SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

Index Number : 650497/2008
MR. HAM, INC.
vs.
PERLBINDER HOLDINGS, LLC
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion by defendant for partial summary judgment is GRANTED solely as to dismissal of the second, third, seventh, and eighth causes of action and is otherwise DENIED;

Plaintiff's cross motion for partial summary judgment on their first and fourth through sixth causes of action is GRANTED all as per the attached Decision and Order.

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

Dated: February 4, 2013

Melvin L. Schweitzer J.S.C.
MELVIN L. SCHWEITZER

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☑ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

MR. HAM, INC. and ARMIN KOGLIN,	:	
Plaintiffs,	:	Index No. 650497/08
-against-	:	DECISION AND ORDER
PERLBINDER HOLDINGS, LLC,	:	Motion Sequence No. 001
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

In this action based on a lease of commercial property, defendant Perlbinder Holdings, LLC moves, pursuant to CPLR 3212, for partial summary judgment on its first through fourth counterclaims, and for an order dismissing the first through third, seventh and eighth causes of action alleged in the complaint. Plaintiffs Mr. Ham, Inc. (Ham) and Armin Koglin (Koglin) cross-move for partial summary judgment on their first, and fourth through sixth causes of action.

Background

Defendant is the owner of property located at 557 Third Avenue, on East 37th Street, in Manhattan, New York. Koglin, on behalf of Ham, entered into a lease with defendant (Lease) (Notice of Motion, Ex. A),[1] to rent the corner ground floor store premises (premises), which had previously been leased to a Chinese restaurant. The Lease was to commence on August 1, 2008. Koglin signed a guarantee of Ham's obligations under the Lease. Upon the signing of the Lease,

[1]The operative Lease is actually the second lease the parties executed; the previous lease, dated July 11, 2008, included the second floor of the building. The Lease replaced this first lease, and excluded the second floor.

Ham paid defendant the sum of $107,974.98 as a security deposit for the premises, as well as $35,991.66 in advance rent.

The premises, as of July 2008, included seating for restaurant customers, and a full commercial kitchen. Ham anticipated operating a restaurant in the premises. According to plaintiffs, the dining room of the premises only needed a coat of paint, and the installation of "display cabinets, counters, seating and dining tables in place of those used by the existing restaurant." Aff. of Koglin, at 3. Plaintiffs do not say what further cooking apparatus, or changes to the kitchen, Ham would have required to make the kitchen usable.

The Lease provided that:

> Tenant acknowledges and agrees that Tenant has inspected the Premises and is fully familiar with the condition thereof and that the Premises are being leased on an "as-is" basis subject to all faults and defects of any nature whatsoever, known or unknown, and Owner makes absolutely no representations, warranties or guaranties of any nature whatsoever, express or implied, with respect to the physical condition of the Premises or the Building ... .

Lease, ¶ 50.1. The Lease further provides that:

> [t]he Premises are being leased to and accepted by Tenant together with all restaurant fixtures, equipment and built-ins which are currently located in the Premises on their current "as-is, where-is" condition ... Tenant hereby assumes all risk and liability in connection with any use or removal from the Premises by Tenant of such restaurant fixtures, equipment and built-ins ... .

Id., ¶ 50.3.

The Lease required Ham, as tenant, to perform certain "Tenant's Initial Work" (Lease, ¶ 80), including those actions necessary to rebuild the restaurant for Ham's use. This section provided that Ham would have "four (4) months after Commencement Date, *time being of the essence*, (i) Tenant shall complete and pay for Tenant's Initial Work and (ii) Tenant shall take

possession of the entire Premises for the purpose of conducting Tenant's business." *Id.* What Ham intended to do to the premises is not set forth.

Paragraph 77.1 of the Lease described "Owner's Work" as "installation of a window on the East 37th Street side of the premises." The Lease further provides that defendant has made no representations or warranties as to the date when its work would be completed. *Id.*, ¶ 77.2.

Defendant maintains that Ham received the keys to the premises in July 2008, although Ham claims the keys were an incomplete set. Regardless, Ham claims that it did not move into the premises at that time, as defendant apparently commenced extensive demolition of the premises, which went beyond the work described in the Lease as "Owner's Work." Defendant relates that it was required to come into the premises to conduct shoring and needling to load-bearing walls to prevent a possible collapse, but it appears from pictures, and from plaintiffs' complaint, that defendant proceeded to remove and demolish the commercial kitchen, as well, and to gut the dining area. No explanation is given as to why defendant performed this amount of work on the premises.

From July until December 2008, defendant continued to work on the premises, despite several Department of Buildings (DOB) and Environmental Control Board stop work orders reflecting defendant's alleged failure to obtain permits for the work it was undertaking. Plaintiffs allege that defendant failed to ever rectify the situation of the lack of proper permits, and failed to obtain a new certificate of occupancy (CO), to replace the 1947 CO which did not allow for more than 14 persons on the premises. As a result, plaintiffs claim that defendant never passed possession of the premises to Ham. According to plaintiffs, defendant knew full well that Ham

had proposed to open before the holiday season, and that defendant's actions had made that impossible.

In a letter dated November 17, 2008, plaintiffs notified defendant that Ham was terminating the Lease, due to defendant's failure to complete its work, and to provide Ham with the premises "as is," that is, in the condition it was upon the signing of the Lease in July 2008. Notice of Motion, Ex. M. Plaintiffs' attorney complained that defendant's actions had made it impossible for Ham to do its required work, thus frustrating the purpose of the Lease. Plaintiffs' attorney returned the keys with the letter, and demanded the return of Ham's security deposit and the advance rent. Upon defendant's refusal, in a letter dated November 30, 2008 (Notice of Motion, Ex. N), to consider the Lease as terminated, and to return the monies paid to it, plaintiffs commenced this suit.

It is noted that, in defendant's November 30, 2008 letter, mention is made of work done by defendant to the premises as limited to "certain structural and other work to the wall [which] was required to be performed in connection with the window installation in order to ensure the structural integrity of the Building." *Id.* at 3. Defendant does not refer to the demolition of the commercial kitchen in its letter, although a DOB stop work order was issued concerning that demolition (Koglin Aff., Ex. P), which demolition is also documented, without denial, in plaintiffs' photographs. It is unclear as to how much demolition work was actually done on the entire premises, although plaintiffs refer to it as a "gut rehab." Plaintiffs' Memorandum of Law, at 8.

Plaintiffs argue that Ham is entitled to rescind the Lease because defendant's actions rendered Ham's performance under the Lease impossible. Plaintiffs deny that they ever took

possession of the premises, and so, could terminate the Lease. They further demand the return of the security deposit and advance rent, pursuant to General Obligations Law (GOL) § 7-01.

Defendant, in its cross claims, calls for full payment of the rents for the Lease term, based on Ham's alleged breach of the Lease, and for other damages. Defendant claims that Ham caused defendant to be damaged when Ham failed to provide defendant with final plans for the alterations Ham expected to make to the premises, which were called for in the Lease, and failed to commence payment under the Lease. Defendant also seeks judgment on the guaranty signed by Koglin.

Plaintiffs bring claims for breach of contract (first cause of action); fraud (second cause of action); mistake (third cause of action); forfeit of the security deposit (fourth cause of action); conversion of the security deposit (fifth cause of action); money had and received (sixth cause of action); negligence and negligent misrepresentation (seventh cause of action); and promissory estoppel (eighth cause of action). Defendant brings three counterclaims for what appears to be breach of the Lease and construction-related damages, and a fourth counterclaim for attorney's fees, allegedly obtainable pursuant to the Lease. Defendant moves to dismiss the first through third, seventh and eighth causes of action, and plaintiffs cross-move for judgment on their first and fourth through sixth causes of action.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a

prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

A. Return of Security Deposit and Advance Rent

Plaintiffs want summary judgment on their three causes of action seeking the return of Ham's security deposit and advance rent. They rely on GOL § 7-103 (1), which states that,

> [w]henever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for the performance of the contract or agreement or to be applied to payments upon such contract or agreement when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same ... .

GOL § 7-103 (2) requires the person accepting the monies to "notify in writing each of the persons making such security deposit or advance, giving the name and address of the banking organization in which the deposit of security money is made, and the amount of such deposit." If the real property contains six or more family dwellings, the account must earn interest. GOL § 7-103 (2-a). GOL § 7-103 (3) states that "[a]ny provision of such a contract or agreement whereby a person who so deposits or advances money waives any provision of this section is absolutely void."

If a landlord violates GOL § 7-103, the tenant has an "'immediate right'" to recover monies given to the landlord as security or advance rent. *Tappan Golf Drive Range, Inc. v Tappan Property, Inc.*, 68 AD3d 440, 440 (1st Dept 2009), quoting *LeRoy Sayers*, 217 AD2d 63, 68-69 (1st Dept 1995). This is so "notwithstanding that [the tenant] may have breached the lease." *Paterno v Carroll*, 75 AD3d 625, 628 (2d Dept 2010). A failure to give written notice of the name of the bank holding a tenant's deposit permits an inference that the landlord violated GOL § 7-103 by commingling the deposit with the landlord's accounts. *Id.*

The Lease contains a provision pertaining to security deposits which provides that:

> [t]he security to be held hereunder by Owner shall be non-interest bearing. Further, the security deposit shall not be maintained by Owner in a separate account and shall be commingled with Owner's other funds and may be expended by Owner in whole or in part for any purpose whatsoever in Owner's sole and absolute discretion, whether or not relating to the Premises or the Building.

Lease, ¶ 53.2. Obviously, under GOL § 7-103 (3), this clause is void.

Plaintiffs claim entitlement to Ham's security deposit and advance rent under GOL § 7-103, as per paragraph 53.2 of the Lease, on the ground that defendant commingled these monies with its own funds.

Defendant, without offering evidence that it did not commingle the funds, simply claims that plaintiffs cannot prove that the funds were commingled, and so have not established a prima facie case for summary judgment. However, plaintiffs provide as evidence defendant's response to an interrogatory served upon defendant concerning the location of the security deposit and advance rent, in which defendant answers: "[t]he security deposit is maintained in accordance with paragraph 53 of the Lease and the Defendant refers Plaintiffs to the terms thereof." Reply Aff. of Michael Q. Carey, Ex. A, at 2. No location of the funds is offered.

Defendant's response is an admission that the security deposit and advance rent were commingled, in violation of GOL § 7-103. There is no need for further evidence of commingling. Plaintiffs have shown their right to partial summary judgment to recover these sums.

Defendant counters that, even if Ham is entitled to the return of the security deposit and advance rent, the amount should be set off from the greater amount defendant expects to recover on its counterclaims. However, as set forth above, the law entitles Ham to the return of the monies "immediately" (*Tappan Golf Drive Range, Inc. v Tappan Property, Inc.*, 68 AD3d at 440), and this language has been found to mean that the funds cannot be set off against a landlord's potential damages. *See Dan Klores Associates, Inc. v Abramoff*, 288 AD2d 121 (1st Dept 2001). Therefore, summary judgment in plaintiffs' favor on its fourth, fifth and sixth causes of action is granted.

B. Breach of Contract and Plaintiffs' Claim for Rescission

A contract may be rescinded:

> for failure of consideration, fraud in making the contract, for inability to perform after it is made, for repudiation of the contract or an essential part thereof and for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual or technical breach, but, as a general rule, only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract. Failure to perform in every respect is not essential, but a failure which leaves the subject of the contract substantially different from what was contracted for is sufficient.

Callanan v Powers, 199 NY 268, 284 (1910); *see also RR Chester, LLC v Arlington Building Corp.*, 22 AD3d 652 (2d Dept 2005); *Babylon Associates v Suffolk County*, 101 AD2d 207 (2d Dept 1984).

There is much discussion on plaintiffs' part of numerous DOB stop-work orders and violations accrued during the rendering of defendant's work as required by the Lease, which plaintiffs allege made it impossible to perform under the Lease, so as to justify rescission. But, the most outstanding violation of the Lease by defendant appears to be the demolition of the entire interior premises, including the removal of the kitchen, which made it impossible for Ham to take the property as it was ("as is") as of July 2008, when the Lease was executed. By November 2008, when Ham unilaterally attempted to terminate the lease, the premises, from plaintiffs' descriptions and photographs, had been vastly changed from the near move-in condition of the premises at the commencement of the Lease. The court finds that this change in circumstances was a material departure from the promises made in the Lease, rendering compliance with the Lease impossible. Ham never agreed to take the premises "as it would become" after defendant proceeded with its unexplained, but undenied, demolition. Defendant has not shown that its "gut rehab" of the entire premises could have been returned to the "as is" state Ham accepted in July 2008. As such, defendant failed to provide Ham with the consideration it expected when it entered into the Lease, and rescission of the Lease is appropriate. Plaintiffs are entitled to partial summary judgment on their first cause of action.

Defendant argues that Ham failed to comply with the Lease by failing to provide a final construction plan for the premises. However, defendant has not shown that plaintiffs' failure to provide a final plan interfered with defendant's work at all. Defendant continued working despite the lack of a plan, and despite the numerous violations and stop-work orders.[2]

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[2]Defendant claims that violations issued to it were not related to work it did in the leased premises, but, it is totally unclear what violations were related to the premises, and what were not. It is only clear that defendant kept on working.

As a result of the foregoing, it is not necessary to go into the parties' arguments as to whether Ham ever took possession of the premises, or whether there was a constructive eviction of Ham as a result of defendant's alleged delays. The remedy of rescission allows Ham to extricate itself from the Lease, and receive adequate compensation thereby.

It is also irrelevant whether or not defendant updated the CO. Plaintiffs were to take the premises "as is," subject to the existing CO, as of July 2008.

C. Disposition of Remaining Causes of Action

Defendant has also moved to dismiss plaintiffs' causes of action for fraud, negligence and negligent misrepresentation, rescission for mistake, and promissary estoppel. However, plaintiffs make no effort whatsoever to defend these claims, and so, have effectively abandoned them. Dismissal of plaintiffs' second, third, seventh and eighth causes of action is appropriate.

D. Defendant's Affirmative Defenses and Counterclaims

Defendant moves for summary judgment on its counterclaims. However, each claim is based on alleged breaches of the Lease, which has been rescinded by this decision. Hence, summary judgment must be denied.

Accordingly, it is

ORDERED that the motion brought by defendant Perlbinder Holdings, LLC for partial summary judgment on its first through fourth counterclaims, and for an order dismissing the first through third, seventh and eighth causes of action in the complaint is granted solely as to the dismissal of the second, third, seventh and eighth causes of action, and is otherwise denied; and it is further

ORDERED that the cross motion brought by plaintiffs Mr. Ham, Inc. and Armin Koglin for partial summary judgment on their first and fourth through sixth causes of action is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiffs in the amount of $143,966.64, together with interest at the rate of 5% per annum from August 1, 2008 the date the Lease was to commence until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the lease executed by the parties is rescinded.

Dated: February 4, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.