

1350 Broadway Assoc., LLC v Rifkin & Lubcher, LLP
2014 NY Slip Op 32399(U)
September 11, 2014
Supreme Court, New York County
Docket Number: 652707/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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1350 BROADWAY ASSOCIATES, LLC,

Plaintiff,

Index No. 652707/2012

-against-

DECISION/ORDER

RIFKIN & LUBCHER, LLP,

Defendant.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action seeking to recover, among other things, use and occupancy from defendant. Defendant now moves pursuant to CPLR § 3212 for an order granting partial summary judgment dismissing the portion of plaintiff’s first cause of action as it relates to “holdover charges.” For the reasons set forth below, defendant’s motion is denied.

The relevant facts are as follows. On or about September 29, 2006, plaintiff entered into a lease with defendant to let out the premises located at 1350 Broadway, Room 1711, New York, New York 10018 for the period of July 1, 2007 through August 31, 2011 (the “Lease”). Thereafter, defendant allegedly failed to pay rent when it became due and owing and on or about February 8, 2008, plaintiff commenced the first non-payment proceeding. According to plaintiff,

the next two years were spent trying to negotiate a settlement, which ultimately proved unsuccessful. Thus, on or about September 7, 2010, plaintiff commenced a second nonpayment proceeding. In connection with that proceeding, on or about June 17, 2011, the parties conducted a settlement conference in an attempt to yet again resolve the matter. According to plaintiff, the conference resulted in a recalculation of some of the amount owed by the defendant but the matter was still left unresolved. Thus, by letter dated August 11, 2011, just prior to the Lease expiring on August 31, 2011, plaintiff sent defendant a revised rent demand (the "Rent Demand"). The Rent Demand informed defendant that it was required to pay the outstanding rents as stated in the letter "on or before September 7, 2011, that being more than ten (10) days from the date of the service of this notice, or surrender up the possession of said premises to the Landlord, in default of which, Landlord will commence summary proceedings under the statute to recover possession thereof." The Rent Demand further provided: "This demand is made without prejudice to the undersigned's rights to collect other sums due under the lease."

Defendant did not make any payment to plaintiff with respect to the Rent Demand. Thus, on or about September 19, 2011, plaintiff commenced a holdover proceeding. It is not clear what happened in the holdover proceeding. However, it is undisputed that defendant vacated the premises in October 2011.

On or about August 3, 2012, plaintiff commenced the instant action asserting two causes of action pursuant to the Lease. Specifically, in its first cause of action, plaintiff seeks, among other things, "holdover rent" for the two months defendant remained in possession of the premises after the Lease had expired pursuant to Section 12 of the Lease. Section 12 of the Lease provides, in relevant part, as follows:

Tenant therefore agrees that if possession of the premises is not surrendered to Landlord within three (3) days after the expiration or sooner termination of the term of this lease, then Tenant will pay Landlord as liquidated damages for each month and for each portion of any month during which Tenant holds over in the premises after expiration or termination of the term of this lease, a sum equal to two (2) times the average rent and additional rent which was payable per month under this lease during the last six months of the term thereof.

Defendant now moves for partial summary judgment dismissing the portion of the first cause of action seeking holdover rent on the ground that plaintiff is estopped from seeking holdover rent pursuant to the Rent Demand.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, defendant’s motion for partial summary judgment dismissing the portion of plaintiff’s first cause of action for holdover rent is denied as defendant has failed to make out its *prima facie* burden of establishing its entitlement to said judgment as a matter of law. Defendant’s sole argument in support of its motion for partial summary judgment is that plaintiff cannot now seek holdover rent as the Rent Demand’s express reference to a date later than the Lease expiration date is “clear evidence of an election by plaintiff to continue the relationship as a month to month tenancy.” However, upon review of the Rent Demand, the

court finds this argument without merit. Contrary to defendant's assertion, the terms of the Rent Demand itself does not support its position. Nowhere in the Rent Demand does plaintiff explicitly state an intent to make defendant a month to month tenant after expiration of Lease or otherwise state an intent to alter the terms of the Lease. On the contrary, plaintiff explicitly stated "[t]his demand is made without prejudice to the undersigned's rights to collect other sums due under the lease." Thus, it is clear that the Rent Demand does not support a finding that plaintiff is now estopped from seeking holdover rent from plaintiff as a matter of law entitling defendant to summary judgment at this time.

Accordingly, defendant's motion is denied. This constitutes the decision and order of the court.

Dated: 9/11/14

CK

J.S.C.

CYNTHIA S. KERN
J.S.C.