

Harlington Realty Co. LLC v Rojas

2014 NY Slip Op 30827(U)

March 28, 2014

Supreme Court, New York County

Docket Number: 651608-2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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HARLINGTON REALTY CO. LLC,

Plaintiff,

Index No.
651608-2013

Mot. Seq No.: 001

- against -

Decision and
Order

SAUL ROJAS and INTI, LLC,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

The instant action was commenced by the Plaintiff Harlington Realty Co. LLC (“Harlington Realty”) pursuant to a summons and verified complaint, dated April 29, 2013, seeking, *inter alia*, a judgment against the Defendants, Saul Rojas and Inti, LLC (“Inti”) (collectively, “Defendants”), in the amount of \$654,193.97, representing base rent and additional rent through April 30, 2013 allegedly owed under the parties’ lease agreement.

The Verified Complaint alleges that Harlington Realty, as landlord, and defendant Saul Rojas, as tenant, executed a lease dated August 24, 2006 (“the Lease”) for the Store on the Ground Floor and basement in the building located at 31-33 Middleneck Road, Great Neck, NY (“the subject premises”). Saul Rojas took possession of the subject premises pursuant to the Lease. On October 10, 2006, Saul Rojas assigned his rights to the Lease to Inti and Inti took possession of the subject premises. Pursuant to the terms of the Assignment, Saul Rojas remains fully responsible for all obligations as tenant under the Lease, as well as all acts and omissions of the Tenant.

Harlington Realty alleges that Defendants failed to pay their rental obligations incurred under the Lease, Defendants abandoned the subject premises on February 28, 2007 without consent of the Plaintiff, and Plaintiff did not release Defendants from the balance of the term of Defendants' Lease which expires on August 31, 2016. Harlington Realty alleges that subsequent to the abandonment of the subject premises by the Defendants on February 28, 2007, on April 18, 2008, it was able to re-rent the subject premises to a new tenant, but at a base rent substantially less than the base rent due from the Defendants pursuant to the lease between the parties.

In this action, Harlington Realty seeks a judgment in \$654,193.97, plus interest from February 1, 2007, as a result of Defendants' breach of the Lease between the parties.

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence; or
 - (2) the court has not jurisdiction of the subject matter of the cause of action; or
 - (3) the party suing has not legal capacity to sue; or
 - ***
 - (5) the cause of action may not be maintained because of ... statute of limitations ...

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and

factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

For a CPLR §3211(a)(5) motion to dismiss based on the running of the statute of limitations, the defendant has the initial burden of proving that the time to commence the claim has expired and the plaintiff's response "must be given their most favorable intendment." (*Benn v. Benn*, 82 A.D.3d 548 [1st Dept 2011]).

Pursuant to CPLR §213(2), an action based on a contractual obligation or liability must be commenced within the six years of accrual. In contract cases, the statute of limitations begins to run and the cause of action accrues when a contract is breached or one party fails to perform a contractual obligation. However, "where a lease requires the payment of rent in installments the statute of limitations begins anew with each separate installment." *J.C. Penney Corp. v. Carousel Ctr. Co.*, 635 F. Supp. 2d 126, 131 [N.D.N.Y. 2008]. New York courts have applied the rule that the non-payment of each installment restarts the statute of limitations.

A & I Realty Corp. v. Kent Dry Cleaners Inc., 61 Misc.2d 887, 890 [N.Y. Dist. Ct. 1969] (holding that, based on the terms of the Lease, "[i]t is obvious [] that it was the intention of the parties that the landlord would have a separate cause of action for each month's rent as it became due." (citation omitted))

Upon review of the Complaint and the parties' submissions, Defendants have not produced documentary evidence that flatly contradicts the legal conclusions and factual conclusions of the Complaint. The evidence submitted does not establish that Defendants' abandonment of the subject premises on February 28, 2007 operated as a surrender of the subject premises within the meaning of the Lease to relieve them of their liability under the Lease or that the six year statute of limitations expired in February, 2013 to warrant dismissal of the action. See Paragraph 24 of Lease ("... No act or thing done by Owner or Owner's agents during the term hereby demised shall be deemed in acceptance of a surrender of said premises and no agreement to accept such surrender shall be valid unless in writing signed by Owner..."); Paragraph 18 of the Lease ("In case of any such default, re-entry, expiration and/or dispossession by summary proceedings or otherwise, (a) all of the rent, and additional rent, shall become due thereupon and

be paid up to the time of such re-entry, dispossess and/or expiration; (b) Owner may re-let the premises or any part or parts thereof . . . and/or (c) Tenant ... shall also pay Owner as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease ..."). While Plaintiff would be barred from collecting any rents owed more than six years before commencing the action, Defendants have not demonstrated that Plaintiff's claims for rent and additional rent owed from April 2008 and forward are barred by the statute of limitations to warrant dismissal of this action.

Defendants further seek to disqualify Harlington Realty's counsel on the grounds "that the Attorneys are necessary and indispensable fact witnesses to the identity of the person(s) who fabricated evidence [of Plaintiff's rent computation]." Defendants' motion to disqualify is denied. There is no indication that they attorneys are the sole source of the information contained in the rent ledgers.

Harlington Realty's Cross Motion for Summary Judgment

Harlington Realty cross moves for an Order granting summary judgment in its favor on its first cause of action in the amount of \$654,193.87 for base rent and additional rent owed under the Lease and setting this matter down for a hearing on the reasonable amount of attorneys' fees owed.

Defendants oppose, contending, among other arguments, that there are issues of fact concerning the alleged damages and specifically, the new lease for the subject premises. Defendants contend that they should be permitted to take discovery, including the opportunity to issue the subpoena production of the new lease(s) for the property, the financial records of the owner of the building and Plaintiff during the lifetime of the new lease(s) and the tax, sewer/water charge and utility bill payment records assessed against the property during the lifetime of the new lease(s).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

CPLR §3212(f) provides that, “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

Harlington Realty has failed to make out a prima facie showing of entitlement to judgment as a matter of law. There are provisions in the Lease which relate to Tenant’s failure to pay and which require notice to the tenant. (See Paragraph 71 of the Lease). Harlington Realty has provided no evidence of having provided notice in accordance with the Lease.

Wherefore, it is hereby

ORDERED that Defendants’ motion is denied in its entirety; and it is further

ORDERED that Plaintiff’s cross motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: MARCH 28, 2014



EILEEN A. RAKOWER, J.S.C.