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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C.
Justice

PART 11

Index Number : 108798/2011
K.L.M.N.I., INC.
vs.
483 BROADWAY REALTY CORP.
SEQUENCE NUMBER : 002
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 is determined in accordance with the annexed decision and order.

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

Dated: July 22, 2013

_____, J.S.C.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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KLMNI, INC.

Plaintiff,

-against

483 BROADWAY REALTY CORP., and
C&A 483 BROADWAY, LLC,

Defendants.

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INDEX NO. 108798/11

JOAN A. MADDEN, J.:

In this dispute involving a commercial lease, current landlord, defendant C&A 483 Broadway Corp. (hereinafter "C&A"), moves for an order pursuant to CPLR 3212 granting summary judgment on its counterclaims against tenant, plaintiff Klmni, Inc. (hereinafter "Klmni"), for reimbursement of the legal fees incurred in defense of an action in Federal court and in connection with the instant action. Former landlord, defendant 483 Broadway Realty Corp. (hereinafter "483 Broadway"), cross-moves for summary judgment on its affirmative defense and counterclaims against tenant Klmni for reimbursement of the $16,000 paid in settlement of the Federal action, and the $38,575.54 in legal fees incurred in defense of that action. Klmni opposes the motion and cross-motion, and requests that the court search the record pursuant to CPLR 3212(b) and grant summary judgment in its favor dismissing defendants' defenses and counterclaims, and an order releasing the funds held in escrow pursuant to two orders of this court.

On September 19, 2002, defendant 483 Broadway and plaintiff Klmni executed a commercial lease for portions of the ground floor, basement and sub-basement of the building located at 483 Broadway, New York, New York. The lease provided for an initial term of ten

years, with an option to renew for an additional ten-year term. By a Master Lease dated December 2, 2009 and commencing July 1, 2010, C&A became Klmni's landlord. In a letter dated June 1, 2010, 483 Broadway notified Klmni of its Master Lease with C&A and the assignment of Klmni's lease to C&A, which required Klmni to attorn to C&A effective July 1, 2010.

On June 22, 2010, Zoltan Hirsch commenced an action Federal court (the "Hirsch action") asserting a claim for violation of the Americans with Disabilities Act ("ADA") based on the alleged failure to provide wheelchair access at the entrance to and within the premises; Klmni, 483 Broadway and C&A were all named as defendants. In July 2011, 483 Broadway paid Hirsch $16,000 to settle the action, and Hirsch consented to the voluntary dismissal of his claims against each defendant with prejudice. The Federal court declined to exercise supplemental jurisdiction over defendants' various state common law claims for contribution, indemnification, breach of contract, attorney's fees and costs.

By letter dated July 15, 2011, 483 Broadway advised Klmni that it was demanding reimbursement for the sum of $54,575.54, consisting of the $16,000 paid to settle the Hirsch action, and $38,575.54 in legal fees incurred in defending the Hirsch action. By letter dated July 27, 2011, C&A similarly advised Klmni that it was demanding reimbursement for $24,954.00 in legal fees incurred in defending the Hirsch action.

In response to those demands, Klmni commenced the instant action for a Yellowstone injunction seeking, *inter alia*, to stay the termination of its lease. On August 1, 2011, this court signed Klmni's order to show cause and issued a TRO, "on consent subject to conditions," which included Klmni's payment of $83,556,54 to C&A for July and August 2011, and Klmni's deposit

of "the sum sought in the 2 demand letters" into the escrow account of counsel for C&A. On August 25, 2011, this court issued an order which, *inter alia*, granted Klmni's motion for a Yellowstone injunction, directed Klmni to pay C&A "arrears" in the amount of $820,211.56, and directed that the "amounts deposited into escrow pursuant to the August 1, 2011 order of this court shall remain in such account until further order of the court."

C&A is now moving for summary judgment on its counterclaims against Klmni for reimbursement of the legal fees incurred in defending the Hirsch action, i.e. the $24,954.00 held in escrow, as well as the legal fees incurred in connection with the instant action. 483 Broadway is cross-moving for summary judgment on its counterclaims against Klmni for reimbursement of the $16,000 paid to settle the Hirsch action and the attorney's fees incurred in defending that action, i.e. the $38,575.54 held in escrow. Klmni opposes the defendants' motion and cross-motion, and requests summary judgment dismissing their defenses and counterclaims, and directing C&A's attorney, as escrow agent, to release to Klmni the $79,529.54 held in escrow ($24,954 + $54,575.54 = $79,529.54).

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 (2005); Ayotte v. Gervasio, 81 NY2d 1062 (1993). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to demonstrate that material issues of fact exist which require a trial. See

Alvarez v. Prospect Hospital, supra at 324.

It is well settled that a the interpretation of a lease is governed by the identical rules of construction applicable to other agreements, and where the parties' intent is clear and unambiguous from the language employed on the face of the lease, the interpretation of the agreement is a matter of law solely for the court. See Horwitz v. 1025 Fifth Ave, Inc, 34 AD3d 248 (1st Dept 2006). "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." Hooper Assocs, Ltd v. AGS Computers, Inc, 74 NY2d 487, 491 (1989). An attorney's fees clause in a lease or agreement must be strictly construed. See Andrews 44 Coffee Shops, Inc v. TST/TMW 405 Lexington, LP, 40 AD3d 544 (1st Dept 2007); Duane Reade v. Highpoint Assocs IX, LLC, 36 AD3d 496 (1st Dept 2007); Horwitz v. 1025 Fifth Ave, Inc, supra. Specifically, the court should not "infer a party's intention to waive the benefit" of the "well-understood rule" that they are responsible for their own attorney's fees "unless the intention to do so is unmistakably clear from the language of the promise." Hooper Assocs, Ltd v. AGS Computers, Inc, supra at 492.

Here, the lease contains language regarding attorney's fees in both paragraph 18 entitled "Remedies and Damages," and paragraph 19 entitled "Fees and Expenses." To support their counterclaims for reimbursement of the attorney's fees incurred in defending the Hirsch action and the instant action, defendants cite subparagraph 18(C)(1), which states as follows:

> C. Legal Fees. (1) Tenant hereby agrees to pay, as additional rent, *all reasonable* attorney's fees and disbursement (and all other court costs or expenses of legal proceedings) which Landlord may incur or pay out by reason of, or in connection with:

(I) any action or proceeding by Landlord to terminate this Lease;
(ii) any other action or proceeding by Landlord against Tenant (including, but not limited to, any arbitration proceeding);
(iii) any *default* by Tenant in the observance or performance of any obligation under this Lease (including, but not limited to, matters involving payment of rent and additional rent, computation of escalations, alterations or other Tenant's work and subletting or assignment), whether or not Landlord commences any action or proceeding against Tenant;
(iv) any action or proceeding brought by Tenant against Landlord (or any officer, partner or employee of Landlord) in which Tenant fails to secure a final unappealable judgment against Landlord; and
(v) any other appearance by Landlord (or any officer, partner or employee of Landlord) as a witness or otherwise in any action or proceeding whatsoever involving or affecting Landlord, Tenant or this Lease. [emphasis added]

Defendants also cite the attorney's fees language in subparagraph 19(A) which states as follows::

A. Curing Tenant's Defaults. If Tenant shall *default* in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any Article of this Lease, Landlord may immediately or at any time thereafter on five (5) days' notice perform the same for the account of Tenant, and if Landlord makes any expenditure or incurs any obligations for the payment of money in connection therewith, including but not limited to reasonable attorneys' fees and disbursements in instituting, prosecuting or defending any action or proceeding, such sums paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Landlord within five (5) days of rendition of any bill or statement to Tenant therefor.

None of the applicable lease provisions quoted above provides a sufficient ground for awarding judgment as a matter of law on defendants' counterclaims for the attorney's fees incurred in defending the Hirsch action or the instant action. By the clear and express language in both subparagraph 18(C)(1)(iii) and subparagraph 19(A), Klmni must be in default under the lease, before it has any obligation to pay the landlord's attorney's fees. See Dupuis v. 424 East 77th Owners Corp, 32 AD3d 720 (1st Dept 2006).

Defendants assert that since Klmni failed to comply with the federal ADA, Klmni was in

default of its obligations under paragraphs 3 and 6 of the lease to comply with the requirements of federal law.[1] Defendants further assert that since such default resulted in their incurring legal fees and costs in defense of the Hirsch action, they are entitled to indemnification pursuant to paragraphs 3 and 37 of the lease.[2] Defendants' assertions are without merit, as Klmni has never been found in default of the lease either by the Federal court or this court. See Horwitz v. 1025 Fifth Ave, Inc, supra. Rather, the Hirsch action was settled without any determination of fault or liability. Moreover, the determination of liability in this court clearly raises issues of fact as to whether the ADA was violated, and if yes, whether Klmni was responsible for such violation.

Subparagraph 18(C)(1)(iv) gives defendants a potential right to recover the reasonable attorney's fees incurred in defense of the instant action alone, since the Hirsch action was not commenced by the tenant. However, in accordance with the explicit terms of that provision, the landlord's right to such fees would not accrue until the "Tenant fails to secure a final

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[1]Paragraph 6 is entitled "Requirements of Law" and states in relevant part: "Tenant, at its sole expense, shall comply with all Legal Requirements which shall now or hereafter impose any violation, order or duty upon Landlord or Tenant with respect to the Premises and with respect to the sidewalk adjacent to the Premises, as a result of the use, occupation or alteration thereof by Tenant."

Paragraph 3 is entitled "Alterations. Subparagraph 3(A)(iv) defines "Legal Requirements" as including "all laws, orders, ordinances, directions, notices, rules and regulations of the federal government . . ."

Subparagraph 3(B)(ii) provides in relevant part: "It shall be Tenant's responsibility and obligation to ensure that all Alterations (1) shall be made at Tenant's own cost and expense and at such times and in such manner as Landlord may from time to time designate . . .(2) shall comply with all Legal Requirements (including . . . all Legal Requirements then in effect relating to asbestos and to access for the handicapped or disabled) . . ."

Subparagraph 3(E) provides in relevant part: "Tenant shall indemnify and save harmless Landlord and its agents from and against any an all claims, actions, liabilities and obligations arising from any work in connection with, or other matters related to, the Alterations."

[2] Paragraph 37 is the indemnification clause, which is quoted and discussed in more detail below.

unappealable judgment against Landlord."

Defendants' reliance on subparagraph 18(C)(1)(v) is not persuasive, as they broadly construe it in isolation from the other provisions in the attorney's fees clause. As noted above, legal fees clauses must be strictly construed and as with the interpretation of any agreement, the specific language at issue cannot be construed in isolation, but must be read in the context of the surrounding provisions and the lease as whole. See Casamento v. Juaregui, 88 AD3d 345 (2nd Dept 2011); J.W. Mays, Inc v. Snyder Fulton St, LLC, 69 AD3d 572 (1st Dept 2010).

As quoted above, subparagraph 18(C)(1)(v) is one of five listed provisions enumerating the situations where the tenant is required to pay the landlord's attorneys fees. Of the four other provisions, three specifically apply where, as here, the landlord is an actual *party* to an action, and one applies when the tenant is simply in default. Subparagraph 18C)(1)(v) must be narrowly construed as limited to the situation where the landlord is not a party, but specifically appears in some "other" capacity, since it uses the phrase "any *other appearance* by landlord . . . *as a witness or otherwise*." Thus, because defendants were parties in the federal action and are parties in the instant action, 18(C)(1)(v) is not applicable and does not provide a basis for awarding them attorney's fees.

Citing paragraph 37 of the lease, defendants also assert that Klmni is obligated to indemnify them for the legal fees incurred and the settlement paid in the Hirsch action. Paragraph 37 is entitled "Indemnity" and provides in relevant part as follows:

> 37. Indemnity. Tenant shall not do or permit any act or thing to be done upon the Premises which may subject Landlord to any liability or responsibility for injury, damages to persons or property or to any liability by reason of any violation of law

> or of any legal requirement of public authority, but shall exercise such control over the Premises as to fully protect Landlord against any such liability. Tenant agrees to indemnify and save harmless Landlord from and against (a) all claims of whatever nature against Landlord arising from any act, omission or negligence of Tenant, its contractors, licensees, agents, servants, employees, invitees or visitors, including any claims arising from any act, omission or negligence of Landlord or Landlord and Tenant, (b) all claims against Landlord arising from any accident, injury or damage whatsoever caused to any person or to the property of any person and occurring during the Term in or about the Premises, © all claims against Landlord arising from any accident, injury or damage to any person, entity or property, occurring outside of the Premises but anywhere within or about the Real Property, where such accident, injury or damage results or is claimed to have resulted from an act or omission of Tenant or Tenant's agents, employees, invitees or visitors, including any claims arising from any act omission or negligence of Landlord or Landlord and Tenant, and (d) any breach, violation or nonperformance of any covenant, condition or agreement in this Lease set forth and contained on the part of Tenant to be fulfilled, kept, observed and performed . . . This indemnity and hold harmless agreement shall include indemnity from and against any all liability, fines, suits, demands, costs and expenses of any kind or nature incurred in or in connection with any such claim or proceeding brought thereon, and the defense thereof. . . .

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." Hooper Assocs, Ltd v. AGS Computers, Inc, supra at 491. In other words, the intention to indemnify "should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." Id.

Here, defendants' right to contractual indemnification depends upon the specific language in the lease, which must be strictly construed. A review of the indemnification clause demonstrates that neither subparagraph 37(b) nor subparagraph 37(c) is intended to cover the circumstances at issue, as those provisions require the tenant to indemnify the landlord for claims involving personal injuries and property damage. In contrast, the Hirsch action involved

discrimination claims in violation of the ADA, and not personal injuries or property damage. Subparagraph 37(a) requires the tenant to indemnify the landlord for claims against the landlord "arising from any act, omission or negligence" of the tenant or the landlord; and subparagraph 37(d) requires indemnification if the tenant is in "breach, violation or nonperformance of any covenant, condition or agreement in this lease." While subparagraphs 37(a) and (d) may potentially impose a duty on Klmni to indemnify defendants, the determination of that issue at this time is premature, since the Hirsch was settled and questions of fact exist as to the parties' liability on the underlying ADA claims.

In view of the foregoing, defendants have failed to make a prima facie showing that they are entitled to judgment as a matter of law, and for that reason the court need not consider the sufficiency of Klmni's opposition papers. However, in view of Klmni's request that the court search the record pursuant to CPLR 3212(b) and grant summary judgment in its favor, the court will consider its opposition papers.

Klmni objects that C&A is improperly attempting to hold it liable for conditions that arose before C&A became the new landlord. Klmni's argument is not persuasive, as the Hirsch action alleged some conditions of a permanent nature that arguably constituted a continuing violation of the ADA, such as the inaccessibility of the entrance due to steps, and the inaccessibility of the lower level of the store due to numerous stairs and no elevator.

Klmni likewise argues it is not liable to 483 Broadway, as the legal fees were not incurred and the settlement amount was not paid until after the lease was assigned to C&A. Klmni's argument is without merit, as the Hirsch action was commenced in June 22, 2010, which was

prior to the July 1, 2010 effective date of the assignment. Moreover, it cannot be disputed that any alleged ADA violations took place prior to the commencement of the Hirsch action, when 483 Broadway was the landlord.

Klmni further argues that the provision in the Master Lease between 483 Broadway and C&A by which 483 Broadway reserved it rights against Klmni, is limited to claims for non-payment of rent or additional rent, and does not cover the counterclaims asserted in this action. The lease, however, defines attorney's fees as "additional rent." For example, paragraph 18(C)(1), explicitly states that the tenant "agrees to pay, as *additional rent,* all reasonable attorney's fees and disbursements . . . which Landlord may incur or pay out . . ." Likewise, under paragraph 19(A) reasonable attorneys fees are among the expenses to which the Landlord is entitled as "additional rent." Also, when 483 Broadway settled the Hirsch action, it expressly reserved its right to seek indemnification from Klmni.

The balance of Klmni's arguments are without merit. Thus, upon a search of the record, the court concludes that Klmni is not entitled to judgment as a matter of law, either dismissing defendants' defenses and counterclaims, or directing C&A's attorney, as escrow agent, to release to Klmni the $79,529.54 held in escrow.

Accordingly, it is

ORDERED that the motion by defendant C&A 483 Broadway LLC for summary judgment is denied; and it is further

ORDERED that the cross-motion by defendant 483 Broadway Realty Corp. for summary judgment is denied; and it is further

ORDERED that upon a search of the record pursuant to CPLR 3212(b), plaintiff Klmni, Inc. is not entitled to summary judgment; and it is further

ORDERED that the parties are directed to appear for a status conference on August 22, 2013 at 9:30 in Part 11, Room 351, 60 Centre Street, at which time the court will determine whether the outstanding discovery issues can be resolved without motion practice.[3]

DATED: July 27, 2013

ENTER:

J.S.C.

[3]Defendant C&A requests that if its motions is denied, the court "grant it leave to make the appropriate discovery motion."