SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

1400 Broadway
-v-
Solo Fashions

INDEX NO. 652184-12

MOTION DATE

MOTION SEQ. NO. 001

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 ~~is~~ for summary judgment is GRANTED in part and DENIED in part per the attached Decision and Order.

A Preliminary Conference is scheduled for March 11, 2013 at 11 AM at 26 Broadway 10th Floor

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

Dated: February 4, 2013

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

1400 BROADWAY ASSOCIATES, LLC,	:	
Plaintiff,	:	Index No. 652184/2012
-against-	:	DECISION AND ORDER
SOHO FASHIONS LTD.,	:	Motion Sequence No. 001
Defendant.	:	

Melvin L. Schweitzer, J.:

Plaintiff 1400 Broadway Associates, LLC (plaintiff or landlord) moves pursuant to CPLR 3212 for summary judgment against defendant Soho Fashins Ltd. (defendant or tenant) on its causes of action for: (1) rent and additional rent owed for the remaining term of the lease and (2) legal costs and fees. Plaintiff's motion as to the first cause of action is granted in its entirety and granted in part, denied in part on the second cause of action.

Background

This case involves a commercial lease entered into by 1400 Broadway Associates and Soho Fashions, on November 22, 2005 for a period of January 1, 2006 through May 31, 2013 for the premises located at 1400 Broadway, Room 2401 New York, N.Y. 10018 (the Lease). Elliot Shalom personally guaranteed the Lease. On September 2, 2008, the Lease was modified and extended to May 31, 2018. Pursuant to the modification, Soho Fashions rented two additional spaces, Room 2502 and 2406 (together with Rooms 2401 collectively, the subject premises). *See* Notice of Motion, Ex. A.

In connection with the lease modification, Defendant was given a rent credit in the sum of $119,715.50 for Rooms 2402 and 2046. Section 4(iii) of the Lease Modification Agreement

provides that if the lease is terminated prior to the expiration of the Lease as a result of tenant's default, then the landlord is entitled to the return in full of this rent credit as additional rent due. *See* Notice of Motion, Ex. A.

On or about April 30, 2012, prior to the expiration the Lease, Soho Fashions vacated the subject premises. Plaintiff now seeks rent owing for the remainder of the lease pursuant Section 27[C] of the Lease, which provides:

> If Tenant breaches either of the covenants in subdivision (A) above [which includes the promise by Tenant to occupy the entire demised premises through the term of the lease], and the lease shall be terminated because of such default, then . . . Landlord shall retain its right to judgment on and collection of Tenant's aforesaid obligations to make a single payment to Landlord of a sum equal to the total of all rent and additional rent reserved for the remainder of the original term of the lease, subject to future credit of repayment to Tenant in the event of any rerenting of the premises by Landlord, after first deducting from rerental income all expenses incurred by Landlord in reducing to judgment or otherwise collecting Tenant's aforesaid obligations.

Prior to commencing this action, Plaintiff entered into a settlement agreement with Mr. Shalom and released him from his obligation under the guaranty. *See* Notice of Motion, Ex. B. Mr. Shalom paid $70,000 as part of the settlement, which was applied toward the rent credit of $119, 717.50. Plaintiff reserved its right to collect the balance of the rent credit, and as a result is seeking $49, 717.50 in addition to the rent owed.

Plaintiff is also seeking legal fees and costs incurred as a result of Defendant's default, including the legal fees incurred during the settlement negotiations with Mr. Shalom. Section 6 of the Lease provides: "If Tenant shall at any time default hereunder, and if landlord shall institute an action for summary proceedings against Tenant based upon such default, then Tenant will reimburse Landlord for legal expenses and fees thereby incurred by Landlord."

Discussion

Pursuant to CPLR 3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." To defeat a motion for summary judgment, the non-moving party must "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v City of New* York, 49 NY2d 557, 562 (1980).

Acceleration Clause

In support of its motion for summary judgment on the first cause of action, plaintiff has submitted an Affidavit of Merit from Roy Lapidus (Lapidus Aff.), the senior managing director with Newmark Grubb Knight Frank, the Plaintiff's managing agent. Mr. Lapidus states that defendant vacated the subject premises on or about April 30, 2012, prior to the expiration of the Lease. *See* Lapidus Aff. ¶3. He alleges that defendant had no basis to vacate the premises, that plaintiff did not consent or execute any release, and that this action constituted a breach of the Lease. *See id.* According to Mr. Lapidus, after applying Defendant's security deposit, defendant now owes, together with the rent credit for Rooms 2402 and 2046, $3,013,986.29. Plaintiff seeks this sum plus interest due and owing. *See id.* at ¶¶7-11.[1]

In response, Defendant has failed to submit any evidence to raise questions of fact. Instead, defendant contends that the acceleration clause is unenforceable because it does not require landlord to rerent the subject premises and is thus a penalty. In support of this argument,

[1] These amounts differ from those alleged in the Complaint and Mr. Lapidus explains this is due to typographical mistakes and mistaken omission of another month's rent. *See* Lapidus Aff. p.3 n1.

defendant relies on *Ross Realty v V & A Iron Fabricators, Inc.*, 5 Misc 2d 72 (App. Term 2004), which held that:

> [W]here, as here, the lease does not require the landlord to rerent the premises upon its recovery of possession after a default in rent and to apply the rent received from the rerenting to the benefit of the tenant, the accelerated rent clause is deemed to impose a penalty and is not enforceable.

Id. at 73.

Plaintiff counters, that although Section 6 of the Lease provides that "Landlord shall have no obligation to relet the premises," Section 27[C] provides that the landlord is entitled to a single payment of the total rent and additional rent due "subject to future credit of repayment to tenant in the event of any rerenting of the premises by Landlord." Plaintiff contends this provision distinguishes the instant action from *Ross Realty*. Unlike the landlord in *Ross Realty*, plaintiff is unable to recover more than its actual damages.

The Court agrees with plaintiff's position. Where there is no claim for fraud, overreaching or unconscionability, agreements providing for the acceleration of rent owed for the entire term of the lease are enforced. *Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc.*, 46 NY2d 573, 577 (1979). Moreover, there is no duty to mitigate damages in a commercial lease. *See Holy Properties Ltd. v Kenneth Cole Productions Inc.*, 87 NY2d 130 (1995) (holding tenant liable for all monetary obligations arising under the lease, where the lease expressly provided that landlord was under no duty to mitigate damages upon defendant's abandonment of the premises or eviction). For these reasons, plaintiff's motion for summary judgment on its first cause of action is granted.

Legal Cost and Fees

Plaintiff contends that in addition to the costs and fees related to the present action, it is also entitled to the legal fees incurred during Plaintiff's negotiations with Mr. Shalom, the guarantor of the Lease. Plaintiff points to Section 6 of the Lease, which provides:

> If Tenant shall at any time default hereunder, and if Landlord shall institute an action for summary proceeding against Tenant based upon such default, then Tenant will reimburse Landlord for the legal expenses and fees incurred by Landlord.

In further support of its motion, plaintiff has provided a breakdown of the services rendered and fees charged as a result of these actions. *See* Notice of Motion, Ex. C.

Defendant does not address plaintiff's claim for legal fees and costs arising out of the present action, but counters that plaintiff is not entitled to legal fees and costs arising out of the settlement agreement with the guarantor. Defendant relies on the plain language of the Lease to support this assertion. First, defendant points out that the settlement agreement was executed more than two months prior to the commencement of "an action for summary proceeding against Tenant." Second, defendant argues that it was not a party to the settlement agreement.

The fundamental rule of contract interpretation requires that clear writing be enforced according to its terms and the intent of the parties be gleaned from the four corners of a document, rather than from extrinsic evidence. *W.W.W. Assocs. v Giacontieri*, 77 NY2d 157 (1990); *Riverside South Planning Corp. v CRP/Exterll Riverside L.P.*, 60 AD3d 61 (1st Dept 2008). Moreover, "[a]ttorney fees are generally considered incidental to litigation, and each party is presumed responsible for his or her own attorneys' fees unless an award is authorized by agreement statute or court rule." *Dupuis v 424 East 77th Owners Corp.*, 32 AD3d 720, 722 (2006) (denying attorney fees where lease agreement provided for fees arising out of default, but

prior action was based on failure to abate nuisance). Here, Section 6 provides for legal costs and fees incurred by landlord in pursuit of a summary proceeding against tenant based on default. The section is silent with respect to all other actions. For these reasons, plaintiff's motion for summary judgment on its second cause of action is granted as to the cost and fees arising out of the present action, but denied as to costs and fees arising out of the negotiations with the guarantor.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment as to the first cause of action is granted ; and it is further

ORDERED that plaintiff's motion for summary judgment as to the second cause of action is granted as to the cost and fees arising out of the present action, but denied as to costs and fees arising out of the negotiations with the guarantor.

Dated: February 4, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.