SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

WU/LH 36 MIDLAND, LLC,

INDEX NO.: 12175/09

Plaintiff,

MOTION DATE:11-24-09
SUBMIT DATE:1-7-10
SEQ. NUMBER - 002

-against-

KEITH LEVINSON,

Defendant.

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The following papers have been read on this motion:

Notice of Motion, dated 10-30-09.....1
Memorandum of Law in Opposition, dated 12-29-09.....2
Affidavit in Opposition, dated 12-24-09.....3
Reply Affirmation, dated 1-6-10.....4

This motion by the plaintiff, in effect, for partial summary judgment on the issue of liability and for dismissal of the defendant's counterclaim is granted in its entirety. The matter will be set down for a trial on the issue of plaintiff's damages.

This is an action on a commercial lease. The parties to that lease were plaintiff as landlord and Perfecto Distributors, LLC as tenant. Defendant Keith Levinson, the tenant's president, was a guarantor of the lease. The lease was made on May 1, 2008, is comprised of 56 single-spaced pages, and covered premises at Port Chester, New York. A lease

modification was entered into by letter agreement dated July 15, 2008. The term of the lease was for five years, commencing on May 1, 2008.

Insofar as is relevant here, the lease called on the tenant to make monthly payments of minimum rent in the amount of $41,375. One of the defaults under the lease was a failure to make any such payment, without its being cured within ten days of notice of the failure by the landlord. Lease, § 22.1(a)(v). Notices were to be sent to the tenant at the address given in the preamble to the lease (an address in Port Chester), and notices were to be sent to the landlord at two locations: one to Lighthouse Real Estate Ventures, 60 Hempstead Avenue, West Hempstead, New York, attention Paul Cooper, with a copy to Marc J. Becker, Esq., Goldfarb and Fleece, 345 Park Avenue, 33rd Floor, New York, New York. Lease, § 24.1.

The lease also contained an early termination provision. That section permitted the tenant to terminate the lease at the end of the first year of the lease (*i.e.*, April 30, 2009) if certain conditions were met. They were that 1) the tenant was not in default, 2) payment of "Termination Consideration" (80% of any legal fees incurred by the landlord in connection with preparation and delivery of the lease, a figure to be provided by the landlord), and 3) notice pursuant to section 24.1 was given at least six months prior to April 30, 2009. Time is stated to be of the essence with respect to the giving of the notice and delivery of the Termination Consideration.

The plaintiff landlord now moves for summary judgment on liability, and to dismiss the defendant's counterclaim, which is for "costs and expenses incurred in this action,

including without limitation reasonable attorney's fees."

Initially, there has been no response to so much of the motion that seeks dismissal of the counterclaim. As a *prima facie* showing has been made that this claim lacks merit (*see, Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]), it is accordingly dismissed.

Turning to the main action, the plaintiff has presented the lease, an affidavit of Paul Cooper, a member of plaintiff LLC, and other proof, all of which constitute *prima facie* proof of a valid and subsisting lease contract, breach thereof by failure to pay rent, landlord's notice of default under the lease and a failure to cure within the applicable 10-day period, and that this rendered the attempt to utilize the early termination provision without legal force. Plaintiff thus demonstrates its right to summary judgment on liability under the lease and guaranty. Specifically, a ten-day notice of default citing failure to pay the July and October, 2008 rent, in the amount of $82,750 was served on the tenant by certified mail on October 9, 2008, to the address provided in the lease. This amount was not contested or fully paid within ten days.

Accordingly, the plaintiff has demonstrated that the tenant remained in default when it attempted to exercise its right to early termination of the lease by way of a hand-written letter from its CEO (Charles Brodsky, not a party to this action) dated October 29, 2008, which included a check for the consideration called for in section 29. [1] Further, there is proof

[1] This check was for $10,750, and there is no dispute that this is the correct amount.

that this notice was not sent to the address stated under section 24.1, as required. Thus, that the tenant's notice was timely and the amount of the termination consideration was correct did not render the termination notice effective, because other conditions had not been met.

Accordingly, the burden shifts to the defendant to demonstrate that issues of fact exist meriting a trial. *See generally, GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v City of New York,* 49 NY2d 557 (1980).

In response, the defendant raises several issues. Substantively, he points to certain of his actions on behalf of the tenant, and the landlord's alleged acquiescence to the termination and related arrangements made to cure the breach. He thus raises the doctrines of estoppel and waiver. He also raises several procedural issues. None is sufficient to stave off this motion.

Initially, Levinson states that tenant paid the October rent in full on October 14, 2008, within the cure period, and provides a stub for the check. This, however, did not cure the default, as the July rent was also in arrears, and was not paid. He further states that "at about this time" he had discussions with one Christopher Hayes, plaintiff's managing agent, regarding the July rent, and that he was unaware that there were any arrears at all. However, there is no proof presented that the default notice, at the time sent, was in error, and/or that the plaintiff, through the managing agent, or anyone else, agreed that the default notice would be withdrawn until the alleged discrepancy could be addressed.

Levinson also states that as a result of these discussions "we came to an agreement regarding the amount of arrears," a payment schedule was established and later payment

made thereunder. Defendant further contends that although "[p]laintiff's attorney had initially raised an objection to the Termination Notice shortly after it was served, Mr. Hayes's subsequent statements to me in January 2009, led me to believe that the initial objection was made only because the attorney was not yet aware that Perfecto had paid the October 2008 rent and/or that the July 2008 rent arrears were settled with an agreed installment plan." He presents emails from Hayes dating from January, 2009 in support of his position, and stresses that the check representing the termination consideration was cashed.

However, the foregoing does not raise an issue of fact concerning the plaintiff's demonstration that the termination notice was ineffective, even assuming that Hayes had the authority to bind the plaintiff with regard to the default notice or the early termination provision, which is disputed. The lease contained clauses concerning the parties' inability to alter any of the terms thereof absent a signed writing (§ 27.8), and that the receipt of the landlord of any rent or other charge due with knowledge of a breach of any provision of the lease was not a waiver of the breach. Lease, § 23.1. Thus, any arrangement with Hayes, or acceptance and deposit of the termination consideration check, was ineffective to alter the requirements for early termination, nor did it constitute a waiver of any part thereof that might have served to render the defective termination notice effective. *See, La Lanterna, Inc. v Fareri Enters., Inc.*, 37 AD3d 420 (2d Dept. 2007); *Elite Gold, Inc. v TT Outlet Jewelry Outlet Corp.*, 31 AD3d 338 (1st Dept. 2006). The stubborn fact remains that under the lease there was an uncured default when the tenant attempted to exercise its right to cancel.

It also should be noted that at the time the early termination check was cashed, the tenant undisputedly still owed the landlord money for the July rent, a debt which had yet to be resolved, even according to the defendant.

The defendant also raises the related doctrines of promissory and equitable estoppel as defenses, but they have no application here. In order to make out a promissory estoppel claim or defense, there must be a clear and unambiguous promise, reasonable reliance on that promise, and damages. *Williams v Eason,* 49 AD3d 866 (2d Dept. 2008). No unambiguous promise that the termination notice would be accepted can be found, and any reliance on Hayes's statements was not reasonable in view of the clear terms of the commercial lease. *See, Aris Indus., Inc. v 1411 Trizechahn-Swig, LLC,* 294 AD2d 107 (1st Dept. 2002). Nor has the defendant pointed to any fraudulent conduct on plaintiff's part, or made a showing that in the present commercial context the plaintiff had been mislead to its detriment, leading to an unconscionable result. *Nassau Trust Co. v Montrose Concrete Prods. Corp.,* 56 NY2d 175 (1982); *see Aris Indus., Inc. v 1411 Trizechahn-Swig, LLC,* 294 AD2d 107, *supra; Papa Gino's of America, Inc. v Plaza Assocs.,* 135 AD2d 74 (3d Dept. 1988); *American Bartenders School v 105 Madison Co.,* 91 AD2d 901 (1st Dept.1983), *affd* 59 NY2d 716 (1983).

The remaining contentions of the defendant, as set forth in his memorandum of law, are without merit. There is no issue presented with regard to an accord and satisfaction, as the acceptance of money after the period for properly exercising the early termination period could not serve to revive that option, as discussed above, and in view of section 23.1 there

is no evidence presented that the payments made constituted an agreement under which all outstanding claims against the tenant, most especially its attempted termination, were to be resolved. *See, Pothos v Arverne Houses, Inc.*, 269 AD2d 377 (2d Dept. 2000).

The Court cannot agree with defendant that the present motion should be denied as premature. The fact that this motion is made in the absence of discovery is of no moment, where there is no showing that additional evidence might be discovered that would alter the clear terms of the commercial lease, under which the tenant and defendant guarantor are bound. *See, Companion Life Ins. Co. Of N.Y. v All State Abstract Corp.*, 35 AD3d 519 (2d Dept. 2006).

Finally, the charge that the plaintiff did not meet the publication requirement of Limited Liability Company Law § 206(a) has been refuted by documentary evidence of compliance, demonstrating that plaintiff thus was permitted to bring this action in a New York court. The contention that the plaintiff was obligated to sue defendant only in the City of New York is not borne out by the terms of the guaranty, which clearly does not mandate such a venue, but rather permits it.

While results in these kinds of cases occasionally may seem harsh, the courts are bound to enforce the terms of agreements as written, especially in the area of commercial real property transactions, where certainty is of paramount concern. *Wallace v 600 Partners Co.*, 86 NY2d 543, 548 (1995).

Accordingly, the motion is granted in its entirety. A trial on the issue of damages flowing from the tenant's breach is required.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for a trial on damages on **March 2, 2010**, at 9:30 A.M.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the damages trial.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 22, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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