Able Rigging Contr., Inc. v Island Swimming Sales, Inc.
2014 NY Slip Op 32764(U)
October 14, 2014
Supreme Court, Suffolk County
Docket Number: 13-1107
Judge: Joseph C. Pastoressa

[* 1]

SHORT FORM ORDER

INDEX No. 13-1107

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 002 - MotD

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ABLE RIGGING CONTRACTORS, INC.,

Plaintiff,

- against -

ISLAND SWIMMING SALES, INC., ISLAND SWIMMING SALES, INC. d/b/a ISLAND RECREATION, JONATHAN BONELLI, and JERYL GRIESING,

Defendants.

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Upon the following papers numbered 1 to 28 read on this motion Summary Judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19 - 25 ; Replying Affidavits and supporting papers 26 - 28 ; Other Plaintiff's memorandum of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Able Rigging Contractors, Inc. for, inter alia, summary judgment on its complaint is determined as follows:

Plaintiff Able Rigging Contractors, Inc. commenced this action for recovery of the security deposit it paid to defendant Island Swimming Sales, Inc., d/b/a Island Recreation ("Island Swimming"), in connection with the sublease of a commercial warehouse located at 14 West Jeffryn Blvd., Deer Park, New York. Plaintiff allegedly utilized the premises and its parking lot to park and store its heavy rigging equipment. On March 5, 2009, the parties entered an agreement for the sublease of the premises commencing April 1, 2009 through June 29, 2012.

In addition to monthly rental charges, the sublease required that plaintiff pay its pro-rata share of real estate taxes, assessments, and common area maintenance fees. Paragraph 4(a) of the sublease also requires plaintiff to "indemnify and hold harmless Sublandlord . . .from and against any cost, loss, damage or expense, including without limitation, attorneys' fees, incurred as a result of any claim, suit,

liability or demand arising out of, pertaining to or involving the obligations of Subtenant under this lease." Correspondingly, paragraph (4)(b), which contains identical language, secures a right to indemnification and an award of attorneys' fees in favor of the subtenant.

Paragraph 16 of the sublease, entitled "Security Deposit," further provides, in pertinent part, as follows:

> Subtenant, on the date of signing this Sublease shall deliver to Sublandlord a security deposit in the amount of Forty Thousand Dollars ($40,000.00) as security for Subtenant's faithful performance of Subtenant's obligations under this Sublease (the "Security Deposit"). If Subtenant fails to pay rent or otherwise defaults under this Sublease, then Sublandlord may use the Security Deposit for the payment of any liability, cost, expense, loss or damage (including reasonable attorneys fees) which Sublandlord may suffer or incur by reason thereof. Sublandlord shall not be required to keep the Security Deposit in a separate account nor shall the Security Deposit bear interest. Upon the expiration or earlier termination of this Sublease, Sublandlord shall return to Subtenant that portion, if any, of the Security Deposit that has not been used or applied by Sublandlord. At all times subtenant shall maintain such Security Deposit in the amount equivalent to four months base rent.

Although plaintiff was not scheduled to take possession of the subject premises until April 1, 2009, needing immediate storage space for some of its equipment, it executed an addendum to the sublease with Island Swimming which permitted it to use 5,000 square feet of the premises for such purposes. On June 12, 2009, the parties executed another addendum to the sublease whereby Island Swimming agreed to lease a slightly smaller space to plaintiff and to decrease its rent under the original sublease. Although plaintiff had already paid a security deposit in the sum of $40,000, pursuant to the June 12, 2009 addendum, the security deposit was reduced to $34,000, and the difference of $6,000 was applied to plaintiff's first month's rent.

By its complaint, plaintiff alleges, inter alia, causes of action based on alleged violations of Real Property Law §227 and General Obligations Law §7-103, and breach of contract. It also seeks to recover attorneys' fees and disbursements incurred in connection with its claims. The complaint names Jonathan Bonelli and Jeryl Griesing, the respective owner and executive financial director of Island Swimming, as parties to the action. Defendants' answer to the complaint asserts general denials, affirmative defenses, and counterclaims in the sum of $104,000 based on the estimated cost to repair the premises, and plaintiff's alleged failure to pay its pro rata share of the increased costs of real estate taxes, common area maintenance fees, and assesments during the term of the sublease.

By order dated February 14, 2014, this court denied, without prejudice to renew, a motion by plaintiff for summary judgment on its complaint, and for dismissal of defendants' affirmative defense based on lack of personal jurisdiction. Plaintiff now renews its motion, arguing, inter alia, that defendants violated the sublease by failing to return its security deposit despite its offer to pay an asphalt

repair contractor the sum of $7,000 for minor repairs to the surface of the premises' parking lot. Plaintiff further asserts that defendants failed to respond to its requests to have the parking lot repaired, for the return of its security deposit, or for an accounting of the manner in which the security deposit was held. Additionally, plaintiff contends that it served defendants in accordance with the rules for service upon individuals and corporations set forth in the CPLR.

In opposition, defendants assert that the motion should be denied, as triable issues exist as to the cost for repairs to the damaged parking lot, and the amount of damages it incurred in connection with its counterclaim for breach of contract based on plaintiff's failure to pay its pro rata share of the increased costs of real estate taxes, common area maintenance fees, and assesments during the term of the sublease. They further assert that plaintiff improperly named Jonathan Bonelli and Jeryl Griesing as individual defendants to the action where, as here, their claims are against Island Swimming.

Initially, the Court notes that an attorney affirmation stating that he has reviewed the case files, together with documentary evidence such as the sublease and an affirmation by plaintiff's chief financial officer, is sufficient to meet the requirements of CPLR 3212 (b) that a motion for summary judgment be supported by an affidavit of a person with personal knowledge of the facts (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 598, 427 NYS2d 925 [1980]; *see also* ***First Interstate Credit Alliance v Sokol***, 179 AD2d 583, 579 NYS2d 653 [1st Dept 1992]; ***Beagle v Parillo***, 116 AD2d 856, 498 NYS2d 177 [3d Dept 1986]; ***Comptroller of the Sate of N.Y. v Gards Realty Corp***., 68 AD2d 186, 416 NYS2d 821 [2d Dept 1979]). Further, inasmuch as Island Swimming failed to move for dismissal of the complaint based on its affirmative defense of lack of personal jurisdiction within sixty days after filing its answer, the defense is deemed abandoned, and the court grants the branch of plaintiff's motion seeking dismissal of the same (*see* CPLR 3211 (a) (8) (e); ***Siu Nam Wong Pun v Che-Kwok Pun***, 119 AD3d 402, 988 NYS2d 482 [1st Dept 2014]; ***Wiebusch v Bethany Mem. Reform Church***, 9 AD3d 315, 781 NYS2d 6 [1st Dept 2004]).

To establish prima facie entitlement to judgment as a matter of law, a movant for summary judgment must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Center***, *supra*).

Here, plaintiff failed to meet its prima facie burden on the branches of its motion seeking summary judgment on its causes of action under Real Property Law §227, and for damages against the individual defendants personally. Real Property Law §227, which permits a tenant to terminate its tenancy after a leased premises has been destroyed, is inapplicable under the circumstances of this case (*see generally* New York Real Property Law §227; ***Tilbern Realty, Inc. v Lax Drug Co.***, 59 Misc 2d 515, 299 NYS2d 758 [Special Term, NY County, 1969]). Moreover, where, as here, no evidence of fraud or illegality has been adduced, the court will not pierce the corporate veil permitting plaintiff to sue the individually named defendants personally (*see* ***Bonacasa Realty Co., LLC v Salvatore***, 109 AD3d 946, 972 NYS2d 84 [2d Dept 2013]; ***Treeline Mineola, LLC v Berg***, 21 AD3d 1028, 801 NYS2d 407

[2d Dept 2005]). Furthermore, to the extent that General Obligations Law §7-103 renders certain conduct illegal, a determination of whether such illegality has risen to the level where piercing of the corporate veil is required, is within the sole discretion of the Attorney General (*see* ***Matter of State of New York v Parker***, 30 NY2d 964, 335 NYS2d 827 [1972]). Therefore, the branches of plaintiff's motion seeking summary judgment against the individual defendants personally, and on its claim under Real Property Law 227, are denied.

Nevertheless, plaintiff established its prima facie entitlement to the immediate return of its security deposit by submitting unrefuted evidence that Island Swimming failed to give it written notice of the banking institution that held its $34,000 security deposit (*see* ***Gihon, LLC v 501 Second St., LLC***, 103 AD3d 840, 962 NYS2d 238 [2d Dept 2013]; ***Paterno v Carroll***, 75 AD3d 625, 628, 905 NYS2d 653 [2d Dept 2010]). Under General Obligations Law §7-103, a landlord now acts as a trustee of its tenant's security deposit and "owes a duty not to commingle the deposit with his own funds" (***LeRoy v Sayers***, 217 AD2d 63, 68, 635 NYS2d 217 [1st Dept 1995], *quoting* ***Matter of Perfection Tech. Servs. Press (Cherno-Dalecar Realty Corp.)***, 22 AD2d 352, 356, 256 NYS2d 166 [2d Dept 1965], *aff'd* 18 NY2d 644, 273 NYS2d 71 [1966]). Failure by a landlord to segregate a security deposit constitutes conversion (*see* ***Matter of Ideal Reliable Sundries, Inc.***, 49 AD2d 852, 374 NYS2d 10 [1st Dept 1975]), and the landlord forfeits his right to avail himself of the security deposit for any purpose and "vest[s] in plaintiff an 'immediate right' to receive those monies" (***Tappan Golf Drive Range, Inc. v Tappan Prop. Inc.***, 68 AD3d 440, 440, 889 NYS2d 580 [1st Dept 2009], *quoting* ***LeRoy v Sayers***, *supra* at 68-69; *see* ***Dan Klores Assocs., Inc. v Abramoff***, 288 AD2d 121, 121, 733 NYS2d 388 [1st Dept 2001]). Indeed, any lease provisions negating the landlord's duty to segregate such deposit is void, as a matter of law, and raises an inference that General Obligations Law § 7-103(1) has been violated (*see* ***Gihon, LLC v 501 Second St., LLC***, *supra*; ***Paterno v Carroll***, *supra*).

In opposition, Island Swimming failed to raise any triable issue warranting denial of this branch of the motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). Significantly, in his affidavit submitted in opposition to the motion, defendant Jonathan Bonelli admits that rather than depositing the subject security deposit into an individual account, it was deposited into Island Swimming's corporate account. Moreover, contrary to defendants' assertion regarding certain set offs related to the cost of repairs to the surface of the parking lot and unpaid common charges, where, as here, commingling of the security deposit has been inferred, to permit a landlord "to set off the deposit against his individual claims is to treat the deposit as a debt and the landlord as a debtor–precisely the situation which [the security deposit law] was enacted to change" (***Matter of Perfection Technical Services Press, Inc.***, 22 AD2d 352, 356, 256 NYS2d 166 [2d Dept 1965]; *see* ***Tappan Golf Drive Range, Inc. v Tappan Property, Inc.***, *supra*; ***Dan Klores Assocs., Inc. v Abramoff***, *supra*; ***State of New York v Thwaites Place Assoc.***, 155 AD2d 3, 552 NYS2d 226 [1st Dept 1990]). Accordingly, the branch of the motion seeking the return of plaintiff's security deposit is granted.

As to the branch of plaintiff's motion seeking an award of attorneys' fees it incurred in connection with this action, a promise by one party to a contract to indemnify the other for attorney fees incurred during litigation between them is contrary to the general rule that parties are responsible for their own attorneys fees and will fail unless such an intention is unmistakably clear from the language of their agreement (*see* ***Hooper Assocs. v AGS Computers***, 74 NY2d 487, 549 NYS2d 365 [1989];

Coventry Real Estate Advisors, L.L.C. v DDR Corp., 118 AD3d 547, 988 NYS2d 583 [1st Dept 2014]; ***Tokyo Tanker v Etra Shipping Corp.***, 142 AD2d 377, 536 NYS2d 75 [1989]). Indeed, "New York public policy disfavors any award of attorneys' fees to the prevailing party in a litigation" (***Horwitz v 1025 Fifth Ave., Inc.***, 34 AD3d 248, 249, 825 NYS2d 5 [1st Dept 2006]). Therefore, "a contractual provision assuming an obligation to indemnify a party for attorneys' . . . fees 'must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed'" (***Spodek v Neiss***, 86 AD3d 561, 561, 926 NYS2d 904 [2d Dept 2011], *quoting* ***Hooper Assoc. v AGS Computers***, *supra* at 491). Here, the language contained within the sublease does not contain a clear expression of intent that the parties pay each other's attorneys fees under these circumstances. Rather, the indemnification clause is typical of those which contemplate reimbursement of attorneys fees for third-party claims only. Therefore, the portion of plaintiff's motion seeking attorneys fees for the prosecution of its action against defendants is denied.

However, as triable issues exist as to defendants' counterclaims based on, inter alia, the estimated cost to repair the parking lot and plaintiff's alleged failure to pay its pro rata share of the common area maintenance fees, the branch of plaintiff's motion for summary judgment dismissing defendants' remaining counterclaims is denied (*see* ***Zuckerman v City of New York***, *supra*; ***Perez v Grace Episcopal Church***, *supra*). Accordingly, the counterclaims are severed and continued.

Dated: October 14, 2014

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION