SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61
Justice

Index Number : 651381/2012
TSI HICKSVILLE, LLC D/B/A
vs.
100 DUFFY LLC
SEQUENCE NUMBER : 001
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 decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/24/13

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

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 : IAS PART 61

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TSI HICKSVILLE, LLC d/b/a NEW YORK SPORTS CLUB,

Plaintiff,

INDEX NO.
651381/12

-against-

100 DUFFY LLC and 100 DUFFY REFI LLC,

Defendants.

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HON. ANIL C. SINGH, J.:

Defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint based on documentary evidence, and granting defendants' counterclaim for costs and attorneys' fees.

Plaintiff health club brought this action against its former landlord for breach of lease agreement, seeking to recover moneys it allegedly spent making improvements to commercial premises in Hicksville, New York.

In January 2007, plaintiff leased commercial premises from defendant 100 Duffy LLC ("Duffy") pursuant to a lease (the "Lease") which, *inter alia*, provided that plaintiff would improve the premises so as to create a health and fitness center, and Duffy would reimburse plaintiff for a portion of its costs (the "Improvement Allowance"; see Lease § 48, at exhibit A to Davis affidavit). In November 2007, Duffy transferred its interest in the property to co-defendant 100 Duffy Refi LLC ("Duffy Refi"), its wholly owned subsidiary.

Plaintiff demanded payment of its Improvement Allowance, in the amount of $843,125,

by letter to Duffy dated April 17, 2009 (the "Demand Letter," plaintiff's exhibit D).[1] It is undisputed that defendants made no payment to plaintiff in response to plaintiff's letter and did not respond in any other way. Plaintiff does not allege making any further efforts to obtain payment of its Improvement Allowance.

Duffy Refi transferred its title and interest in the property to its current owner, non-party Capmark Finance LLC ("Capmark") by a deed in lieu of foreclosure agreement dated October 19, 2011 (the "Deed," exhibit B to defendants' moving papers). In connection with Duffy Refi's transfer of the property to Capmark, plaintiff executed an estoppel agreement dated October 14, 2011 (the "Estoppel Agreement," exhibit C to defendants' moving papers).

Plaintiff commenced this action in April 2012 seeking to recover its Improvement Allowance from defendants. Defendants answered the complaint and made the instant pre-discovery motion for summary judgment. Defendants' answer asserts seven affirmative defenses and a counterclaim for costs and attorneys' fees.

Defendants ground their motion on the two documents executed by plaintiff, the Lease and the Estoppel Agreement. They argue that under section 44.01 of the Lease, any liability they had thereunder was extinguished when the property was transferred to Capmark in October 2011 since § 44.01 limited the landlord's liability to its "direct interest in the property ... and any income or insurance proceeds thereof." Defendants further argue that plaintiff waived its right to recover the Improvement Allowance by representing in the 2011 Estoppel Agreement that there were "no uncured defaults by the Landlord ... [and] no ... charges due and owing under the Lease

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[1] Defendants claim they never received the Demand Letter, and contend that even if plaintiff had sent it, it was ineffectual as a demand for payment because it did not comply with the Lease requirements.

... by the Landlord" (Estoppel Agreement, ¶ 7). Defendants then contend that even if, *arguendo*, defendants could be found liable under the Lease, plaintiff is not entitled to recover the Improvement Allowance because it did not comply with the prerequisites for reimbursement specified therein (Lease ¶ 48.02). Finally, defendants request summary judgment on their counterclaim for costs and attorneys' fees pursuant to section 45.06 of the Lease.

In opposition, plaintiff argues that the "Landlord"[2] has an express and unconditional obligation under section 48.01 of the Lease to pay plaintiff's Improvement Allowance. Plaintiff states that its April 2009 Demand Letter was properly addressed to Landlord at "100 Duffy, LLC, c/o Apollo Real Estate Advisors, L.P., 2 Manhattanville Road, 2nd Floor, Purchase, NY 10577, Attention: Ron Solotruk." Plaintiff then argues that the Estoppel Agreement does not bar plaintiff's right to the Improvement Allowance because plaintiff's representations therein that "[t]here are no uncured defaults by the Landlord" and "no existing defenses or offsets which the Tenant has against its obligations to pay rent" does not apply to Landlord's failure to pay the Improvement Allowance. According to plaintiff, that failure was not a "default" but a mere "breach" of the Lease which entitles plaintiff to collect interest and attorneys' fees pursuant to section 48.03 thereof. Plaintiff, citing *inter alia 67 Wall Street Company v Franklin National Bank* (37 NY2d 245 [1975]), further contends that an estoppel certificate will not be enforced where the certifying party has an equitable defense or where the party attempting to enforce the document has knowledge of a contrary state of the facts. Next, plaintiff argues that Landlord's October 2011 foreclosure sale of the premises to Capmark does not absolve Landlord of its

[2] Plaintiff refers to defendants either singly or collectively as "Landlord."

obligation to pay the Improvement Allowance because Landlord had equity in the property during the period when plaintiff's damages were sustained. Plaintiff adds that the Lease permits it to look to "income" from the building to satisfy a judgment and that Capmark's cancellation of Landlord's approximately $55 million loan qualifies as "income" pursuant to section 108 of the Internal Revenue Code (26 USC § 108).

Plaintiff then argues that it did not forfeit its right to the Improvement Allowance by failing to send timely invoices to Landlord because section 48.02 of the Lease "merely provides the mechanics" of how Landlord "shall" pay the Improvement Allowance and does not constitute a condition precedent or contingency which would relieve Landlord of its obligation. Plaintiff argues further that it "substantially complied" with the Lease when it sent the Demand Letter to Landlord together with the required back-up documentation. Plaintiff adds that equity abhors a forfeiture and that Landlord was aware of the improvements and in any event could have required access to inspect the improvements after it received plaintiff's Demand Letter.

After addressing defendants' arguments (*supra*), plaintiff then contends that defendants' "pre-discovery motion" is premature and recites 10 purported material facts starting with "whether Landlord received the Demand Letter" and ending with "whether Landlord knew and/or observed Tenants' Initial Improvements, including the performance and/or completion thereof" (see plaintiff's memorandum of law, pp 15-16).

Plaintiff states that it is entitled to discovery pursuant to CPLR 3212(f) and that defendants' motion is not supported by an affidavit from someone with personal knowledge of the facts. Plaintiff concludes that Landlord's request for attorneys' fees is without merit because Landlord transferred all of lits right, title and interest in the Lease to Capmark before this action

was commenced.

A motion for summary judgment is properly granted when the moving party establishes a *prima facie* entitlement to judgment as a matter of law and the opposing party fails to present evidentiary proof sufficient to establish the existence of issues of material fact that require a trial for resolution (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *Guiffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Dismissal of the complaint based on documentary evidence (see CPLR 3211[a]1) is warranted when the documents submitted definitively dispose of plaintiff's claims (see *Demas v 325 West End Avenue Corp.*, 127 AD2d 476, 477 [1st Dept 1987]). A motion for summary judgment prior to discovery is properly entertained when the opposing party fails to demonstrate how discovery will lend merit to its case (see *Martinez v Higher Powered Pizza*, 43 AD3d 670 [1st Dept 2007]).

The court finds that defendants' motion should be granted. The motion is fully supported by the Lease and the Estoppel Agreement, which are clear and unambiguous documents.

The Lease provides in pertinent part as follows:

> It is specifically understood and agreed that there shall be no personal liability on the part of Landlord or any of its constituent members, partners or shareholders, with respect to any of the terms, provisions, covenants and/or conditions of this Lease and that Tenant shall look solely to the estate, property and equity of Landlord in the Building for the satisfaction of any judgment obtained by Tenant relating to the breach of any such terms, provisions, covenants and/or conditions of this Lease to be performed by Landlord or in the event of any other claim which Tenant may allege against Landlord arising out of this Lease. For purposes of this section, the term estate, property and equity of Landlord in the Building shall mean their[sic] direct interest in the real property comprising the Building and any income or insurance proceeds thereof, excluding, without limitation: any proceeds of sale produced upon a sale or refinancing of the Building...

(see defendants' exhibit A, § 44.01, p 48).

Plaintiff explicitly agreed that its right to recover damages under the Lease was limited to

defendants' "estate, property and equity" in the premises.

> A familiar and eminently sensible proposition of law is that when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add or to vary the writing

(*W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; accord *Vermont Teddy Bear Co., Inc.*, 1 NY3d 470 [2004]; *Ashwood Capital, Inc. v OTG Management, Inc.*, 99 AD3d 1 [1st Dept 2012]; see also *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002] [unambiguous written agreement must be enforced according to plain meaning of its terms]). Defendants transferred the leased premises to Capmark in April 2011 (two years after plaintiff's purported Demand Letter), after which they no longer had any "estate, property or equity" in the premises. As a result, when plaintiff commenced this action in April 2012, its right to recover damages from defendants for an alleged breach of the Lease no longer existed.

The Estoppel Agreement provides a separate and independent ground for granting defendants' motion. That agreement, which was signed by plaintiff's Senior Vice President and General Counsel in October 2011, provides in pertinent part that:

> There are no uncured defaults by the Landlord or the Tenant under the Lease or any of the related agreements described above, and the Tenant knows of no event or condition which with the passage of time or notice or both, would constitute a default by the Landlord or the Tenant under the Lease or any of the related agreements described above, except that there are on-going leaks through the roof and walls of the Premises that Landlord has failed to cure. There are no existing defenses or offsets which the Tenant has against its obligations to pay the rent or other charges due and owing under the Lease or against the enforcement of the Lease by the Landlord or the Tenant.

(defendants' exhibit C, ¶ 7).

The Estoppel Agreement also provides that: "The Lease represents the entire agreement

between the Tenant and the Landlord with respect to the leasing of the Property.... All work/tenant fit-up, if any, required under the Lease has been completed and approved by the Tenant" (defendants' exhibit C, ¶ 2). Prior to commencing this action, plaintiff clearly agreed that there were no uncured defaults by defendants at the time they divested themselves of all interest in the leased premises and severed their relationship with plaintiff (see *W.W.W. Assocs v Giancontieri, supra,* 77 NY2d 157; see also *JKR Franklin, LLC v 164 East 87th Street LLC*, 27 AD3d 392 [1st Dept 2006], lv den 7 NY3d 705 [2006] [an estoppel certificate bars any claims that pre-existing violations constitute a default under the lease]).

A third independent, but less compelling, reason for granting defendants' motion can be found in the fact that plaintiff failed to comply with the notice requirements of the Lease. Section 48.02 provides that: "Tenant ... shall provide Landlord by the fifth (5th) business day of each calendar month with an invoice ... setting forth the cost of any tenant improvement work ... payable since the last such invoice ..." (defendants' exhibt A, § 48.02, p 53). Plaintiff failed to send timely invoices to defendants. Section 18.01 of the Lease provides that copies of all notices sent to Landlord "shall" be given to three additional parties. Plaintiff failed to send any copies of the Demand Letter. While plaintiff's failure to send the required copies is not earth-shattering, it perhaps warrants comment in another context. In its opposing papers plaintiff claims that defendants' motion, which is supported by the affidavit of Kevin Davis should be denied because Mr. Davis does not claim to have "personal knowledge" of the underlying facts. In his moving affidavit, Mr. Davis states that he is an "authorized representative for defendants" and that he is "fully familiar with the facts and circumstances involved." The court finds that the Davis affidavit is sufficient to support defendants' motion, which is based on documentary evidence (*cf.*

Nidzyn v Stevens, 148 AD2d 592, 593 [2d Dept 1989] [attorney's affirmation was of probative value because it was based on documentary evidence"]). In this connection the court notes that Mr. Davis is specifically mentioned in the Lease as one of defendants' three representatives entitled to a copy of all notices, invoices and instruments sent by plaintiff to defendants under the Lease (see defendants' exhibit A, § 18.01, p 39).

Section 45.06 of the Lease provides that "[i]n the event that either party shall institute any action or proceeding against the other party relating to this Lease, the unsuccessful party ... shall reimburse the successful party for its disbursements incurred in connection therewith and for its reasonable attorneys' fees as fixed by the court ..." (defendants' exhibit A, § 45.06, p 50). While it is true that defendants no longer have an interest in the leased premises, as argued by plaintiff, this fact does not vitiate defendants' counterclaim for attorneys' fees because plaintiff's action "relates" to the Lease upon which it is based.

Accordingly, it is

ORDERED that defendants' motion is granted in its entirety; and it is further

ORDERED that plaintiff's complaint is hereby dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the counterclaim for costs and attorneys' fees asserted in defendants' answer against plaintiff is severed, and the issue of the amount of reasonable attorneys' fees defendants may recover against the plaintiff is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information

Sheet,[3] upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This decision constitutes the order of the court.

DATED: 10/24, 2013

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

[3]Copies are available in Room 119M at 60 Centre Street and on the Court's website.