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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

PANDEM ENTERPRISES, INC.,

Plaintiff,

-against-

MOTION SEQ. NO.: 001, 002
MOTION DATE: 3/16/11

AUTO BARN OF CENTRAL ISLIP, INC RODI AUTOMOTIVE, INC., AUTO BARN OF HUNTINGTON, INC., AUTO BARN OF COMMACK, INC., AUTO BARN HICKSVILLE STORE, INC., aka AUTO BARN OF HICKSVILLE STORE, INC., AUTO BARN MASSAPEQUA, INC., aka AUTO BARN OF MASSAPEQUA, INC., AUTO BARN PATCHOGUE, INC., aka AUTO BARN OF PATCHOGUE, INC., AUTO BARN OF CORUM, INC., aka AUTO BARN OF CORAM, INC., AUTO BARN OF WOODSIDE, INC., AUTO BARN STORES, INC., AUTOBARN OF INWOOD, INC., AUTO BARN OF CENTEREACH, INC., EXPANSION REALTY, INC., and AUTO BARN OZONE PARK REALTY, INC., fna GLOBE FOREIGN AUTO PARTS, INC.,

INDEX NO.: 21567/08

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Notice of Cross Motion.....2
Reply Affirmation in Opposition to Defendant's Cross Motion.....3

Motion (seq. no. 1) by the attorney for the plaintiff and cross-motion (seq. no. 2) by the attorney for the defendants for an order pursuant to CPLR 3212 granting summary judgment are determined as follows.

This action involves a dispute over the amount due pursuant to a lease agreement.

On or about March 12, 2008, the plaintiff received a Surrender Notice pursuant to the terms of the lease designating September 8, 2010 as the Surrender Date.

On or about June 3, 2008, plaintiff's counsel rejected the Surrender Notice on the grounds that defendant was in default under the lease for failure to pay the Common Area Maintenance Charges (CAM) for 2007.

Defendants sent plaintiff a letter dated August 18, 2008, disputing the CAM charges in the amount of $10,142.92. Defendants stated that:

> This is a follow up on our July 17, 2008 letter. The following charges (copies attached) in the total amount of $10,124.92 do not fall into a "CAM" expense as per the lease:
>
> - $3,237.01 for various repairs (Island Garden Contracting, Inc.)
> - $3,537.91 for various repairs (Island Garden Contracting, Inc.)
> - $2,650.00 for roof repairs (All Seasons Commercial Systems, Inc.)
> - $ 700.00 for town fine (Islip Town)
>
> Please send us a revised CAM bill and a prorated R/E tax bill for the period commencing December 1, 2007 to September 8, 2008.

Defendants argue that pursuant to paragraph 4 of the lease, it was the obligation of the landlord to maintain and repair structural portions of the building, both exterior and interior, and the "charges" were the responsibility of the landlord, not the tenant, as CAM expenses or as "additional rent." Defendants also assert that the $700 amount for a Town of Islip fine was incurred by, and the responsibility of, another tenant.

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact. *Andre v Pomeroy*, 35 NY2d 361. Failure to make a *prima facie* showing requires a denial of the motion regardless of the sufficiency of the opposing papers. *Alvarez v Prospect Hospital*, 68 NY2d 324. Neither party has made a sufficient *prima facie* showing to support their respective motions for summary judgment.

There are factual issues regarding whether the charges are CAM and additional rent, or the responsibility of the landlord pursuant to paragraph 4 of the lease. Parties do not carry their burden in moving for summary judgment by pointing to gaps in their opponent's proof, but must affirmatively demonstrate the merits of their claim or defense. *Fromme v Lamour*, 292 AD2d 417.

Defendants assert that the plaintiff lacks standing to bring this action. The plaintiff acquired title to the subject premises by deed dated March 1, 2005. There is no documentary evidence that the subject lease was assigned to the plaintiff. The plaintiff argues that defendants did not pay the last month's rent for August 2008. Defendants assert that the only reason they did not pay the rent for August was based on the belief and understanding that the one (1) month security deposit could and would be attributed to the August rent. Absent the production of the assignment of the lease, there is no documentary evidence to demonstrate that the plaintiff was the beneficial assignee of any security deposit to return to the tenant when the premises were vacated.

Defendants assert that they did not cause any damage to the premises, as demonstrated by the fact that the Amended Complaint does not contain any claims or causes of action for physical damage to the premises. It is not disputed that the defendants complied with the terms of the guaranty of lease in that the Notice to Vacate was timely given, the keys returned to the landlord and all sums due and owing other than the contested CAM charges have been paid in full. The attorney for plaintiff acknowledges that the amount in dispute for CAM charges has been reduced to the sum of $5,189.04 (Reply Affirmation, ¶ 10). It is incredulous that a dispute which could have been resolved for no more than $5,194.04 in September 2008, prior to judicial intervention, has ripened into a claim for damages in the sum of $208,069 and $5,000 in legal fees.

The courts have long been guided by the rule that "every contract contains an implied obligation by each party to deal fairly with the other and to eschew actions which would deprive the other party of the fruits of the agreement." *Miller v Almquist*, 241 AD2d 181, 184; *Greenwich Village Associates v Salle*, 110 AD2d 111, 115; *Gross v Neuman*, 53 AD2d 2, 5; *see also, Dalton v Educational Testing Service*, 87 NY2d 384. What constitutes a reasonable time for performance depends on the facts and circumstances of the particular case. Included within a court's determination of reasonableness is the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance." *Ben Zev v Merman*, 73 NY2d 781.

In that connection, the Court notes that the plaintiff sent defendant notice of default dated July 22, 2008 alleging that $17,968.81 was due plaintiff, consisting of $6,847.75 for taxes and common charges of $11,121.06, evidencing the obvious -- that no rent was due on that date. Thereafter, as demonstrated by plaintiff's reply affirmation and opposition to defendants' cross-motion for summary judgment, defendants failed to pay the August 2008 rent. However the Court notes that plaintiff, as set forth in paragraph 10 of the reply, had

reduced the common charges to $10,000.00, but agreed to a further reduction to $5,189.04 for 2008. The foregoing shows that the plaintiff has failed to demonstrate that the 2007 and 2008 common or (CAM) charges were clearly alleged, and therefore, there was a clear disagreement between the parties regarding the amounts due, relieving the defendant from an obligation to pay rent after August 2008 and allowing the defendant to use the security to satisfy the August rent. The foregoing is being considered in the light most favorable to plaintiff as there has been no demonstration by plaintiff that it was a successor in interest under the lease, though it may have acquired the real property interest.

The respective motions for summary judgment are **denied**.

The Court further requires that if the parties are able to resolve their dispute based on the Court's findings, submit a judgment on 15 days notice. If not, the Court will conference this matter on **August 25, 2011 at 9:30 a.m.**

This constitutes the Order of the Court.

Dated: July 14, 2011

J.S.C.

ENTERED
AUG 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE