use and occupancy for two months, which plaintiff refused as a partial payment, Bivou is relinquished from its obligation. However, this argument has already been denied in the September 28, 2005, Civil Court decision in this case wherein the court stated that "petitioner's [Aimco's] rejection of tender of payment for use and occupancy does not operate as a forfeiture of its right to such claim."

Lastly, Bivou contends that it should be credited with $49,973.36 that was paid directly to plaintiff. Plaintiff does not argue with this contention. Therefore, taking this credit into account, it is determined that Bivou owes plaintiff $374,204.20 in use and occupancy, plus statutory interest.

Fourth Cause of Action Aqaisnt Katehis as Guarantor for Use and Occupancy Accrued by Bivou for February, 2005 Through October, 2005.

As stated above, Katehis, as guarantor, is liable for Bivou's obligations under the lease. Therefore, Katehis, as guarantor, is liable to plaintiff for use and occupancy in the amount of $374,204.20, plus statutory interest.

Fifth Cause of Action Against Bivou for Liquidated Damages Accrued for the Months Following Plaintiff's Re-Entry into the Subject Premises Through the End of the Lease Term.

Plaintiff is seeking partial summary judgment for the base rent for the period of November, 2005 through July, 2006, when the lease terminated, pursuant to its liquidated damages clause (relying on the lease). This amount totals $222,693.21. Additionally, plaintiff believes that it is entitled to the brokerage fee it incurred in finding a new tenant. In its opposition, Bivou challenges the amount of the brokerage fee alleged as it claims that plaintiff has not provided documentary evidence of such fee.

In its reply papers, plaintiff provided a copy of an invoice from Crubb & Ellis, a real estate firm, showing a balance due of $148,658 for a lease at the location of 199 Columbus Avenue. Plaintiff is entitled to the sum it actually expended on a brokerage fee. However, the document provided to the court does not

show proof of payment.

Accordingly, the court grants plaintiff's motion only to the extent of the amount of the base rent. Plaintiff may raise the matter of the amount due for the brokerage fee at the time of the attorney fee hearing directed below.

It is noted that Bivou argues that plaintiff failed to mitigate damages, but ¶18 of the lease provides that plaintiff is not required to mitigate damages. *See Holy Properties limited, L.P. v Kenneth Cole Productions, Inc.* 208 AD2d 394 (1st Dept 1994)(a commercial landlord is under no duty to mitigate damages).

Sixth Cause of Action Against Katehis as Guarantor for Liquidated Damages.

Katehis argues that, pursuant to the "good guy" clause in his guaranty, he is only obligated for Bivou's liabilities until plaintiff regains possession, and therefore he is not responsible for any liquidated damages accruing after plaintiff re-entered the premises. However, a careful reading of this clause only relieves the guarantor if Bivou executes and delivers to plaintiff a Surrender and Release Agreement, and performs all obligations under the lease through and including the date on which Bivou vacates the property. This is a condition precedent to relieve Katehis of his responsibilities as guarantor, and, as discussed above, Bivou did not execute the Surrender and Release Agreement, nor did it perform all of its lease obligations; hence, the non-payment proceeding.

Consequently, Katehis remains liable for any liquidated damages assessed against Bivou that Bivou does not itself discharge.

Ninth Cause of Action for an Order Directing the Commissioner of Finance to Release to Plaintiff the $126,761.37 Deposited by Bivou During the Underlying Non-Payment Proceeding.

Bivou's argument against this request is that it has counterclaimed for damages that exceed this amount and that the funds should remain intact until its counterclaims are decided. However, in all its other arguments, Bivou has asserted a credit of these funds against the amounts claimed by plaintiff. Further, the funds were deposited by court order for the benefit of plaintiff should plaintiff be found entitled to rent, additional rent, and use and occupancy. The funds were not deposited for any other purpose.

Since the court has found plaintiff to be entitled to rent, additional rent, and use and occupancy, plaintiff's motion with respect to this cause of action is granted.

Tenth Cause of Action Against Bivou for Attorneys' Fees, and Eleventh Cause of Action Against Katehis as Guarantor for Attorneys' Fees.

Bivou and Katehis allege that plaintiff is not entitled to attorneys' fees because it did not ask for attorneys' fees in the underlying summary proceeding, which precludes it from seeking them now (*930 Fifth Avenue Corp. v King*, 42 NY2d 886 [1977]), and

because plaintiff is not the prevailing party. Bivou and Katehis are incorrect on both assertions.

First, according to the Non-Payment Petition, legal fees were included in the sums sought by plaintiff, and so they may be sought in this action.

Second, plaintiff has been found to be entitled to possession of the premises, base rent and additional rent, use and occupancy, and liquidated damages. Consequently, plaintiff, by comparison of what has been achieved in this action, is deemed to be the prevailing party. *See Excelsior 57th Corp. v Winters*, 227 AD2d 146 (1st Dept 1996).

Therefore, based on the foregoing, plaintiff is entitled to reasonable attorneys' fees associated with this action. However, the court is unwilling to set the amount of those fees until a hearing has been held on this matter. Accordingly, by separate order of today's date, the court is sending the issue of the amount of attorney fees due to plaintiff, along with the issue of the amount of the brokerage fee incurred, to a Special Referee to hear and report.

Bivou and Katehis have cross-moved for summary judgment on plaintiff's first, second, third, fourth, sixth, seventh, tenth and eleventh causes of action. Since all of these arguments have been addressed above with the exception of the seventh cause of action, that is the only one that needs to be separately addressed.

The seventh cause of action is against Katehis for use and occupancy under a theory of quantum meruit. Katehis maintains that this cause of action must be dismissed because, although he occupied the premises as the owner of Bivou, he never occupied the premises in his individual capacity, nor as a residence. Katehis provides no legal authority for his position.

In *Eighteen Associates, L.L.C. v Nanjim Leasing Corp.* (257 AD2d 559 [2d Dept 1998]), the court held that a landlord may seek use and occupancy under a theory of quantum meruit against anyone who occupies the landlord's property without authority, regardless of whether there is a lease or privity of contract.

At this point, based on the documents presented, there remains a triable issue of material fact as to whether Katehis personally ever occupied the premises, and so this crossmotion must be denied.

Lastly, Katehis and Bivou claim that there should be a set-off for the security deposit paid to plaintiff's predecessor in interest.

Under the subject lease, Bivou was to provide proof to plaintiff by December 15, 1996, of such security deposit payment. No such proof was forthcoming, and no such proof appears in Bivou's moving papers. Therefore, Bivou's motion for summary judgment on its third counterclaim is denied.

CONCLUSION

It is hereby

ORDERED that plaintiff Aimco Columbus Avenue, LLC's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant Bivou Restaurant Corp. d/b/a Caprice Café, as principal, and against defendant Vasilios Kitehis, as guarantor, on the first, second, third, fourth, fifth, sixth and ninth causes of action in the amounts indicated below, and the motion is denied in all other respects; and it is further

ORDERED and ADJUDGED that plaintiff Aimco Columbus Ave., LLC, is entitled to a judgment against defendants Bivou Restaurant Corp. and Vasilios Katehis, jointly and severally:

(a) on the first and second causes of action, the principal amount of **$77,468.67**, with interest at the legal rate of 9% per annum from December 1, 2004 until entry of judgment, as calculated by the Clerk of the Court;

(b) on the third and fourth causes of action, the principal amount of **$374,204.20**, with interest at the legal rate of 9% per annum from June 15, 2005 until entry of judgment, as calculated by the Clerk of the Court;

(c) on the fifth and sixth causes of action, the principal amount of **$222,693.21**, with interest at the legal rate of 9% per annum from March 15, 2005 until entry of judgment, as calculated by

the Clerk of the Court; and it is further

ORDERED that plaintiff is granted judgment on the ninth cause of action; and it is further

ORDERED and ADJUDGED that the Commissioner of Finance is directed, upon receipt of a certified copy of this order and judgment, to turn over to Aimco Columbus Ave., LLC all funds deposited with the Commissioner of Finance by Bicou Restaurant Corp. d/b/a Caprice Café and/or Vasilios Katehis, totaling **$126,761.37**; and it is further

ORDERED and ADJUDGED that upon such turn-over of funds, the amount so turned-over shall be credited against the amounts owed by defendants to plaintiff pursuant to this order and judgment; and it is further

ORDERED that defendants' cross motion for summary judgment and other relief is denied in its entirety; and it is further

ORDERED that the remaining causes of action, together with plaintiff's request for the recovery of brokerage fees and attorneys' fees, are severed; and it is further

ORDERED that the issue of attorney fees and brokerage fees shall be sent to a Special Referee to hear and report.

This constitutes the decision and order of the court.

Dated: SEPTEMBER 3 , 2008

ENTER:

SHERRY KLEIN HEITLER, J.S.C.