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SHORT FORM ORDER

INDEX No. 12-500
CAL. No. 13-00838CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-12-13
ADJ. DATE 9-19-13
Mot. Seq. # 002 - MotD

STERN FAMILY LIMITED PARTNERSHIP,

Plaintiff,

- against -

ROLLIN DAIRY CORP. and ROLLIN GIANELLA,

Defendants.

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Upon the following papers numbered 1 to 41 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 27 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 28 - 39 ; Replying Affidavits and supporting papers 40 - 41 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for an order granting summary judgment in its favor is granted only to the extent that the second, fourth, sixth and seventh affirmative defenses are dismissed, and is otherwise denied.

Plaintiff Stern Family Limited Partnership, the owner of a commercial building located in Farmingdale, New York, brought this action to recover damages for unpaid rent and other costs allegedly due under a lease agreement with defendant Rollin Dairy Corp. executed in June 2004. The lease agreement was for a five-year term commencing either August 1, 2004 or the date plaintiff completed certain improvements to the property, and included an option to renew for an additional five-year period. Subsequently, the parties agreed the five-year lease term would run from December 1, 2004 to November 30, 2009. Performance of Rollin Dairy's obligations under the lease was secured by the personal guaranty of defendant Rollin Gianella, an owner of the closely-held corporation, who serves as its president and chief executive.

The lease agreement consists of the "standard form of loft lease" of the Real Estate Board of New York, a rider, and a "lease commencement letter" allegedly issued by plaintiff on November 30, 2004. The Court notes that a copy of the "lease commencement letter" was not included with the moving papers. As relevant to the instant motion, paragraph 65 of the rider, entitled Option to Renew, states, in part, as follows:

> [P]rovided there is no default in the performance of any term or condition of this lease on the part of the Tenant to be performed beyond any applicable grace and/or curing period at the time specified hereafter for exercising the option to renew, Tenant shall have the option to renew this Lease . . . The Tenant hereby agrees to give the Landlord written notice sent by certified mail, return receipt requested of its intention to either exercise or not exercise its option to renew hereunder no later than six (6) months prior to the expiration of the initial term. In the event the Tenant fails to give the required notice to the Landlord in the time allocated therefor, then and in that event the Tenant's right to exercise the option hereunder shall lapse and become null and void as if such option never existed in the first place.

Paragraph 73 of the rider sets forth the base rent payable during the renewal term. Such paragraph provides, in part, that for the first year of the renewal term, Rollin Dairy, as Tenant, agrees to pay annual net rent

> which shall be equal to the greater of (i) One Hundred Twenty-Eight Thousand Eight Hundred Dollars ($128,000.00) ($6.44 per square foot) payable in monthly installments . . . or (ii) . . . equal to One Hundred Twenty-One Thousand Four Hundred Dollars ($124,000.00) plus an amount equal to the sum of One Hundred Twenty-One Thousand Four Hundred Dollars ($124,00.00) multiplied by the percentage of the increase of the Consumer Price Index from the month preceding the first month of the Lease Term and the fifty-third month of the Lease Term (it being understood that the rent for the first year of the Renewal Term shall in no event be less than One Hundred Twenty-Eight Thousand Eight Hundred Dollars [$128,000.00]).

Such paragraph also sets out the annual base rental amounts for the second through fifth years of the renewal term, and provides that "[u]nder no circumstances shall the annual rent payable during the first through fifth years of the Renewal Term be less than" the amounts specified thereafter. The lease requires Rollin Dairy to pay, as additional rent during the original five-year lease term, among other things, all increases in amount of real estate taxes on the property and the cost incurred by plaintiff in constructing loading docks at the premises. It also provides at paragraph 71 that Tenant is taking possession in an "as is" condition, "with the mechanical systems . . .and air conditioning systems in working order and with the improvements contemplated by this Lease as specified in paragraph 77."

Further, Paragraph 32 of the lease, entitled Security Deposit, states that Tenant deposited the sum of $24,192 with plaintiff, referred to as Owner, " as security for the faithful performance and observance by Tenant of the terms, provisions and conditions of this Lease," and that, in the event Tenant defaults on any of its lease obligations, plaintiff "may use, apply or retain" the amount deposited "for the payment of any rent and additional rent . . . or for any sum which Owner may expend, by reason of Tenant's default . . . including but not limited to, any damages or deficiency in the re-letting of the demised premises." Paragraph 75 of the rider states that Tenant agrees that it shall maintain, at all times during the lease and the renewal term, a security deposit with plaintiff in an amount not less than two months of the gross rental payments owed under the agreement. Moreover, the rider states at paragraph 57 that, in the event Tenant remains in possession of the premises "after the termination of this Lease without the execution by Landlord and Tenant of a new Lease, such holdover shall be unlawful and in no manner constitute a renewal or extension of the lease," and that, at the Landlord's option, Tenant "shall be deemed to occupy the Demised Premises as a Tenant from month to month, at a monthly rental equal to one and one-half (1½) times the fixed rent and additional rent payable the last month of the term, subject to all the other terms of this Lease insofar as same are applicable to a month-to-month tenancy."

By correspondence from Rollin Dairy to plaintiff dated May 4, 2009, Rollin Gianella advised "[w]e hereby exercise our option to renew our lease for a period of five years as per clause 65 of the lease" agreement between the parties. Plaintiff allegedly did not respond to Rollin Dairy's May 4 letter. Shortly thereafter, by correspondence to plaintiff dated May 29, 2009, Rollin Dairy again advised that it was exercising its option to renew the lease agreement for another five-year term, but with certain "exceptions," including a reduction in the rental amount and a second five-year renewal option "at a 3% increase per year." As the parties engaged in negotiations regarding the terms of the lease, including plaintiff's obligations to make certain repairs to the property, Rollin Dairy continued to operate its business out of the subject premises. Various draft lease extension agreements apparently were exchanged by the parties' counsel. A proposed lease extension agreement prepared by its counsel allegedly was signed by Rollin Dairy and forwarded to plaintiff sometime in the summer of 2010.

Meanwhile, on August 2, 2010, plaintiff brought a holdover proceeding against Rollin Dairy to recover possession of the premises, alleging that the lease term ended on June 30, 2010 pursuant to a 30-day notice of lease termination, that Rollin Dairy remained in possession of the property after the termination date, and that it had not accepted any payments for rent or use and occupancy for the period beginning July 1, 2010. By e-mail correspondence to defendants' counsel from plaintiff's counsel dated September 3, 2010, plaintiff indicated, in part, that, in light of the apparent conflict between the May 4, 2009 letter and the May 29, 2009 letter, it viewed Rollin Dairy's "refusal to conclude the lease extension on the terms set forth in the Lease as a revocation of the notice of exercise of Rollin Dairy's renewal option." Moreover, in the same e-mail correspondence, plaintiff, after stating it "has no desire to debate with tenant the issue of whether it properly exercised the renewal option," states as follows:

> Accordingly, landlord now elects to take the following action:
>
> (1) Landlord will voluntarily discontinue the holdover proceeding; and

(2) Landlord shall accept Rollin Dairy's exercise or its option and the continuance of the Lease in accordance with the original terms which includes without limitation paragraph 73 of the Lease; and

(3) Landlord will pay Finkelstein Realty and A.J. Finkelstein Realty brokerage commission in accordance with the Commission Agreement dated March 8, 2007 previously signed by landlord and such brokers.

The effect of landlord's action will be that (i) Rollin Dairy will continue to pay basic rent commencing at the rate of $128,800 for the first year of the renewal term (commencing December 1, 2009) and that such basic rent will increase 3% each year in the second through fifth years of such renewal term, (ii) there will be no further extension of the Lease beyond November 30, 2014, and (iii) the landlord, tenant and broker need not execute any further documents for the foregoing to be effective.

Subsequently, the holdover proceeding was withdrawn by plaintiff, without prejudice, pursuant to a written stipulation, which was filed with the Suffolk County District Court on September 20, 2010.

Thereafter, by correspondence dated December 13, 2010, Rollin Dairy advised plaintiff that it would be vacating the premises "early next year," and that it would notify plaintiff "of a definitive date of termination as early as possible." By separate letter, also dated December 13, 2010, Rollin Gianella advised "I am using the two months rent we have on deposit as payment for the last two months of rental of your facilities." By correspondence dated March 11, 2011, plaintiff notified Rollin Dairy that it was in default of its obligation to pay rent, taxes, insurance and operating expenses, that $17,234 was due as of the date of such notice, and that plaintiff would pursue "any and all remedies available at law and in equity" if Rollin Dairy did not pay the amount due within 10 days of the receipt of such notice. Rollin Dairy vacated the premises in April 2011. In August 2011, plaintiff allegedly entered into a new lease agreement with a third party for the subject premises, with such lease term commencing on December 1, 2011.

The complaint contains four causes of action. The first cause of action alleges that Rollin Dairy breached the original lease agreement by failing to pay rent from December 2010 through February 2011, and that it breached the "Renewal Lease" by failing to pay rent from March 2011 and continuing to date. It alleges that as a result of such breach, plaintiff has been damaged in the principal sum of $150,000, plus interest from April 1, 2011. The second and third causes of action allege Rollin Dairy is liable under the lease agreement for the costs and fees incurred in re-letting the subject premises, and for all reasonable attorneys' fees incurred in connection with this action. The fourth cause of action asserts a claim against Rollin Gianella for $235,000 based on the personal guaranty. Defendants' answer asserts six affirmative defenses, including failure to state a cause of action, unclean hands, and lack of capacity to sue.

Plaintiff now moves for summary judgment in its favor on the complaint and the affirmative defenses. Plaintiff argues Rollin Dairy exercised the renewal option in the lease and, therefore, it is entitled to recover all rent and additional rent due under both the lease and the renewal lease, less the payments made by the new tenant at the premises. It argues it is entitled under the lease agreement to recover from Rollin Dairy the costs it incurred in finding a new tenant for the premises, as well as reasonable attorneys' fees and expenses. Plaintiff further asserts it is entitled under the personal guaranty provision to summary judgment against Rollin Gianella for rent and additional rent, the cost of re-letting the premises, and attorneys' fees. Defendants oppose the motion, arguing, among other things, that plaintiff did not respond to Rollin Dairy's May 4 letter advising of the intent to exercise the renewal option, and that it rejected Rollin Dairy's May 29 offer that it would renew the lease agreement if, among other things, plaintiff reduced the amount of the base rent.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Andre v Pomeroy***, 35 NY2d 361, 363 NYS2d 131 [1974]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

An option "is a continuing offer, binding for the time specified the one who makes it, but not the one to whom it is made, unless he accepts, when it becomes binding on both. It neither transfers nor agrees to transfer title to property, but confers the bare right to accept an offer within the time limited and upon the terms provided" (***Benedict v Pincus***, 191 NY 377, 382, 84 NE 284 [1908]). While an option constitutes a unilateral contract binding on the offeror, the exercise of the option transforms the parties' obligations into a bilateral contract (*see* ***Heller v Pope***, 250 NY 132, 164 NE 881 [1928]; ***Goldman v Orange County Ch., N.Y. State Assn. for Retarded Children***, 121 AD2d 683, 503 NYS2d 884 [2d Dept 1986]; ***Toroy Realty Corp. v Ronka Realty Corp.***, 113 AD2d 882, 493 NYS2d 800 [2d Dept 1985]). "Once the option [to renew] is exercised, the original lease is deemed a unitary one for the extended term and a new lease is not necessary" (***Dime Sav. Bank of N.Y. v Montague St. Realty Assoc.***, 90 NY2d 539, 543, 664 NYS2d 246 [1997]; *see* ***Orr v Doubleday, Page & Co.***, 223 NY 334, 119 NE 552 [1918] ***Atkin's Waste Materials v May***, 34 NY2d 422, 358 NYS2d 129 [1974]). Furthermore, an election to exercise an option must be timely, definite, unequivocal and in strict compliance with the terms of the lease (*see* ***Orr v Doubleday, Page & Co.***, 223 NY 334, 119 NE 552; ***Matter of Joyous Holdings v Volkswagen of Oneonta***, 128 AD2d 1002, 513 NYS2d 841 [3d Dept 1987]).

Summary judgment in favor of plaintiff is denied, as its submissions in support of the motion fail to establish as a matter of law that Rollin Dairy properly exercised the option and renewed the lease agreement. Here, there is no evidence, or even an allegation, that Rollin Dairy's letter of May 4, 2010 expressing its intent to renew the lease was sent, as required by paragraph 65 of the lease, by certified mail, return receipt requested (*cf.* ***Baygold Assocs., Inc. v Congregation Yetev Lev of Monsey, Inc.***, 81 AD3d

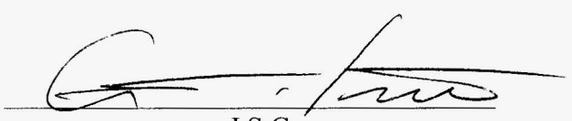
763, 916 NYS2d 639 [2d Dept 2011], *affd* 19 NY3d 223, 947 NYS2d 794 [2012]; ***Matter of 2039 Jericho Turnpike Corp. v Caglayan***, 64 AD3d 609, 882 NYS2d 311 [2d Dept 2009]). Further, "[w]hile strict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation" (***Fortune Limousine Serv., Inc. v Nextel Communications***, 35 AD3d 350, 353, 826 NYS2d 392 [2d Dept 2006], *lv denied* 8 NY3d 816, 839 NYS2d 454 [2007]; *see* ***Suarez v Ingalls***, 282 AD2d 599, 723 NYS2d 380 [2d Dept 2001]), plaintiff failed to demonstrate it waived such compliance. Here, a 30-day lease termination notice was served on Rollin Dairy following plaintiff's receipt of the May 4 letter. Such notice, signed by plaintiff's president and dated May 27, 2010, states that Rollin Dairy's tenancy at the Farmingdale property was held "under monthly hiring," and demands that it vacate the property by June 30, 2010. Then, following the May 29, 2010 letter from Rollin Dairy stating it would renew the lease contingent on a reduction in the rental amount and other changes to the lease agreement, plaintiff commenced the holdover proceeding. As the holdover proceeding was pending, the parties engaged in negotiations over the terms of the lease, and plaintiff's counsel, in the e-mail correspondence of September 3, 2010, advised that, while "Rollin Dairy exercised its option to renew the lease . . . by letter dated May 4, 2009," plaintiff viewed Rollin Dairy's subsequent actions, namely the May 29 letter and its demands that plaintiff undertake certain construction and repair work at the property, to be "a revocation of the notice of exercise of Rollin Dairy's renewal option." Moreover, while plaintiff asserts the September 3 e-mail correspondence and subsequent withdrawal of the holdover proceeding reflect "the parties' acknowledgment that [Rollin Dairy] had exercised the Renewal Option," such correspondence, which discusses the parties' inability to reach a new lease extension agreement and plaintiff's "effort to accommodate Rollin Dairy's new terms before the Lease term expired," and which proposes the withdrawal of the holdover proceeding and an annual base rent amount for the first year of the new five-year term different from the amount specified in paragraph 73 of the lease agreement, constitutes an offer for a new lease agreement (*see* ***Dime Sav. Bank of N.Y. v Montague St. Realty Assoc.***, 90 NY2d 539, 664 NYS2d 246; *see also* ***Keryakos Textiles v CRA Dev.***, 167 AD2d 738, 563 NYS2d 308 [3d Dept 1990]). Thus, the parties' conduct, as evidenced by the documents and deposition testimony submitted in support of the motion, shows triable issues exist as to whether the renewal option was properly exercised, whether plaintiff waived strict compliance with the requirements for exercise of the renewal option, and, if the renewal option was not exercised, whether the parties had reached an agreement concerning plaintiff's tenancy after November 20, 2009 (*see* ***Matter of 2039 Jericho Turnpike Corp. v Caglayan***, 64 AD3d 609, 882 NYS2d 311).

The branch of the motion for an order dismissing the affirmative defenses is granted as to the second, fourth, sixth and seventh causes of action, and is otherwise denied. The doctrine of unclean hands, an equitable defense, does not bar recovery in an action at law for contract damages or for rent arrears and legal fees (*see* ***Greco v Christoffersen***, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]; ***Color Wheel v Interstate Print. Co.***, 281 AD2d 161, 721 NYS2d 512 [1st Dept 2001]; ***518 E. 80th St. Co. v Smith***, 251 AD2d 215, 674 NYS2d 680 [1st Dept 1998]). Summary judgment dismissing the second affirmative defense, therefore, is granted. Further, as defendants concede rent was not paid for the last two months Rollin Dairy occupied the subject premises, summary judgment dismissing the fourth and sixth affirmative defenses is granted. "The furnishing of the security deposit is a substantial obligation of the tenancy, as it provides a fund from which the landlord can draw for unpaid rent or damages and which puts the landlord in the status of secured creditor" (***Markowitz v Landau***, 171 AD2d 564, 565, 567 NYS2d 268 [1st Dept 1991]), and a tenant may

not require a landlord to apply such deposit money for the payment of rent (*see* ***Josephi v Creston Co.***, 188 AD 97, 176 NYS 316 [1st Dept 1919], *affd* 230 NY 549, 130 NE 889 [1920]; ***Brill v Schlosser***, 40 Misc 247, 81 NYS 678 [App Term 1903]). Summary judgment dismissing the seventh affirmative defense, which alleges plaintiff, a foreign limited partnership, is not a proper party, is granted upon uncontroverted documentary proof that plaintiff obtained a certificate of authority to conduct business in New York prior to the commencement of this action (*see* Partnership Law § 121-907).

However, as no motion by a plaintiff lies to dismiss an affirmative defense for failure to state a cause of action, "as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim" (***Butler v Catinella***, 58 AD3d 145, 150, 868 NYS2d 101 [2d Dept 2008]; *see* ***Coluccio v Urbanek***, 129 AD2d 551, 514 NYS2d 45 [2d Dept 1987]; ***Torres v Southside Hosp.***, 84 AD2d 836, 444 NYS2d 182 [2d Dept 1981]), summary judgment dismissing the first affirmative defense is denied. As to the third affirmative defense, when a commercial tenant abandons leased premises prior to the expiration of the lease, the landlord has three options: (1) it may do nothing and collect the full rent due under the lease; (2) it may accept the tenant's surrender, reenter the premises, and relet them for its own account, thereby releasing the tenant from further liability for rent; or (3) it may notify the tenant that it was reentering the premises and reletting it for the tenant's benefit (***Holy Props. v Cole Prods.***, 87 NY2d 130, 133, 637 NYS2d 964 [1995]). While plaintiff asserts it had no obligation under the lease to mitigate damages, it failed to submit evidence establishing prima facie entitlement to judgment in its favor on the claim that it reentered and relet part of the subject premises for use as a parking lot (*see* ***Centurian Dev. v Kenford Co.***, 60 AD2d 96, 400 NYS2d 263 [4th Dept 1977]). As a triable issue continues to exist as to whether plaintiff relet the property during the lease term, and, if so, whether it reentered for its own account, summary judgment dismissing the third affirmative defense is denied. Similarly, plaintiff failed to establish entitlement to judgment in its favor on the fifth affirmative defense, which alleges, in effect, that plaintiff was acting in its own behalf, and to harm defendant tenant's business, when it erected a sign on the demised premises advertising the property as available for rent. Summary judgment dismissing this affirmative defense, therefore, is denied.

Dated: January 6, 2014



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION