123 Third Partners LLC v B&E 813 Broadway, LLC
2009 NY Slip Op 30872(U)
April 16, 2009
Supreme Court, New York County
Docket Number: 112227/08
Judge: Carol R. Edmead
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SCANNED ON 4/20/2009

[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 112227/2008

123 THIRD PARTNERS LLC

vs.

B&E BROADWAY

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 112227-08

MOTION DATE 3/10/09

MOTION SEQ. NO. #001

MOTION CAL. NO.

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

FILED
APR 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff 123 Third Partners LLC's motion for an order, pursuant to CPLR §3212, granting plaintiff summary judgment in the amount of $66,193.55, plus attorneys' fees and reasonable costs against defendant B&E 813 Broadway, LLC , is granted; and it is further

ORDERED that an assessment of attorneys' fees shall be held on May 11, 2009 at 10:30 a.m., in Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O Ira Gammerman; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 4/16/09

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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123 THIRD PARTNERS LLC,

Plaintiff,

Index No. 11227/08

-against-

DECISION/ORDER

B&E 813 BROADWAY, LLC,

Defendant.

HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
APR 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action, plaintiff 123 Third Partners LLC ("plaintiff") seeks the return of its rent overpayment and security deposit, which is currently being held by defendant B&E 813 Broadway, LLC ("defendant").

Plaintiff now moves for an order, pursuant to CPLR §3212, granting plaintiff summary judgment in the amount of $66,193.55, plus attorneys' fees and reasonable costs.

Plaintiff's Contentions[1]

Plaintiff was the tenant and defendant was the landlord under a lease dated October 23, 2007 ("the Lease") for a portion of the ground floor and basement of a building known as 813 and 815 Broadway, New York, New York (the "Premises"). The Lease was amended on December 31, 2007 (the "Modification Agreement"). Plaintiff contends that, pursuant to the Lease, Plaintiff was required to tender to defendant a security deposit of $54,000. Upon execution of the Lease, plaintiff tendered such payment (the "Security Deposit"). Pursuant to

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[1] Information is taken from plaintiff's motion ("motion"), which comprises an affirmation from plaintiff's attorney Nancy S. Pitkofsky, an affidavit from Andrew Bradfield, a member of plaintiff 123 Third Partners LLC, and plaintiff's Complaint (motion Exh. A).

Paragraph 41 of the Lease, Plaintiff also delivered $27,000 to defendant to be applied to the first month's rent ("First Month's Rent").

Plaintiff contends that it paid $27,000 for the First Month's Rent based on a rent commencement date of December 1, 2007 ("Rent Commencement Date"). However, pursuant to Paragraph 2 of the Modification Agreement, the Rent Commencement Date was changed to March 15, 2008. The lease commencement date ("Lease Commencement Date") was also changed to January 16, 2008. Accordingly, plaintiff argues, plaintiff's payment of $27,000 as applied to March 2008 rent on a pro-rata basis would amount to $14,806.45 for the 17 days of March 2008 that plaintiff was required to pay, and the remaining $12,193.55 would be applied to the April 2008 rent.

Plaintiff further contends that it exercised its right to terminate the Lease, in accordance with the terms of the Lease. On or about January 29, 2008, plaintiff sent defendant a written notice of Plaintiff's intent to terminate the Lease on March 31, 2008, via Federal Express (the "Termination Notice"[2]). Thereafter, having received no response from defendant, Plaintiff delivered possession of the Premises, plaintiff contends (motion, ¶ 21). Plaintiff vacated the Premises and arranged to have Chris Bremner ("Mr. Bremner") surrender the keys to defendant's management office. Mr. Bremner delivered the keys to defendant's management office on March 31, 2008; he received a receipt in return ("Receipt," motion Exh. G), and the Lease was terminated as of March 31, 2008, plaintiff contends (motion, ¶¶ 17, 21-22). As a result, plaintiff was not obligated to pay any rent for April 2008 or thereafter, and it is entitled to a return of the $12,193.55 Rent Overpayment balance, plaintiff contends (motion, ¶ 18).

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[2]Plaintiff also includes copies of the Federal Express receipts.

Plaintiff contends that it was not in default of the Lease when it served defendant with the Termination Notice or when it surrendered possession of the Premises to defendant. In fact, at no time following the execution of the Lease has plaintiff ever been held in default under the terms and conditions of the Lease. However, defendant refused to return the Rent Overpayment and Security Deposit.

Further, on April 15, 2008, plaintiff's counsel wrote a letter to defendant's counsel requesting the return of the Rent Overpayment and Security Deposit ("April 25, 2008 Letter"). However, "nothing was forthcoming." Therefore, plaintiff argues, as defendant has failed to return either the Rent Overpayment or the Security Deposit, defendant has breached its obligations under the Lease (motion, ¶ 28).

Plaintiff further points out that defendant's Answer in response to plaintiff's Complaint contains only a general denial, "without any basis or support whatsoever." By contrast, plaintiff's motion is premised upon documentary evidence and the absence of an issue of fact as apparent in defendant's Verified Answer. Citing caselaw, plaintiff argues that a general denial is insufficient to raise a factual issue on a summary judgment motion. Plaintiff further argues that CPLR § 3015(a) requires a defendant to deny the satisfaction of the condition precedent "specifically and with particularity." Here, defendant has not denied with specificity and particularity the allegations of the Complaint that sets forth Plaintiff's compliance with the conditions precedent to defendant's obligation to return the Rent Overpayment and Security Deposit. Moreover, defendant's Answer consists solely of naked denials. Plaintiff maintains that on these grounds alone, summary judgment is warranted.

Defendant's Opposition[3]

Defendant argues that plaintiff's motion should be denied in its entirely, on the grounds that the action was only recently commenced, and there has been no opportunity for discovery. Moreover, defendant argues, Paragraph 41 of the Lease, upon which plaintiff relies, does not expressly provide for a return of any payment made, but rather releases Tenant of "future obligations" under the Lease, *viz*:

> Tenant shall have a right to terminate this lease on sixty (60) days written notice to Landlord. Upon exercise of said right, Tenant shall be released of *all future obligations* under the Lease provided that upon surrender, Tenant is not in default beyond the expiration of any grace, notice and/or cure, if applicable. (*emphasis added*)

Minimally, as set forth in Paragraph 54 of the Lease relating to the Security Deposit, any return of the security deposit would be at the "end of the term" which is not to occur until October 31, 2009. Consequently, no monies are presently due and owing to Plaintiff, and its motion should be denied.

Plaintiff's Reply

Contrary to defendant's allegation, summary judgment is ripe and warranted, plaintiff argues. Citing caselaw, plaintiff contends that discovery is not needed prior to an award of summary judgment when it is clear that no issue of fact exists. Defendant has not raised one affirmative defense, nor pleaded the denial with specificity. In addition defendant's affidavit in opposition offers no facts to defeat plaintiff's motion, plaintiff maintains.

Defendant's one allegation that the Security Deposit "at a minimum" is returnable at the end of term – to wit, October 31, 2009 – is a misnomer, plaintiff argues. The "Witnesseth"

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[3]Defendant's opposition ("opp.") comprises an affidavit from Benjamin Shaoul, a member of defendant B&E 813 Broadway, LLC.

paragraph of the first page of the Lease states in pertinent part: "for the term of two (2) years (or until such term shall sooner cease and expire as hereinafter provided)." It is undisputed that plaintiff properly exercised its right to terminate the Lease early, has vacated the Premises and has no future obligations to defendant, plaintiff argues. Hence, there is no valid reason for defendant to continue to hold plaintiff's money (reply, ¶ 7).

Analysis

Summary Judgment

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]. Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the

burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Here, plaintiff has submitted admissible evidence supporting summary judgment in its favor. Plaintiff has clearly demonstrated that defendant owes him the Rent Overpayment and Security Deposit. At the same time, defendant has failed to raise an issue of fact as to his liability for the Rent Overpayment and Security Deposit.

Pursuant to the Lease, plaintiff tendered a security deposit of $54,000. Also pursuant to the Lease, plaintiff paid $27,000 for the First Month's Rent. The First Month's Rent originally was based on a Rent Commencement Date of December 1, 2007 (Lease, ¶ 41). However, the Modification Agreement amended the Rent Commencement Date to March 15, 2008 (ModificationAgreement, ¶ 2). Further, the Modification Agreement clearly states that:

> *Notwithstanding anything to the contrary contained herein*, the Rent Commencement Date shall be deemed to be March 15, 2008 and *the check paid by Tenant on the execution of the Lease in the sum of $27,000 shall be applied on a pro-rata basis* for the fixed rent due as of the Rent Commencement Date and for the applicable portion of the month immediately following the month in which the Rent Commencement Date shall occur.
> (Modification Agreement, ¶ 2) (*emphasis added*)

On or about January 29, 2008, plaintiff submitted to defendant notice of its intention to vacate the Premises on March 31, 2008, pursuant to the Lease *(see* Termination Notice). Paragraph 41 of the Lease states in pertinent part:

> Tenant shall have a right to terminate this Lease on sixty (60) days written notice to Landlord. Upon the exercise of said right, Tenant shall be released of all future obligations under the Lease provided that upon surrender, Tenant is not in default beyond the expiration of any grace, notice, and/or cure period if applicable.

According to Paragraph 41 of the Lease, plaintiff's notice to defendant was timely. On March 31, 2008, plaintiff vacated the premises, delivered the keys to defendant's management office and received a receipt in return, dated March 31, 2008 (*see* Receipt). The Lease further provides:

> If Tenant shall fully and faithfully observe and perform all of the terms, covenants and conditions of this Lease, the security, without interest, shall be returned to Tenant after the end of the term of this Lease and the delivery of possession of the Demised Premises to the Landlord within 15 days.
> (Lease, ¶ 54)

Plaintiff provides an affidavit from Mr. Bradfield contending that plaintiff was not in default under the terms of the Lease when it served defendant the Termination Notice; nor was plaintiff in default during any period plaintiff leased the Premises from defendant. Defendant does not contest plaintiff's contentions; nor does defendant provide any evidence to the contrary. Accordingly, by the terms of the Lease and Modification Agreement, defendant owes plaintiff its

$27,000 Security Deposit and $12,193.55 Rent Overpayment for March 2008[4].

Although the action was only recently commenced, CPLR §3211[a] makes clear that "[a]ny party may move for summary judgment in any action, after issue has been joined." Here, issues have been joined. Furthermore, the absence of discovery does not necessarily precludes summary judgment.

> Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just. (CPLR §3212[f]; *see also Global Minerals and Metals Corp. v Holme*, 35 AD3d 93 [1st Dept 2006] [a party opposing summary judgment who is seeking to obtain further discovery must provide a proper evidentiary basis supporting its request for further discovery]).

It is well settled that an argument opposing summary judgment on the grounds of insufficient discovery "is unavailing where the nonmoving party has failed to 'produce some evidence indicating that further discovery will yield material and relevant evidence'" (*Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3d 426, 427 [2d Dept 2008], *citing Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]).

In the instant case, defendant has provided no evidence in its moving papers indicating that further discovery will yield material and relevant evidence. Therefore, defendant's argument lacks merit.

Additionally, defendant's argument that Paragraph 41 of the Lease does not expressly provide for a return of any payment made but rather only releases Tenant of "future obligations"

[4]Plaintiff paid defendant $27,000 as applied to March 2008 rent on a pro-rata basis. Since, pursuant to the Paragraph 2 of Modification Agreement, the Rent Commencement Date was March 15, 2008, $14,806.45 of the $27,000 applied to the 17 days remain in March 2008. The remaining $12,193.55 represents the Rent Overpayment that would have been applied to the April 2008 rent, had plaintiff not vacated the Premises on March 31.

under the Lease is unavailing. When considering documentary evidence, such as a contract or lease, the Court must construe a lease in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v Jamie Towers Housing Co., Inc.*, 294 AD2d 268, 269 [1st Dept. 2002]; *Barrow v Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3d Dept 1989] ["Thus, it is equally settled law that specific clauses of a contract are to be read consistently with the over-all manifest purpose of the parties' agreement" (*id.*)]). Here, in reading specific terms of the Lease in conjunction with the entire Lease (including the Modification Agreement), the Court finds defendant's argument lacks merit.

Contrary to defendant's contention, plaintiff does not "rely" on Paragraph 41 of the Lease for the recovery of the Security Deposit and Rent Overpayment. Plaintiff cites Paragraph 41 to establish that it tendered to defendant the First Month's Rent of $27,000 in accordance with the terms of Paragraph 41, for the proposition that the rent shall be prorated if the Rent Commencement Date is not the first of the month (motion, ¶¶ 12-13), and to support plaintiff's allegation that it timely terminated the Lease (motion, ¶¶ 19-20). Paragraph 41, which details the Tenant's obligation to pay rent, does not void or eliminate the Landlord's obligations under the Lease, *i.e.*, Paragraph 54 of the Lease concerning the return of the Security Deposit, Paragraph 2 of the Modification Agreement, directing that the First Month's Rent be applied on a pro-rata basis, and Paragraph 59 of the Lease, concerning the obligation of "any party" to pay the attorneys fees of the "prevailing party" in "an action seeking damages for a breach of, or enforcement" of the Lease.

Finally, defendant argues that plaintiff is not owed the Security Deposit because "any return of the security deposit would be at the 'end of the term' which is not to occur until October

31, 2009"(opp., ¶ 6, *citing* Lease, ¶ 54). However, the first page of the Lease contains the following statement regarding the end of the term of the Lease:

> Witnesseth: Owner hereby leases to Tenant and Tenant hereby hires from Owner [the Premises] for the term of two (2) years (*or until such term shall sooner cease and expire as hereinafter provided*) to commence on the first day of November in the year 2007, and to end on the thirty first day of October in the year 2009.

Subsequently, Paragraph 21 of the Lease defines "end of term" as "the expiration *or other termination* of this lease" (*emphasis added*). Paragraph 41 of the Lease gives the Tenant "a right to *terminate this Lease* on sixty (60) days written notice to Landlord" (*emphasis added*). The Court finds that the term of the Lease ended on March 31, 2008, when plaintiff terminated the Lease after giving defendant timely notice. Accordingly, defendant owes plaintiff the Security Deposit.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff 123 Third Partners LLC's motion for an order, pursuant to CPLR §3212, granting plaintiff summary judgment in the amount of $66,193.55, plus attorneys' fees and reasonable costs against defendant B&E 813 Broadway, LLC , is granted; and it is further

ORDERED that an assessment of attorneys' fees shall be held on May 11, 2009 at 10:30 a.m., in Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O Ira Gammerman; and it is further

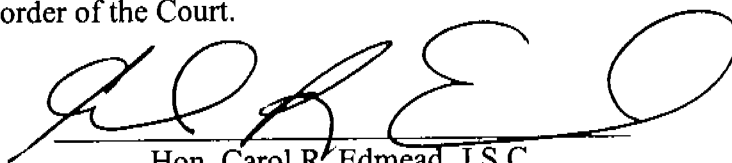
ORDERED that plaintiff serve a copy of this order with notice of entry upon the Clerk of

the Trial Support Office (Room 158), file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 16, 2009



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

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