

**291 W. Broadway Realty Assoc. LLC v Subin Assoc.,
LLP**

2012 NY Slip Op 31945(U)

June 29, 2012

Supreme Court, New York County

Docket Number: 111413/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN

Justice

PART 7

291 WEST BROADWAY REALTY ASSOCIATES LLC,

Plaintiff,

-against-

SUBIN ASSOCIATES, LLP,

Defendant.

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INDEX NO. 111413/10

MOTION SEQ. NO. 001

FILED

The following papers, numbered 1 to 3, were read on this motion by plaintiff.

PAPERS NUMBERED

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

1 JUL 20 2012

Answering Affidavits — Exhibits (Memo) _____

2 _____

Replying Affidavits (Reply Memo) _____

3 NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

This is an action brought by 291 West Broadway Realty Associates LLC, (plaintiff) for an alleged breach of a commercial lease agreement dated January 1, 1985, and it's successor agreements for subsequent unpaid commercial real estate taxes, premises clean up, unjust enrichment, and attorney fees when Subin Associates, LLP, (defendant) moved from the 9th floor premises on or about June 15, 2010. Plaintiff now moves to amend the caption to reflect the plaintiff's proper name, for summary judgment pursuant to CPLR 3212 in its favor, and to dismiss defendant's affirmative defenses and counterclaims for negligent misrepresentation and fraud. Defendant files in opposition and plaintiff files a reply.

The parties previously had a cordial twenty-five year business relationship. Plaintiff's predecessor and defendant's predecessor entered into a lease in 1985 for the entire 9th floor of the building located at 291 Broadway, New York, New York, which provided for three, five year options to renew the lease. Defendant's predecessor and then defendant exercised all three of the renew options, and after the expiration of same the parties entered into a Lease Amendment and Extension Agreement dated January 31, 2007 (Extension Agreement). After the expiration of the Extension Agreement on November 30, 2009, and pursuant to its terms,

* 2]

defendant became a month-to-month tenant. Prior to the November 30, 2009 expiration the parties discussed the prospect of a renewal lease on the 18th floor within the building, which could be built out to their specifications, and pursuant to which defendant retained the services of an architect. Although there were negotiations as to the terms of the new lease, there was no written agreement. Subsequently, these negotiations fell through and defendant ended up leasing space in a different building.

Plaintiff brings this action to recoup unpaid real estate taxes as well as clean up costs against defendant upon its vacating the premises, asserting causes of action for breach of contract, unjust enrichment and attorneys fees. Defendant files an answer denying plaintiff's claims and asserting four affirmative defenses and two counterclaims, but concedes they left the premises on or about June 15, 2010 with all rental fees paid. Defendant's affirmative defenses are: oral representation which assured defendant a new space within the building, equitable estoppel, comparative negligence, and unclean hands. Defendant's counterclaims are for damages that it incurred for architectural fees to renovate the 18th floor, in the reliance on plaintiff's alleged oral agreement that defendants would remain in the building and move from the 9th floor to 18th floor, as well as fraud.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]).

Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

DISCUSSION

The Court finds that plaintiff has submitted evidence in admissible form to establish its entitlement to partial summary judgment on the first cause of action for breach of contract for unpaid real estate taxes in the amount of \$25,502.06 with pre-judgment interest from July 27, 2010, the date that defendants received notice of the debt. However, defendant has raised a triable issue of fact in opposition as to whether the space was left in "broom clean" condition, and thus the portion of plaintiff's first cause of action seeking \$5,000.00 in clean-up costs is denied.

As to plaintiff's second cause of action for unjust enrichment, plaintiff fails to meet its burden in establishing its entitlement to summary judgment on its unjust enrichment claim. The existence of a valid contract typically precludes the availability of quasi contractual remedies, such as quantum meruit and unjust enrichment, for events arising out of the same subject matter (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]; *IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401 [1st Dept 2007]). However, "where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit or unjust enrichment, and will not be required to elect his or her remedies" (*IIG Capital LLC*, 36 AD3d at 405). Here, it is undisputed that there are express contracts that fully detail the applicable terms regarding defendant's obligation to pay real estate taxes. As such, plaintiff cannot recover under a claim for unjust enrichment, and this cause of action is dismissed.

Additionally, as a portion of plaintiff's cause of action for breach of contract was denied, the Court finds that plaintiff's third cause of action seeking attorneys' fees pursuant to Article 19 the lease agreement is denied as premature.

Turning to the portion of plaintiff's motion seeking to dismiss defendant's affirmative defenses and counterclaims, the Court finds that plaintiff has failed to meet its burden of proof for summary judgment on these claims. Lastly, the portion of plaintiff's motion seeking leave to amend the caption to reflect plaintiff's proper name is granted without opposition.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the plaintiff's motion to amend the caption to reflect plaintiff's proper name is granted; and it is further,

ORDERED that the new caption shall bear the following form:

-----X
291 BROADWAY REALTY ASSOCIATES LLC,
Plaintiff,

- v -

SUBIN ASSOCIATES, LLP,
Defendant.

-----X
And it is further,

ORDERED that counsel plaintiff shall serve a copy of this Order with Notice of Entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the Court's records accordingly; and it is further,

ORDERED that the portion of plaintiff's motion for summary judgment, pursuant to CPLR 3212, for judgment on its first cause of action for breach of contract is granted to the extent that plaintiff is granted judgment in the amount of \$25,502.06 for unpaid real estate taxes with pre-judgment interest at the statutory rate from July 27, 2010, as calculated by the Clerk of

the Court, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the remainder of the cause of action seeking \$5,000.00 in cleaning and repair costs is denied; and it is further,

ORDERED that the portion of plaintiff's motion for summary judgment, pursuant to CPLR 3212, for judgment on its second cause of action for unjust enrichment is denied and that cause of action is dismissed; and it is further,

ORDERED that the portion of plaintiff's motion for summary judgment, pursuant to CPLR 3212, for judgment on its third cause of action for attorneys' fees is denied as premature; and it is further,

ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR 3212, seeking to dismiss defendant's affirmative defenses and counterclaims is denied; and it is further,

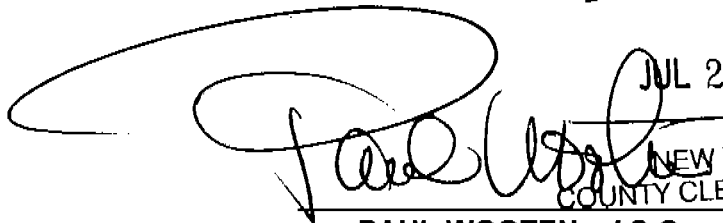
ORDERED that the parties are directed to appear for a Preliminary Conference at 11:00 a.m. on September 12, 2012, at 60 Centre Street, Room 341, Part 7; and it is further,

ORDERED that plaintiff shall serve a copy of this order with Notice of Entry to the Clerk of the Court, who is directed to enter judgment accordingly, within 30 days of entry.

This constitutes the Decision and Order of the Court.

FILED

Dated: 6-29-2012


JUL 20 2012
NEW YORK
COUNTY CLERK'S OFFICE
PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: : DO NOT POST REFERENCE