

L. Charney 1410 Broadway, LLC v Whaling MFG Co. Inc.
2012 NY Slip Op 30531(U)
March 1, 2012
Supreme Court, New York County
Docket Number: 114259/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 114259/2009 **J.S.C.**

L.CHARNEY 1410 BROADWAY LLC

vs
WHALING MFG.CO.INC.

Sequence Number : 002

DISMISS

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

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

MAR 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/1/12

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

L. CHARNEY 1410 BROADWAY, LLC, x

Plaintiff,

-against-

WHALING MFG CO. INC and WHALING
DISTRIBUTORS, INC.,

Defendants.
_____x

Decision/Order

Index No.: 114259/09

Seq. No. : 002, 003

Present:

Hon. Judith J. Gische

J.S.C.

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

FILED

Papers

Numbered

MAR 06 2012

Sequence # 002:

Def's n/m [3126] w/ GB affid, exhs	1
Plt's opp w/ ENP affid	2
Def's reply w/ GB affid	3

NEW YORK
COUNTY CLERK'S OFFICE

Sequence #003:

Plt's amended n/m [3212, 3211] w/ BB affirm, ENP affid, exhs	1
Def's m/x-m [3212] and opp w/ JP affirm, GB affid, memo (sep back), exhs	2
Plt's opp and reply w/ BB affirm, ENP affid, exhs	3
Def's reply w/ GB affid	4

Gische, J:

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

This action arises from a dispute involving a commercial lease. Defendant, Whaling Mfg Co. Inc ("defendant" or "Whaling") entered into a Lease with, plaintiff, L. Charney 1410 Broadway, LLC ("plaintiff" or "Charney"), for unit 1906, located at 1410 Broadway in New York City ("Premises"). This action was previously dismissed as to Whaling Distributors, Inc. (Gische order, August 24, 2010). In its complaint, plaintiff raises various claims for breach of contract, seeking rent, additional rent, liquidated damages, accelerated rent owed, and

attorney's fees.

Presently before the court are two motion sequences. In motion sequence # 002 ("Seq. 002"), defendant moves to conditionally dismiss the summons and verified complaint (CPLR § 3126) based upon plaintiff's claimed failure to provide discovery. Plaintiff opposes the motion.

In motion sequence # 003 ("Seq. 003"), plaintiff moves for partial summary judgment (CPLR § 3212) as to: (1) as to both liability and damages on plaintiff's first cause of action ("1st COA"), (2) as to both liability and damages on plaintiff's second cause of action ("2nd COA"), (3) as to liability on the fourth cause of action ("4th COA") and for an order granting it reasonable attorney's fees. Plaintiff further moves to dismiss all of defendant's affirmative defenses (CPLR § 3211). Plaintiff does not move on its third cause of action ("3rd COA"). Defendant opposes plaintiff's motion and cross-moves to dismiss all four causes of action in the complaint (CPLR § 3212). Plaintiff opposes defendant's cross-motion. Issue is joined and the motions are timely and may be considered on their merits. CPLR § 3212, Brill v. City of New York, 2 N.Y.3d 648 (2004)

Facts Presented

The following facts are undisputed unless otherwise indicated.

Whaling was a tenant in the Premises pursuant to a five year lease dated November 17, 2006 ("Lease"). Pursuant to the Lease, Whaling agreed to pay an annual base rent of \$89,300.00 for the period from December 15, 2006 through December 31, 2008, then increased to \$94,000.00 for the remainder of the Lease, in equal monthly installments. Whaling was also obligated to pay items of additional rent throughout the lease term.

Plaintiff claims that on several occasions during the months of February and March

2008, Mr. Bruce Block ("Mr. Block"), president of L.H. Charney Associates, Inc, the buildings Managing Agent, visited the Premises during business hours. On each such occasion, Mr. Block observed that the Premises were unlit and locked, although the Premises appeared to contain Whaling's furnishings and trade goods.

On March 6, 2008, it is undisputed that Whaling completely vacated the Premises. On March 7, 2008 plaintiff re-entered the Premises and changed the locks. Also, on March 7, 2008, plaintiff served notice on Whaling that it was in default of the Lease for failure to pay rent and additional rent. The notice further stated that the Lease was terminated, as of March 11, 2008, if Whaling failed to pay an aggregate total of \$15,595.12. The notice did not address any claim of non-occupancy. Whaling did not pay any rent before the March 11, 2008 deadline set by plaintiff.

On March 26, 2008, plaintiff's attorney served another notice on Mr. Swergold, defendant's attorney, that Whaling was in default of the Lease for failure to pay rent and additional rent, and for failure to occupy the premises. Under the new notice, plaintiff claims that Whaling owed an aggregate total rent and additional rent of \$365,558.99. Whaling did not pay the new amount stated in the second notice.

On April 17, 2008, plaintiff served a Notice of Cancellation upon Whaling's attorney, which by its terms, ended Whaling's Lease effective April 23, 2008. Plaintiff claims that only then did it re-enter the Premises. Plaintiff claims that as of April 23, 2008, Whaling was in arrears for Base Rent, Utilities, Taxes and Late Charges in the amount of \$21,918.76 and that no part of the arrearage has been paid.

Plaintiff claims it began attempts to re-let the Premises on or about April 23, 2008, in an effort to mitigate Whaling's damages arising from breach of the Lease. Plaintiff secured

a new tenant for the premises and entered into a lease; the new tenant commenced paying rent for the Premises on September 15th 2008.

Plaintiff argues that in addition to unpaid rent through March 2008, it is also entitled to rents and additional rents for the period April 13, 2008 through September 15, 2008, during which the Premises remained vacant. Through September 15, 2008, plaintiff claims \$43,540.18. Plaintiff argues that it paid third party brokerage fees totaling \$56,430.73 in its efforts to relet the Premises and \$81,750.00 to renovate the Premises, to which it also claims entitlement.

Defendant opposes the motion and cross-moves for summary judgment (CPLR § 3212) dismissing the four causes of action in the complaint, claiming that no money is owed to plaintiff because of (1) plaintiff's retention of Whaling's \$15,667 security deposit, (2) a \$10,500 credit in favor of Whaling in accordance with a stipulation of settlement in a separate lawsuit captioned *L. Charney 1410 Broadway, LLC v. James Pavao, as guarantor for Whaling Mfg. Inc.* (Supreme Court, New York County)(Index No.: 114153/08), (3) plaintiff's failure to obtain lawful possession of the subject premises via a summary proceeding, a judgment of possession and a warrant of eviction and (4) Whaling having surrendered the subject premises by operation of law when plaintiff changed the lock on the door, reentered and relet the Premises for its own benefit.

Plaintiff opposes the defendant's cross-motion, substantively arguing that: (1) plaintiff's retention of the security deposit can be applied to all costs incurred in connection with defendant's default and abandonment of the premises, (2) defendant unilaterally abandoned the premises, plaintiff did not agree to or accept defendant's abandonment, thus there can be no surrender by operation of law, and (3) the alleged defects in the notices of default and

cancellation are irrelevant, since they were served after defendant abandoned the premises.

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 it meets this burden, 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). Since each party has moved for summary judgment, each bears their own burden on their respective motions.

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).

The primary and dispositive legal dispute between the parties on these motions is

whether there was a surrender of the Lease on March 6, 2008 and acceptance on the Lease on March 7, 2008, when the plaintiff changed the locks. For the reasons set forth below, the court holds that there was such a surrender, by operation of law.

A surrender by operation of law "occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated." Riverside Research Inst v. KMGA, Inc., 68 N.Y.2d 689, 692 (1986); Bay Plaza Estates, Inc. New York Univ., 257 A.D.2d 472, 473 (1st Dept. 1999). It is inferred from the conduct of the parties, where not only must the tenant abandon the premises, but the landlord must accept the premises as a surrender. Ford Coyle Prop., Inc. v. 3029 Avenue V Realty, LLC., 63 A.D.3d 782 (2d Dept 2009) (internal citations omitted); Riverside Research Inst. v KMGA, Inc., *supra*. A surrender by operation of law precludes the landlord from asserting continuing lease obligations (NHS Nat. Health Services, Inc. v. Kaufman, 250 A.D.2d 528, 529 [1st Dept. 1998]) and terminates the owners right to rent for any period after the tenant has vacated the premises (Bedford v. Terhune, 30 N.Y. 453 [1864]).

Whether a surrender by operation of law has occurred is a determination to be made on the facts of each particular case (Riverside Research Inst. v KMGA, Inc., *supra*). Where, as here, the pertinent facts are not disputed, the determination can be made as a matter of law without the need for a trial (NHS Natl. Health Servs. v Kaufman, *supra*).

An abandonment of premises, coupled with the refusal to pay rent, when acted upon by the landlord in such a manner as to show that s/he intended to resume control for his own benefit and not for the benefit of the outgoing tenants, is equivalent to surrender by operation of law. Saracena v. Preisler, 180 A.D.348, 349 (1st Dept. 1917); Wofford v Adams, 299 A.D.2d 249 (1st Dept. 2002); Deer Hills Hardware, Inc. v. Conlin Realty Corp., 292 A.D.2d

565 (2d Dept. 2002); Brock Enterprises Ltd. v Dunham's Bay Boat Co. Inc., 292 A.D.2d 681 (2d Dept. 2002); Bay Plaza Estates, Inc. v New York University, *supra*; Centurian Development Ltd. v Kenford Co., Inc., 60 A.D.2d 98 (4th Dept. 1977).

While there is some ambiguity about whether Whaling vacated the Premises in February, there is no dispute that by March 6, 2008, it had completely vacated the Premises. Defendant claims, and plaintiff does not refute, that plaintiff re-entered the Premises the following day, on March 7, 2008, and changed the locks. Defendant claims, without opposition, that its employee was not able to enter the Premises on March 7, 2008, because the locks had been changed. The new keys were not offered or otherwise made available to Whaling. There is no proof that the change in locks was done for any other reason than to retake the Premises.

Although plaintiff subsequently served notices regarding the Lease, they were irrelevant, because the Premises had, by plaintiffs own acts, already changed possession. Plaintiff changed the locks. The Premises were subsequently remodeled, with the admitted express intent to entice a new tenant to rent them. Plaintiff's claim that the defendant's surrender was unilateral is rejected. The facts do not support any conclusion of unilateral action because plaintiff acted by changing the locks after defendant's abandonment. The court, therefore, finds that the parties manifestly intended a surrender and acceptance of the premises on March 7, 2008, thereby terminating the lease.

When a landlord accepts a surrender of the premises, this act operates to discharge the tenant from all liability for rent in the future." Enjoy Realty Corp. v. Van Wagner Communications, LLC, 73 A.D.3d 546, 553 (1st Dept. 2010) (internal citations omitted). Similarly, where a landlord chooses to re-enter and relet the premises for his own purposes,

"the tenant [is] released from further liability from rent" (Centurian Dev. v Kenford Co., *supra*). Such a surrender and acceptance severs the relationship between the parties, by the creation of an estate inconsistent with the prior tenant's rights under the lease (see, Centurian Dev. v Kenford Co., *Id.* at 100). Thus, after March 7, 2008, Whaling has no further responsibility under the Lease. Termination of the lease in this manner, however, does not relieve defendants of liability incurred prior to the surrender. Nicholas A. Cutaia, Inc. v. Buyer's Bazaar, Inc., 224 A.D.2d 952, 954 (4th Dept. 1996). Therefore, Whaling is still responsible for all unpaid rents and additional rents accruing under the Lease before the surrender.

The motion and cross-motion for summary judgment are, therefore, resolved as follows:

The 1st COA seeks rent and additional rent for breach of lease. Since the Lease terminated March 7, 2007, plaintiff's right of recovery is limited to only the rent and additional rent that accrued prior to the date of surrender. In this case, plaintiff has submitted its statement of account showing that through March 7, 2008 the amount of \$15,531.99 was due and owing in rent and additional rent. Whaling claims that this amount does not reflect a credit for amounts paid by its guarantor, pursuant to a stipulation of settlement dated July 19, 2010 ("settlement stipulation"), made in a separate action. It also claims that it is entitled to an offset for its security deposit. Plaintiff argues that the \$10,500.00 paid by the guarantor should be applied post-judgment and that the security deposit is governed by Article 34 of the Lease.

There is no dispute that the plaintiff has not credited the \$10,500.00 paid by the guarantor toward any outstanding amounts. This credit should be applied. There is no

restriction in the settlement stipulation that limits the application of the credit post-judgment.

The security deposit, however, is governed by Article 34 of the lease. This provision gives the plaintiff discretion over how to apply the monies. Therefore, the court will not offset the amounts owed by the security deposit. The plaintiff may apply the security deposit to any judgment it obtains hereunder which will include reasonable attorney's fees. In the event there is an excess, plaintiff may be responsible to return a portion of that security deposit to Whaling. (Ring v. Anabil USA, Inc., 29 A.D.3d 408 [1st Dept. 2006]).

The court, therefore, finds that through March 7, 2008, plaintiff is owed \$5,031.99 (\$15,531.99 less \$10,500.00) and may have a judgment therefore. Plaintiff's motion for summary judgment is granted only to the extent stated herein. This amount is without prejudice to either parties' claims regarding the application and/or return of the security deposit.

In the complaint, plaintiff seeks the sum of \$181,720.91 as liquidated damages as its 2nd COA. In the current motion, plaintiff seeks summary judgment on a lesser sum, that of \$167,223.83, as its liquidated damages for the 2nd COA. This amount represents the unpaid rents and additional rents due for the use and occupancy of the Premises from April 15, 2008 through September 15, 2008. The court denies plaintiff's summary judgment motion and grants summary judgment in favor of defendant's cross-motion dismissing the 2nd COA. The Lease terminated as of March 7, 2008 by operation of law. The damages plaintiff is seeking in the 2nd COA are all alleged to have accrued after March 7, 2008.

Plaintiff does not move with respect to its 3rd COA, seeking acceleration of the entire amount of rent due under the Lease. Defendant, however, does cross-move for summary judgment dismissing this cause of action. Once the surrender and acceptance by operation

of law occurred on March 7, 2008, the rights of the parties under the Lease terminated. Any attempt by plaintiff to accelerate rent, therefore, falls as a matter of law. Defendant's cross-motion for summary judgment on the 3rd COA is granted.

On plaintiff's 4th COA, the court finds that the plaintiff is entitled to fees reasonably incurred, but only to the extent plaintiff prevailed in the 1st COA. 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 expressly provides that Defendant is liable for Plaintiff's reasonable attorneys fees in this action. The Court, therefore, refers the issue of what Plaintiff may recover from Defendant for its reasonable attorneys fees to a Special Referee to hear and report back to the court. The Special Referee is directed to consider the impact of the small amount actually recovered as rent and additional rent as compared to the vast amount of legal work performed in this action on unsuccessful claims, when s/he makes its recommendations on what is reasonable. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

Other reliefs requested

In light of the foregoing decision, plaintiff's motion (Seq. 003) for the dismissal of the affirmative defenses pursuant to CPLR § 3211 is moot. The affirmative defenses (that are not otherwise boiler-plate) pertain to damages sought post March 7, 2008. Since the Lease terminated by operation of law on that date, the right to recover such damages is denied as a matter of law, without consideration of the affirmative defenses.

Defendant's motion (Seq. 002) for an order striking or dismissing the complaint as a

discovery sanction, pursuant to CPLR § 3126, is likewise moot in light of the foregoing decision.

Conclusion

In accordance with the foregoing, it is hereby:

ORDERED that motion sequence # 002 is denied as moot; and it is further

ORDERED that on plaintiff, L. Charney 1410 Broadway, LLC's, 1st COA, the court grants partial summary judgment in favor of plaintiff, L. Charney 1410 Broadway, LLC's, for any rent and additional rent outstanding for the months of February 2008 and March 2008 in the sum of \$5,031.99; and it is further

ORDERED that the court denies plaintiff, L. Charney 1410 Broadway, LLC's, summary judgment motion and grants summary judgment in favor of defendant, Whaling MFG Co. Inc's, cross-motion dismissing the 2nd COA; and it is further

ORDERED that the court grants summary judgment in favor of defendant, Whaling MFG Co. Inc's, cross-motion dismissing the 3rd COA; and it is further

ORDERED that on plaintiff's 4th COA, the court finds that the plaintiff, L. Charney 1410 Broadway, LLC, is entitled to fees reasonably incurred in connection with the 1st COA and refers the issue of what plaintiff, L. Charney 1410 Broadway, LLC, may recover from defendant, Whaling MFG Co. Inc, for its reasonable attorneys fees to a Special Referee, to hear and report her findings back to the court; and it is further

ORDERED that plaintiff, L. Charney 1410 Broadway, LLC, is hereby directed to serve a copy of this Decision and Order upon the Office of the Special Referee within 60 days of the date of this Decision and Order so that the matter may be calendared, failure to timely

serve will be deemed an abandonment of the right to seek legal fees; and it is further

ORDERED that plaintiff, L. C Chamey 1410 Broadway, LLC's, motion to dismiss the defendant, Whaling MFG Co. Inc's, affirmative defense is denied as moot; and it is further

ORDERED that entry of judgment is held in abeyance pending the final determination of legal fees sought in the 4th COA; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

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

Dated: New York, New York
March 1, 2012

So Ordered:



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

FILED

MAR 06 2012

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