

Goidel & Siegel, LLP v 122 E. 42nd St., LLC
2012 NY Slip Op 33099(U)
January 27, 2012
Sup Ct, New York County
Docket Number: 101979/2011
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

GOIDEL & SIEGEL, LLP,

INDEX NO.: 101979/2011

Plaintiff,

MOTION SEQ. NO.: 001

- against -

FILED

DECISION and ORDER

122 EAST 42ND STREET, LLC,

Defendant. JAN 07 2013

NEW YORK COUNTY CLERK'S OFFICE

Motion by plaintiff for an order to remove a County of action in Civil Court and join it with this action, staying the Non-Payment Proceeding pending the determination of this motion, staying further proceedings pending the posting of security for costs, and determining whether this action may proceed as a class action.


	Papers Numbered
Plaintiff's Notice of Motion with Affidavit of Andrew B. Siegel, Esq., & Exhibits 1 and 2	<u>1, 2, 3</u>
Affirmation of Defendant's Counsel John G. Nicolich, Esq., in Opposition to Motion	<u>4</u>
Notice of Cross-Motion by Defendant for Summary Judgment	<u>5</u>
Affidavit of Richard F. Czaja, in Opposition to Plaintiff's Motion and in Support of Defendant's Cross-Motion	<u>6</u>
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Plaintiff's Counsel's Letter Dated May 23, 2012, Providing Case Law as Requested by the Court at the May 7, 2012 Oral Argument	<u>13</u>
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Cross-Motion: No Yes **Number of Cross-Motions:** 1

Cross-Motion by defendant pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint and for reasonable attorney's fees and disbursements, and other relief.

Upon the foregoing papers, it is hereby ordered that this Motion is denied as moot and the stay is vacated as set forth in the attached separate written Decision and Order and the Cross-Motion is granted unless plaintiff repleads as also set forth in the attached separate written Decision and Order.

Dated: December 27, 2012
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

Check one: **Final Disposition** **Non-Final Disposition**

Motion is: Granted Denied Granted in Part Other

Cross -Motion is: Granted Denied Granted in Part Other

Check if Appropriate: SETTLE ORDER SUBMIT ORDER

DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

GOIDEL & SIEGEL, LLP,

Plaintiff,

Index No. 101979/2011

Motion Sequence Nos.: 001 &002

-against-

122 EAST 42ND STREET, LLC,

FILED

DECISION/ORDER

Defendant.

JAN 07 2013

Hon. Shlomo S. Hagler, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff law firm Goidel & Siegel, LLP ("G&S", "tenant" or "plaintiff") moves under Motion Sequence #001, pursuant to CPLR §§ 602, 901, 2201, and 8502, for an order (1) removing a non-payment proceeding commenced in Civil Court, New York County entitled 122 East 42nd Street, LLC v Goidel & Siegel, LLP, Index No. 67694/10, ("the Non-Payment Proceeding") and joining it with this action for trial, (2) staying the Non-Payment Proceeding pending the determination of this motion, (3) staying further proceedings pending the posting of security for costs, and (4) determining whether this action may proceed as a class action.¹ Defendant 122 East 42nd Street, LLC ("Landlord" or "defendant") opposes the motion and cross-moves for an order pursuant to CPLR § 3212 granting it summary judgment dismissing this action.

In a second round of motion practice under Motion Sequence #002, plaintiff moves for an order pursuant to CPLR § 3025, granting it leave to amend the complaint as annexed thereto as Exhibit "A." Defendant opposes the motion and cross-moves for an order pursuant to

1. By Interim Decision dated July 28, 2011, the Hon. Emily Jane Goodman granted the second branch of the motion staying the Non-Payment Proceeding pending determination of this motion and plaintiff withdrew the fourth branch of the motion seeking a class action.

22 NYCRR § 130-1.1 imposing sanctions against plaintiff and awarding defendant its reasonable attorney's fees and disbursements. Plaintiff opposes the cross-motion. All motions and cross-motions are consolidated herein for disposition.

Background

Plaintiff is a law firm which entered into a lease dated March 30, 2004 ("Lease") with defendant to rent suite 4500 located at 122 East 42nd Street, New York, New York ("subject premises"). (See Exhibit "A" to the Affidavit of Richard F. Czaja, sworn to on May 20, 2011). The Lease contains two relevant provisions concerning the payment of late fees (Article 37[C][6]) and electricity charges (Article 38) which were both denominated as additional rent. In the event the tenant fails to pay rent or additional rent for more than ten business days after it becomes due, Article 37(C)(6) requires the tenant to pay "four (4) cents for each dollar" or 4% of said amount as late charges. In Article 38, the parties agreed to a complicated formula for the payment of electricity charges.

Defendant commenced the Non-Payment Proceeding against plaintiff to collect certain rent and additional rent. Plaintiff interposed an answer essentially challenging the validity of the late fees provision and the calculation of the electricity charges. Both parties then moved for summary judgment. By decision and order dated May 16, 2011, the Hon. Tanya R. Kennedy granted defendant's motion and struck and/or dismissed all of plaintiff's affirmative defenses and counterclaims. Judge Kennedy also denied plaintiff's cross-motion dismissing the Non-Payment Proceeding. (See Exhibit "E" to Plaintiff's motion to amend the complaint.)

Summary Judgment

The movant under CPLR § 3212 has the initial burden of proving entitlement to summary judgment. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985].) Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." (CPLR § 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Freedman v Chemical Construction Corp., 43 NY2d 260 [1977]; Spearmon v Times Square Stores Corp., 96 AD2d 552 [2d Dept 1983].) "It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the] answer are real and are capable of being established upon a trial." Spearmon, 96 AD2d at 553 (quoting Di Sabato v Soffes, 9 AD2d 297, 301 [1st Dept 1959].) If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists. (Kuehne & Nagel, Inc. v F.W. Baiden, 36 NY2d 539 [1975].)

Late Fees

In this case, plaintiff alleges that the late fees provision is unlawful and an inappropriate penalty. (See Exhibits "A" and "E" to plaintiff's motion to amend the complaint.) In support of the cross-motion for summary judgment, defendant asserts that the late fees provision was negotiated by plaintiff law firm's independent outside counsel and defendant's inside counsel. Initially, defendant sought a 6% late fee and plaintiff countered with a 2% offer. The parties eventually settled in the middle and agreed upon the current 4% late fee. (See Exhibit "G" to the Affidavit of

Richard F. Czaja, sworn to on May 20, 2011, in opposition to plaintiff's motion and in support of the cross-motion for summary judgment.)

Inasmuch as it is quite clear that this particular late fees provision was negotiated by sophisticated parties and their counsel, and plaintiff failed to come forward with any evidence that this provision was either unreasonable or against public policy, defendant is entitled to summary judgment declaring that the late fees provision is enforceable. (K.I.D.E. Assocs., LTD v Garage Estates Co., 280 AD2d 251 [1st Dept 2001] [court upheld a 5% late fee provision as it was negotiated between sophisticated parties and no evidence proffered that it was unreasonable or against public policy].)

Accounting

Plaintiff challenges the calculation of the electricity charges and seeks an accounting to discover any possible overcharges and rescission of the Lease.

It is well settled that there must be a fiduciary relationship between the parties in order to obtain an accounting. (Top-All Varieties, Inc. v RAJ Dev. Co., 173 AD2d 604 [2d Dept 2001].) The parties herein have a landlord-tenant relationship and not a fiduciary relationship. (NOPAR Rlty Corp. v Central Caterers, Inc., 91 AD2d 991 [2d Dept 1983]; Soberman v Groff Studio Corp., New York Law Journal, April 14, 2000, page 36, col. 3 [SDNY, Cote, J.].) There are no obligations that are distinct from their respective obligations under the Lease.² In other words, defendant owes no fiduciary duty to plaintiff. Thus, plaintiff is not entitled to an accounting.

2. Plaintiff has not alleged that the Lease provides for a right to an accounting for a breach of Article 38 or any other provision thereof.

Plaintiff's Motion for Leave to Amend

Plaintiffs seek leave to amend the complaint to “more specifically articulate defendant’s unlawful conduct as it pertains to the billing for and collection of certain electrical charges arising under an alleged lease between the parties.” (See Affidavit of Andrew B. Siegel, sworn to on August 17, 2011, in support of the motion to amend the complaint, at ¶ 1.) Essentially, plaintiff seeks “an accounting of rents and additional rents improperly collected by defendants and an award of damages in the amount of said overpayments.” (Id. at ¶ 7.)

It is well settled law that “leave to amend pleadings is to be freely given, absent a showing of prejudice or surprise.” (Briarpatch Ltd., L.P. v Briarpatch Film Corp., 60 AD3d 585 [1st Dept 2009].) Nevertheless, an examination of the underlying merit of the proposed amendment is required, and “leave will be denied where the proposed pleading fails to state a claim or is palpably insufficient as a matter of law.” (Thompson v Cooper, 24 AD3d 203, 205 [1st Dept 2005].)

Here, there is neither a showing by the defendants of prejudice nor surprise resulting from plaintiff’s delay in seeking to amend the complaint. However, granting plaintiff’s motion to amend the complaint in the form as submitted would be futile since the most allegations set forth in the proposed amended complaint are not sufficient to declare that the Lease is void, to order an accounting and award damages based on an accounting where no fiduciary duty exists, and to rescind this Lease which expired on April 30, 2012. (See Exhibit “C” to the motion to amend the complaint.) However, plaintiff may replead solely as to its allegations of overcharges on the electricity charges.

Sanctions

A court, in its discretion, may impose financial sanctions upon any party who engages in frivolous conduct. (22 NYCRR §130.1-1.) Conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. (22 NYCRR §130.1-1 [c][1-3].) In determining whether the conduct was frivolous, "the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent, or was brought to the attention of counsel or the party." (Id.)

Inasmuch as there was a colorable legal basis for the motions, no imposition of sanctions are warranted.

CONCLUSION

Accordingly, it is hereby:

ORDERED, that plaintiff's motion under Motion Sequence No. 001 for an order pursuant to CPLR §§ 602, 901, 2201, and 8502 staying the Non-Payment Proceeding pending the determination of this motion, removing the Non-Payment Proceeding and joining it with this action for trial, and staying further proceedings pending the posting of security for costs is denied as moot³

3. In order to avoid the collateral estoppel effect of Judge Kennedy's prior decision and order in the Non-Payment Proceeding, plaintiff acknowledges that because its claims concerning the Electricity Inclusion Factor ("EIF") "were not part of the petition [in the Non-Payment Proceeding] and, therefore, were outside the purview of the Civil Court that we sought to include them in the [instant] Supreme Court action." (See Letter of Jonathan M. Goidel, dated May 23,

* 8]
and the stay is vacated; and it is further

ORDERED, that defendant's cross-motion under Motion Sequence No. 001 for summary judgment dismissing this action is granted unless plaintiff repleads as set forth below; and it is further

ORDERED, that the plaintiff's motion under Motion Sequence No. 002 for leave to amend the complaint is denied without prejudice to allow plaintiff, within 30 days of entry of this Decision and Order, to replead only to allege overcharges on the electricity charges; and it is further


ORDERED, that defendant's cross-motion under Motion Sequence No. 002 for sanctions and an award of reasonable attorney's fees is denied.

ORDERED, that the Clerk shall enter judgment accordingly.

The foregoing constitutes the decision and order of this Court.

Dated: December 27, 2012
New York, New York

ENTER:



Hon. Shlomo S. Hagler, J.S.C.

FILED

JAN 07 2013

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COUNTY CLERK'S OFFICE**

2012.) Therefore, plaintiff failed to establish that the claims in the Civil Court are related to this action so as to join them together in Supreme Court.