

413 W. 14 Assoc. v Santorelli

2011 NY Slip Op 32105(U)

July 29, 2011

Sup Ct, NY County

Docket Number: 101303/10

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____
J.S.G.
Justice

PART 10

413 W 14 Assoc

INDEX NO. 101303/10

MOTION DATE _____

- v -

MOTION SEQ. NO. 01

Santorelli, Michael

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

AUG 02 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Preliminary conference scheduled for
October 6, 2011 at 9:30am.

Dated: 7/29/11

HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

-----X
413 WEST 14 ASSOCIATES,

Plaintiff,

-against-

MICHAEL SANTORELLI, LAUREL HARRIS, and
DOGMATIC, INC.,

Defendants.
-----X

DECISION/ ORDER
Index No.: 101303/10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische

J.S.C.
FILED

AUG 02 2011

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

NEW YORK
COUNTY CLERK'S OFFICE

Papers	Numbered
Pltf n/m (3212) w/ FLS affirm, RM affid, exhs	1
Def opp w/ LH, DW affids, AMP affirm, exhs	2,3
Pltf reply w/ FLS affirm, exhs	4

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by Plaintiff, 413 West 14 Associates ("413 West"), to recover damages accrued under a commercial lease agreement that the defendant Dogmatic, Inc. ("Dogmatic") entered into and that defendants Michael Santorelli ("Santorelli") and Laurel Harris ("Harris") personally guaranteed.

Issue was joined and plaintiff now moves, pre-note of issue, for an order granting it partial summary judgment on its first and second causes of action, and dismissing defendants' affirmative defenses. Defendants, Santorelli and Harris, oppose this motion in its entirety. Since summary judgment is available once issue has been joined, even if the note of issue has not been filed, this motion can and will be decided on its merits (CPLR § 3212 [a]; Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept

2001]). The court's decision is as follows:

Facts Considered and Arguments Presented

It is undisputed that on November 10, 2005, plaintiff leased commercial premises located at 413-419 West 14th Street, New York, New York, 2nd Floor (the "Premises"), to Dogmatic, subject to the terms of a lease and attached rider ("Lease"), for a five-year term commencing March 1, 2006 and ending February 28, 2011. As further consideration for plaintiff's agreement to lease the space to Dogmatic, defendants Santorelli and Harris signed personal guaranties of the Lease (the "Guaranties").

It is further undisputed that Dogmatic submitted a Notice to Vacate, dated June 17, 2009, which provides, in relevant part: "this letter serves as official notice of Dogmatic's intent to vacate the space currently under lease within 90 days of the date above." The Notice to Vacate was accompanied by an email, which provides, in relevant part: "[a]ttached to this email is our official 90 day notice to vacate the space. I am sending this to safeguard Michael and Laurel in the event that we cannot find a solution within that time frame."

In a series of letters dated July 10, 13, and 22, 2009, plaintiff notified Dogmatic that based on its failure to pay rent and additional rent under the Lease, Dogmatic's security deposit was applied to the rent arrears and that the security deposit had to be replenished. On July 29, 2009, plaintiff sent Dogmatic a "Fifteen (15) Day Notice to Cure Lease Default" based on Dogmatic's failure to replenish its security deposit. By letter dated August 20, 2009, plaintiff extended Dogmatic's time to cure through September 8, 2009, and Dogmatic withdrew its Notice of Termination. On September 22, 2009, plaintiff served Dogmatic with a "Five (5) Day Notice of Termination and

Cancellation of Lease” because it had not replenished the security deposit. Several weeks later, on October 6, 2009, Dogmatic vacated the Premises.

Plaintiff asserts causes of action for breach of personal guaranty, against Santorelli and Harris only (COA1); breach of the Lease agreement, against Dogmatic only (COA2); failure to restore the premises to its original condition (COA3); and for legal fees (COA4). Plaintiff now seeks partial summary judgment on COA1 and COA2, an order striking defendants’ affirmative defenses and answer, and a hearing on legal fees (COA4).

Plaintiff claims that Dogmatic defaulted under the Lease by failing to make payments of rent and additional rent beginning June 1, 2009, and each month thereafter and that Dogmatic owes \$44,747.53 in unpaid rent. Plaintiff also contends that Dogmatic has failed to replenish its security deposit, as required under the Lease, and that Dogmatic must do so now, even though it has vacated the Premises. Thus, plaintiff seeks additional unpaid rent of \$117,235.00.

Although Dogmatic does not deny having unpaid rent, it contends that 413 West orally agreed to apply money on deposit as security to its final rent payments, which became due during the notice period with no expectation that such security would be replenished. Dogmatic argues that since it has vacated and returned the Premises to the landlord, it is unnecessary for Dogmatic to replenish the security deposit. Dogmatic further argues that it is not obligated to pay rent for the full month of October, since it vacated the Premises on October 6, 2009.

413 West denies it waived the security deposit when said monies were applied to the arrears and argues, instead, that Dogmatic forfeited its right to have the security

deposit returned.

Both sides rely on Article 44 of the Lease which provides, in relevant part, as follows:

The Tenant shall deposit with the Owner four (4) months rent (\$104,000.00) as security, contemporaneously upon the execution of the Agreement by all the parties to the Agreement. Tenant shall be required on the anniversary date of its lease to pay additional security to Owner so that at all times the security held by Owner equals four (4) months of the then current rent. . . . Said interest earned less Owner's administrative expenses of 1%, **shall at the expiration of the Lease, be returned, to the Tenant, along with the security deposited**, provided that the Tenant has faithfully and fully complied with all the terms of the Lease. The Owner shall be entitled annually to collect and deduct from Tenant's security account is one (1%) percent administrative fee. **If Owner shall use security sums to cure Tenant's defaults, then Tenant shall within ten (10) days of sending of notice by Owner, replenish, as Additional Rent, such sums used.**

(Emphasis added)

413 West further claims that Dogmatic's failure to replenish its security deposit (a/k/a additional rent), triggered Santorelli and Harris' obligations under the Guaranties to now pay the landlord four months of "additional" rent, which the landlord is entitled to keep because it was forfeited.

Specifically, the Guaranty states that:

the obligations of the undersigned under this guaranty shall be limited to payment of all defaults of any kind whatsoever under the Lease . . . until and through the date that Tenant vacates the premises and delivers the keys to the Owner, provided that the Tenant delivers to the Owner a written notice of vacatur ninety (90) days prior to the delivery of the keys and the actual vacatur.

In the event that the Tenant fails to provide the requisite notice to the Owner as set forth above, and, or, fails to

deliver the keys and vacate the premises as set forth above, and, or fails to pay its rent and additional rent obligations under the Lease as of the date of its vacatur, then the Tenant, as well as the Guarantor(s), shall jointly and severally liable [sic] to the Owner for the full amount of the rent balance then due under the Lease . . . The rent balance to be paid shall be deemed liquidated damages as to the rent obligations and Owner shall not be required to mitigate its damages.

(Emphasis in original)

However, the Guaranty also provides that:

In the event this guaranty must be enforced, a credit against any monies due Tenant shall be granted. Any such credit will be comprised of the amount of any security deposit remaining and held by the Owner after application to cover premises damage and any additional rent due. A credit shall be granted as well as for any advance rent received, by the Owner for a period beyond the vacatur date.

(Emphasis in original).

In addition to summary judgment, plaintiff seeks the dismissal of defendants' thirty-two affirmative defenses, which range from failure to state a claim to lack of jurisdiction.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if this burden is met, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman

v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2d Dept. 2003).

Breach of Lease

A lease is a form of contract (Havana Cent. NY2 LLC v Lunney's Pub. Inc., 49 A.D.3d 70 (1st Dept. 2007). To establish a *prima facie* case of breach of contract, plaintiff must plead facts that show: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 116 A.D.2d 694 (2d Dept. 1986); see Ascoli v. Lynch, 2 A.D.3d 553 (2d Dept. 2003) (citing PJI). In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based, Sud v. Sud, 211 A.D.2d 423 (1st Dept. 1995); Atkinson v. Mobil Oil Corp., 205 A.D.2d 719 (2d Dept. 1984).

Dogmatic entered into a binding Lease agreement with 413 West and 413 West has established that Dogmatic breached its Lease by defaulting in the payment of rent. Plaintiff has proved, and Dogmatic does not deny, owing rent through October 6, 2009. Although Dogmatic claims it did not have unpaid rent for the month of October 2009, this is based on its unsuccessful defense that it vacated the Premises on October 6th and, therefore, should not have to pay rent that month. The Lease, however, provides for the payment of rent on the 1st of each month and, therefore, 413 West is entitled to summary judgment for unpaid rent through October 31, 2009.

413 West relies on language in Article 44 of the Lease, which provides that "if Owner shall use security sums to cure Tenant's defaults, then Tenant shall within ten (10) days of sending of notice by Owner, replenish, as Additional Rent, such sums used." However, 413 West does not further consider other language in that provision or in the obligations set forth under the Guaranties. The security deposit is provided as security by the tenant so that it will "faithfully and fully" comply with the terms of its Lease. It is not "additional rent," but liquidated damages held in escrow. See 930 Fifth Avenue Corp. v. Shearman, 17 Misc.3d 1126(A) (Civ. Ct, N.Y. County 2007). Any argument by defendants to the contrary is easily dispatched by language in the Guaranties, which provide that the security remaining and held by the Owner may be used to cover premises damage and any additional rent due. It is axiomatic that Dogmatic would be required to replenish its security deposit upon vacating the Premises, since at that point it will no longer have any obligations to secure.

Consequently, although Dogmatic owes 413 West rent in the amount of \$44,747.53 for half of September 2009 and all of October 2009, it does not have to

replenish its security. For the same reasons, Santorelli and Harris are responsible for the unpaid rent, but not the security deposit that was applied but not replenished. See Weissman v. Sinorm Deli, 88 N.Y.2d 437, 446 (1996).

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (1986). Here, the Lease and Guaranties expressly provide that defendants are liable for reasonable attorney's fees. Plaintiff has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The issue of what plaintiff may recover from defendants for its reasonable attorney's fees, costs and disbursements will be set for a hearing following determination of plaintiff's 3rd cause of action.

Affirmative Defenses

Since summary judgment has been granted on plaintiff's first, second, and fourth causes of action, the affirmative defenses asserted by defendants remain ineffective against these claims. However, to the extent that any of defendants' thirty-two affirmative defenses are specific to COA3, they remain.

Conclusion

Partial summary judgement is granted to 413 West. Dogmatic, Santorelli, and Harris are jointly and severally liable in the amount of \$44,747.53. Since a **preliminary**

conference has not yet been held, it is hereby scheduled for **October 6, 2011 at 9:30 a.m.** on plaintiff's only remaining cause of action (COA3) and on the issue of the calculation of legal fees (COA4).

For the foregoing reasons, it is hereby:

ORDERED that plaintiff, 413 WEST 14 ASSOCIATES, motion for partial summary judgment against defendants, MICHAEL SANTORELLI, LAUREL HARRIS, and DOGMATIC, INC., is granted in part, only as to plaintiff's first, second, and fourth causes of action; and it is further

ORDERED that the issue of what plaintiff may recover from defendants for its reasonable attorney's fees, costs and disbursements will be set for a hearing following determination of plaintiff's 3rd cause of action; and it is further

ORDERED that a **Preliminary Conference** is hereby scheduled for **October 6, 2011 at 9:30 a.m. in Part 10, 60 Centre Street** on the outstanding discovery; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
July 29, 2011

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.
FILED

AUG 02 2011