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

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 117155/2007
SUPER NOVA 330
VS.
MUNICIPAL PARTNERS
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1+2
Answering Affidavits — Exhibits	5
Replying Affidavits	6

Cross-Motion: ☑ Yes ☐ No 3, 4

Upon the foregoing papers, it is ordered that this motion + cross-motion are decided in accordance with the attached memorandum decision.

FILED
OCT 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 10/19/09

J.S.C.

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

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: IAS PART 36

----------X

SUPER NOVA 330, LLC,

Plaintiff,

- against -

Index No. 117155/07

MUNICIPAL PARTNERS, LLC and BRIAN KELLY,

Motion Seq. No.: 001

Defendants.

LING-COHAN, J.:

Plaintiff commenced this action to recover rent. Defendants move to dismiss the complaint pursuant to CPLR 3126, on the ground that plaintiff's response to a discovery demand was unsatisfactory, or, alternatively, to compel disclosure pursuant to CPLR 3124. Plaintiff cross-moves for summary judgment on its complaint, to strike defendants' jury demand, to dismiss their affirmative defense and counterclaim, and to set the matter down for a hearing on the amount of damages due to plaintiff.

Plaintiff is the landlord/owner of a building in which defendant Municipal Partners, LLC (Municipal), a bond brokerage business, rented a suite. Defendant Brian Kelly was Municipal's president and guarantor of Municipal's obligations under its lease. The lease term extended from January 28, 2002 to February 28, 2012. Allegedly, starting in 2003, the suite began flooding whenever it rained. Municipal stopped paying rent in August 2007 and left the premises on October 1, 2007. Plaintiff commenced a nonpayment proceeding in Civil Court, for which Municipal failed to appear, and obtained a warrant of eviction. Plaintiff obtained legal possession of the premises on December 11, 2007. Plaintiff did not re-let the premises.

Plaintiff's first cause of action seeks $64,100.15 (base and additional rent, late fees, and interest from August 2007 through December 2007) from Municipal. The second cause of action seeks the same amount from Kelly, *via* the personal guaranty.

In the third cause of action, plaintiff seeks all the rent due from January 1, 2008 through the end of the lease term, amounting to $565,699.04, plus interest. The third cause of action is based on Article 18 of the lease, which provides that if the tenant is dispossessed by summary proceedings, rent and additional rent shall become due up to the time of such dispossession. The tenant shall also pay the landlord, as liquidated damages, "any deficiency between the rent" named in the tenant's lease and "the net amount, if any, of the rents collected on account of the subsequent lease, nor leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease. The failure of Owner to re-let the premises ... shall not release or affect Tenant's liability for damages" (Cross motion, Ex. B, Article 18). The fourth cause of action is the same as the third, as against Kelly.

The fifth cause of action seeks, under Article 18 of the lease, that Municipal pay back any expenses that plaintiff incurred in trying to find a new tenant and maintaining the premises in a good condition in order to re-let it. The sum is alleged to be at least $150,000. The sixth cause of action is the same as the fifth, as against Kelly.

The seventh cause of action seeks at least $50,000 from Municipal, pursuant to Articles 19 and 60 of the lease. Article 19 provides that, if by reason of the tenant's failure to pay rent, the owner brings an action against the tenant and prevails, the tenant shall reimburse the landlord for expenditures incurred in the action, including attorneys' fees. Article 60 provides the same, with the addition that the tenant must reimburse the landlord for the expenditures incurred in

collecting the expenditures incurred by the aforesaid action. The eighth cause of action seeks at least $50,000 from Kelly, pursuant to a provision in the guaranty that Kelly will pay the amounts due from the tenant under the lease, including attorneys' fees and costs.

Defendants' affirmative defense is that plaintiff has possession of the security deposit. Defendants' counterclaim is that plaintiff caused Municipal to be unable to use some rooms in the suite by negligently causing noise, leaks, and floods. Defendants allege that the bad conditions resulted from construction work that was performed directly outside defendants' office on the building exterior. Defendants further allege that water entering the premises caused a ceiling collapse, mold growth, and bad odors, and that it damaged their equipment and destroyed their documents. The counterclaim alleges a "loss of use of a portion of the premises," which is a claim for partial constructive eviction (Motion, Ex. B, Answer, ¶ 7). Defendants' answer seeks judgment over and against the plaintiff for all or a part of any judgment obtained by the plaintiff. They do not seek other damages.

In the writing entitled "Good Guy Guaranty", Kelly guarantees to perform the tenant's obligations under the lease, including the payment of rent, additional rent, and other charges and sums due under the lease, including reasonable attorneys' fees and disbursements through the date that the tenant vacates and surrenders the premises. (Notice of Cross-Motion, Exh. C, ¶1).

Regarding plaintiff's cross motion to dismiss the counterclaim, a constructive eviction occurs when a tenant abandons the leased premises because the landlord has prevented the tenant from using the premises for the intended purposes (*See Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 82-83 [1970]; *Dinicu v Groff Studios Corp.*, 257 AD2d 218, 224 [1st Dept 1999]). A constructive eviction may be partial, rather than total, in which case the tenant

abandons only the portion of the premises that are affected by the landlord's actions, not the entire premises (*Minjak Co. v Randolph,* 140 AD2d 245, 248 [1st Dept 1988]).

Plaintiff argues that contradictions in defendants' evidence show that defendants were not constructively evicted. Plaintiff's argument, however, does not affect plaintiff's claim of partial constructive eviction; rather, the argument applies to the claim that defendants were totally constructively evicted.

Total constructive eviction means that the landlord created conditions so untenable that the tenant had no choice but to leave the premises. During his deposition, Kelly testified that he told the landlord that Municipal "went out of business, and we will be leaving as of October 1st" (Cross motion, Ex. H, at 149-150). Municipal went of business "due to the financial meltdown that was occurring on Wall Street, prohibited transactions, it basically froze the credit markets. And we were in the credit market" (*id.* at 150). Thus, Kelly testified that Municipal left the premises because it went out of business.

In his affidavit, Kelly alleges that flooding forced defendants to stop using certain parts of the premises and also to leave the premises entirely. Kelly's affidavit does not address his earlier deposition testimony that defendants left the premises because Municipal went out of business. As plaintiff correctly states, Kelly's affidavit contradicts his deposition testimony.

Although ordinarily issues of fact and credibility are not determined on a motion for summary judgment, where an affidavit by a party clearly contradicts that party's deposition testimony, and can only be considered to have been tailored to avoid the consequences of the earlier testimony, such affidavit will not be considered as evidence (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]). To the extent that defendants are attempting to

make a claim for total constructive eviction, Kelly's affidavit will not be considered. It will not be allowed to contradict the earlier statement made in the deposition that Municipal left because of bad business conditions.

However, regarding the partial constructive eviction claim, there is nothing in Kelly's affidavit to negate it. Plaintiff contends that since defendants cannot prove that they were partially constructively evicted, the counterclaim should be dismissed. Plaintiff argues that defendants have no evidence of flooding, leaks, unacceptable noise levels, ceiling collapse, and the other alleged bad conditions, and that they cannot prove that plaintiff was responsible for them. Plaintiff points to deposition testimony to show that defendants' allegations are conclusory.

As the party moving for summary judgment, plaintiff must make a prima facie showing of entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to do so requires a denial of the motion (*id.*).

Here, plaintiff does not prove that the inappropriate conditions did not exist and/or that it did not cause such conditions. Further, the court disagrees with plaintiff's evaluation of the deposition testimony. There was testimony that, during Municipal's tenancy the roof and exterior bricks were replaced, that this work caused rain to enter Municipal's suite, and that the rain caused certain bad conditions. Witnesses testified that parts of the suite were flooded and that some equipment was damaged. The testimony sufficiently raises issues of fact regarding whether the bad conditions existed, whether plaintiff caused them, and whether they forced the tenant to abandon parts of the suite. Therefore, the counterclaim of partial constructive eviction is not dismissed.

In addition, plaintiff is not entitled to summary judgment on its rent claims because Municipal may be entitled to rent abatement. A partial constructive eviction will result in an abatement of a portion of the rent or an award of damages (*New York City Econ. Dev. Corp. v Harborside Mini Storage, Inc.*, 12 Misc 3d 1160[A], 2006 NY Slip Op 50974[U], *7 [Civ Ct, Kings County 2006], *affd* 20 Misc 3d 137[A], 2008 NY Slip Op 51549[U] [App Term, 2d & 11th Jud Dists 2008]). "The appropriate remedy for a partial constructive eviction depends in great measure upon whether the tenant has paid the rent during the period of eviction" (*id.*). The tenant who was partially constructively evicted, who did not pay the rent, has a claim for an abatement of the rent (*id.*; *see also Goldman v MJJ Music, Inc.*, 17 Misc 3d 1127[A], 2007 NY Slip Op 52163[U], *4 [Civ Ct, Kings County 2007]). Where the tenant has paid the rent, the tenant waives the right to claim that it was discharged from the rent; instead, the tenant has a claim for damages for the partial constructive eviction (*id.*; *see also 85 John St. Partnership v Kaye Ins. Assoc., L.P.*, 261 AD2d 104, 105 [1st Dept 1999]; *81 Franklin Co. v Ginaccini*, 160 AD2d 558, 559 [1st Dept 1990]).

Municipal paid rent through July and has a claim for damages during the time it paid rent. For the period in which Municipal remained in possession and paid no rent, it has a claim for an abatement of the rent.

The parties disagree on how long Municipal remained in possession of the premises. Municipal contends that it surrendered the premises in October 2007 when it left, that the lease terminated then, and that it is not liable for rent after that date. However, Article 25 of the lease provides that a surrender will not take place unless the landlord agrees to it in a signed writing. Such provisions are enforceable (*see Hudson Towers Housing Co., Inc. v VIP Yacht Cruises,*

Inc., 63 AD3d 413, 413 [1st Dept 2009]). As there was no signed writing, Municipal's quitting the premises did not constitute a valid surrender and termination of the lease. The lease terminated in December 2007, when plaintiff, via the summary proceeding, gained possession of the premises.

The cross motion to dismiss the affirmative defense, which is that plaintiff has the security deposit, is denied. Article 32 of the lease provides that the tenant has deposited $27,680.49 with the landlord, and that the landlord may use the deposit to pay any sums for which the tenant becomes liable to the landlord as a result of the tenant's default under the lease. The affirmative defense is properly understood as a claim for a set off, in the event that Municipal must pay damages to plaintiff.

The cross motion to strike defendants' demand for a jury trial is granted. Both the lease and the guaranty waive the right to a jury trial. Defendants' reply to the cross motion does not oppose plaintiff's request.

Turning now to defendants' motion, defendants move to dismiss the complaint on the ground that plaintiff has willfully and contumaciously failed to comply with court orders regarding discovery. Alternatively, defendants move for an order compelling plaintiff to provide all outstanding discovery by a date certain.

Plaintiff produced its building superintendent for deposition. Afterward, defendants requested that plaintiff produce the work log identified by the deponent, photographs that he reviewed before being deposed, and contracts, work orders, and permits entered into between plaintiff and a construction company, a subcontractor, and Local Law 11. This discovery demand was dated October 30, 2008. On November 14, 2008, the parties appeared for a

conference before this court and entered into a so-ordered stipulation that provided that plaintiff would respond to the discovery demand on or before December 5, 2008. Plaintiff alleges that it served the response on defendants on December 5, 2008.

The parties appeared for another conference before this court on December 19, 2008, at which time defendants' counsel said that counsel had not received plaintiff's response to defendants' discovery demand. The parties entered into another so-ordered stipulation providing that plaintiff would serve a duplicate copy of its response within 20 days. Plaintiff served its response on December 20, 2008.

Defendants were not satisfied with the response for the following reasons. First, plaintiff produced three pages from its work log instead of the entire log, and parts of the pages are not legible. Second, the photographs are alleged to be of poor quality. Defendants claim that they are entitled to laser copies of the photographs. Third, plaintiff did not produce any contracts, work orders, or permits. In its response to the discovery demand, plaintiff stated that the demand for such documents was irrelevant, unduly burdensome, and had no time frame.

Defendants did not contact plaintiff about the unsatisfactory nature of the response. Defendants made the instant motion, alleging that plaintiff's response was incomplete and insufficient.

As plaintiff correctly points out, the Uniform Civil Rules for the Supreme Court and the County Court require that a motion relating to disclosure must be accompanied by an affirmation by the counsel for the moving party that he or she "conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (22 NYCRR 202.7 [a] [2]). A motion to compel discovery or to dismiss the complaint for failing to comply with discovery

demands will not be granted when the moving party fails to submit the requisite good-faith affirmation. Here, there is no other indication that such discussions had occurred between counsel (*Cestaro v Chin,* 20 AD3d 500, 501 [2d Dept 2005]; *Fulton v Allstate Ins. Co.,* 14 AD3d 380, 382 [1st Dept 2005]).

Attached to defendants' motion is an Affirmation of Good Faith, wherein defendants' counsel: 1) states that the parties attempted to schedule and conduct discovery and that it became apparent that said discovery and depositions could not be completed without court intervention; and 2) requests that the court schedule a preliminary conference in order to schedule depositions and discovery. The affirmation date is the same as the motion date.

Clearly, this affirmation does not meet the requirements of the rule. The affirmation does not state that the attorneys attempted to resolve the issues raised by defendants' instant motion. Defendants' counsel takes the position that the conferences and so-ordered stipulations constitute a good faith effort to resolve the discovery disputes raised by this motion. But the conferences took place before defendants received plaintiff's response. After plaintiff responded would have been the time to address the alleged deficiencies of the response. As this was not done, defendants' motion must be denied.

Plaintiff also refers to a rule of Part 36 (this Part) which provides that prior to filing a discovery related motion, if parties are still unable to resolve discovery issues after efforts have been made as required by Rule 202.7 (a), parties are encouraged to write a letter to the court requesting a conference. There has been no attempt to comply with Rule 202.7 (a) . The court notes that a note of issue was filed in this case on February 2, 2009, and this matter is scheduled for mediation on November 16, 2009.

In conclusion, it is

ORDERED that defendants' motion to dismiss the complaint and alternatively to compel disclosure is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment on its complaint and to dismiss defendants' affirmative defense, counterclaim, and to strike defendants' demand for a jury trial is granted to the extent that defendants' demand for a jury trial is stricken; and is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry.

Dated: 10/19/09

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

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