Trumbull Equities LLC v City.Com Media LLC
2015 NY Slip Op 30559(U)
April 8, 2015
Sup Ct, Queens County
Docket Number: 704961/14
Judge: Allan B. Weiss
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART_2_

TRUMBULL EQUITIES LLC

Plaintiff,

-against-

CITY.COM MEDIA LLC

Defendants.

Index Number: 704961/14

Motion Date: November 5, 2014

Motion Seq. No. 1

The following numbered papers read on this motion by plaintiff Trumbull Equities LLC for an order dismissing defendant's second, third, fourth, fifth, sixth, eighth, and ninth affirmative defenses pursuant to CPLR 3211(b) and granting summary judgment on the first and second causes of action; and in the alternative granting summary judgment on the first and second causes of action and scheduling a hearing to determine plaintiff's reasonable attorney's fees.

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Memorandum of Law-Exhibits....	E 7 - 17
Opposing Affirmation-Affidavits-Memorandum of Law.....	E 33 - 34
Reply Affidavit.....	E26 - 32

Upon the foregoing papers the motion is determined as follows:

Plaintiff Trumbull Equities LLC is the owner of commercial real property known as 31-10 37th Avenue, Long Island City, New York. Defendant City.Com Media LLC is the former tenant of a portion of the second floor of said premises, pursuant to a written lease agreement dated April 25, 2012. The lease term commenced on May 1, 2012 and expired on April 30, 2017.

Plaintiff commenced the within action on July 16, 2014, and alleges in its amended verified complaint that the defendant has not paid rent since August 2013 and that the defendant abandoned the premises on August 28, 2013 without the landlord's consent as required by the lease. Plaintiff, in its first cause of action, seeks to recover pursuant to the terms of the lease unpaid rent from September 1, 2013 through January 1, 2014, totaling

$30,500.00; deficiency base rent in the amount of $2,959.60 commencing February 1, 2014 when the successor tenant commenced paying rent, through April 30, 2017; defendant's proportionate share of the cleaning services for the building pursuant to Article 6(B) of the lease, for the period of September 1, 2013 through January 1, 2014, totaling $1,777.50; and late charges pursuant to Article 3(B), for the period of September 1, 2013 through September 1, 2014, totaling $1,651.35. In addition, plaintiff, pursuant to Article 36 of the lease seeks to recover expenses incurred in re-letting the premises, in an amount no less than $10,000.00. Plaintiff alleges that after deducting defendant's security deposit in the amount of $6,000.00, it is entitled to recover the sum of $40,888.45 for unpaid rent, additional rent and other costs and expenses.

Plaintiff, in its second cause of action, seeks to recover attorney's fee, costs and expenses, incurred in this action, pursuant to Article 37 of the lease.

Defendant has served an answer and interposed nine affirmative defenses.

Plaintiff now moves for an order dismissing defendant's second, third, fourth, fifth, sixth, eighth, and ninth affirmative defenses pursuant to CPLR 3211(b) and granting summary judgment on the first and second causes of action; and in the alternative granting summary judgment on the first and second causes of action. Plaintiff in support of its motion has submitted the amended verified complaint, that was verified by its managing member; an affirmation from its counsel; an affidavit from Peter Kosteas, plaintiff's commercial property manager; a copy of the deed to the subject premises, a copy of the parties' lease agreement, a copy of the first amendment to the lease agreement, and an itemized bill from plaintiff's counsel dated October 6, 2014, for legal services totaling $6,685.00.

Defendant, in opposition, to the motion asserts that it had the plaintiff's consent to terminate the lease and surrender the leasehold with no penalty; that the plaintiff took possession of the subject premises immediately after the defendant's surrender; and that the subject premises was re-let less than two months after defendant vacated the premises. Defendant argues that a triable issue of fact exists with respect to an alleged oral modification of the lease agreement. Defendant further asserts that the motion for summary judgment is defective as the affidavit submitted by Mr. Kosteas is insufficient to lay an evidentiary foundation for the documents submitted and relied upon as business records. Defendant has submitted an affirmation from its counsel, and an affidavit from Michael Bahlitzianakis, who states that he is the "principal of the corporate Defendant".

Plaintiff, in its reply papers has submitted a certified copy of the deed, and asserts that the leases are non-hearsay documents. It is asserted that there is no dispute that the parties

were in a landlord-tenant relationship, and that said leases have been authenticated in affidavits submitted in reply by Mr. Kosteas and Efstathios Valiotis, plaintiff's managing member.

Plaintiff further asserts that no issue of fact exists with respect to the tenant's claim that the landlord accepted his surrender of the premises. Mr. Kosteas and Mr. Valiotis both state in their affidavits that Kosteas does not have the authority to consent to a tenant's early surrender of the demised premises; that only Valiotis has such authority; that the landlord did not consent to the surrender of the premises; and that the lease requires that any such agreement to accept a surrender of the premises be in writing. Kosteas andValiotis both state that the landlord was willing to accept the defendant's surrender of the premises, provided that the tenant accept certain financial conditions and terms; that an agreement could not be had, and the tenant abandoned the premises. Plaintiff also submits a letter from plaintiff's counsel, addressed to Mr. Bahlitzianakis and dated February 10, 2014, which confirmed the tenant's August 8, 2013 attempt to give notice of its intention to vacate and surrender the subject premises, and set forth the reasons said attempted offer was rejected. Counsel, however, also stated that the landlord was willing to accept the tenant's surrender, subject to payment of $19,366.50 on or before March 1, 2014, "the same deal that was offered to you upon your August 2013 abandonment", while expressly preserving the landlord's rights and remedies.

It is well established that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp*., 68 NY2d 320[1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562[1980]). The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord & Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]).

The affidavits submitted herein are sufficient to establish the genuineness and authenticity of the documentary evidence. In any event, merely attaching the subject leases to the attorney's affirmation is sufficient to admit the leases (*see DeLeon v Port Auth*., 306 AD2d 146 [1st Dept 2003]; *Mascoli v Mascoli*, 129 AD2d 778 [1987]; *see also Malloy v V.W. Credit Leasing, Ltd.*, 21 Misc3d 1110 [A][Sup Ct Bronx County, 2008][a lease is not hearsay]).

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (see CPLR

3211 [b]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*se, Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see id*.). "A defense not properly stated or one that has no merit, however, is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff seeking dismissal of any affirmative defense after the joinder of issue" (*Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc*., 35 Misc3d 1228A [Sup Ct Suffolk County 2012]).

Defendant's second, third, fourth and fifth affirmative defenses of lack of standing, conditions precedent to suit have not been met, waiver and laches, and statute of limitation, are dismissed, as they merely plead conclusions of law without any supporting facts (*see Morgenstern v Cohon*, 2 NY2d 302 [1957]; *Moran Enters., Inc. v Hurst*, 96 AD3d 914, 917 [2d Dept 2012]; *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d at 723 [2008]; *170 W. Vil. Assoc. v G & E Realty, Inc*., 56 AD3d 372, 372-373 [1st Dept 2008]; *Glenesk v Guidance Realty Corp*., 36 AD2d 852, 853[2d Dept 1971]).

Defendant's sixth affirmative defense is dismissed. Since as the claim upon which plaintiff seeks summary judgment sounds in breach of contract, as opposed to tortious conduct, an affirmative defense based upon the notion of culpable conduct is unavailable (*American Express Equip. Fin. Corp. v Mercado*, 34 AD3d 880, 881-82 [3d Dept 2006]; *Pilewski v Solymosy*, 266 AD2d 83, 85 [1st Dept 1999]; *Viacom Intl. v Midtown Realty Co.*, 235 AD2d 332, 332-333[1st Dept 1997]). As the alleged negligence of the plaintiff is not a defense to this action for breach of contract, the eighth affirmative defense is dismissed (see *Viacom Intl. v Midtown Realty Co.*, 235 AD2d at 332-333).

Defendant's ninth affirmative defense of failure to mitigate damages is dismissed, as a commercial landlord has no duty to re-let the premises in order to mitigate damages (*see Holy Properties v Kenneth Cole Productions, Inc*., 87 NY2d 130, 133[1995]). Furthermore, although the parties' lease expressly provides that the landlord's failure to re-let the premises does not relive the tenant from liability under the lease, the landlord took steps to re-let the premises shortly after the tenant ceased paying rent and attempted to surrender the premises.

Turning now to plaintiff's request for summary judgment, a lease is a contract which is subject to the same rules of construction as any other agreement (*see George Backer Mgt. Corp. v Acme Quitting Co., Inc*., 46 NY2d 211 [1978]). Thus, a written lease "agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc*., 98 NY2d 562, 569 [2002]; *see*

MHR Capital Partners LP v Presstek. Inc., 12 NY3d 640 [2009]). A lease or any other contract is unambiguous and may not be altered if "on its face it is reasonably susceptible of only one meaning" (*Greenfield v Philles Records*, 98 NY2d at 570).

The executed lease submitted by the plaintiff is clear and unambiguous that the plaintiff's written consent upon the defendant's notice of vacatur or surrender of the premises was required to terminate the lease. Article 38 of the lease states that: " No act or thing done by the Landlord or Landlord's agents during the term hereby demised shall be deemed an acceptance of surrender of the Demised Premises and no agreement to accept such surrender of the Demised Premises shall be valid unless in writing signed by the Landlord. No employee of the Landlord or of the Landlord's agents shall have any power to accept the keys of said Demised Premises prior to termination of this Lease. The delivery of keys to any employee of Landlord or Landlord's agents shall not operate as a termination of this Lease or a surrender of the Demised Premises".

Article 66 of the lease provides that: "Notwithstanding anything contained herein to the contrary, commencing as of the first day of the third year of the Lease Tenant may cancel this Lease and the obligations of Tenant under this Lease shall terminate upon the occurrence of the following: (i) the Tenant has surrender action possession of the demised premises to Landlord in vacant and broom clean condition and as otherwise would have been required if the lease had run for the full term; (ii) Tenant has given Landlord at least ninety days (90) days [sic] prior written notice of its intent to surrender possession of the Demised Premises by Certified Mail Return Receipt to the Landlord at the address stated in the Lease; and (iii) at the time of such surrender, all fixed minimum rent and additional rent due under the Lease has been paid up to Landlord up to such time."

As the lease term commenced on May 1, 2012, the defendant's right to terminate the lease under Article 66, could not take effect until May 1, 2014. Defendant provided written notice of its surrender and vacatur of the premises via an email from Michael Bahlitzanakis to Peter Kosteas, sent on August 28, 2013, and an undated letter addressed "To Whom It May Concern". Mr. Bahlitzanakis does not dispute that the plaintiff's consent in writing was never given to the defendant. Rather, he contends that Mr. Kosteas verbally consented to the tenant's vacatur during their August 2013 conversation, and that defendant forfeited the security deposit and returned the keys to Mr. Kosteas.

Defendant's claims of oral modification of the lease and partial performance, is rejected. The parties' lease requires the plaintiff landlord's written consent to the vacatur and specifies that the delivery of keys to any agent or employee of plaintiff could not operate as a termination of the lease or surrender of the premises. The lease also requires the forfeiture of the security deposit under the circumstances presented here. Therefore, the notice letter

with verbal consent, along with the delivery of the keys to Kosteas, fails to meet the requirements of the lease, and does not constitute a surrender of the premises (*see Connaught Tower Corp. v Nagar*, 59 AD3d 218[1st Dept 2009]; *Forty Four Eighteen Joint Venture v Rare Medium, Inc.*, 18 AD3d 237, 238 [1st Dept 2005]).

Article 34 (E)(b) of the lease provides, in pertinent part, that if the tenant defaults in paying rent under the lease, the landlord may re-let the premises, and may "make such repairs, replacements, alterations, additions, improvements, decorations and other physical changes in and to the Demised Premises as Landlord, in its discretion considers advisable or necessary in connection with any such reletting without relieving Tenant of any liability under this Lease or otherwise affecting any such liability". Thus, plaintiff's re-letting of the demised premises and performing certain work in that space for the new tenant is consistent with the terms of the parties' lease, and does not constitute a surrender by operation of law.

Once a lease is executed, a tenant's obligation to pay rent is fixed according to its terms (*see Holy Properties Ltd. LP. v Kenneth Cole Productions Inc.*, 87 NY2d 130, *supra,* [1995]). Parties to a lease are free to contract as they please (*see Holy Properties Ltd. L.P. v Kenneth Cole Productions Inc*., 87 NY2d 130, *supra*; *Patchogue Associates v Sears Roebuck and Co.*, 108 AD3d 659, 660 [(2d Dept 2013]). The parties may contract for the tenant to remain liable for the rent for the duration of the lease term, however no action can be brought for future rent in the absence of a provision permitting acceleration (*see Van Duzer Realty Corp. v Globe Alumni Student Assistance Assoc. Inc*., 102 AD3d 543 [1st Dept 2013]; *Ring v Printmaking Workshop Inc.*, 70 AD3d 480 [1st Dept 2010]).

Plaintiff's first cause of action for seeks to recover damages for rent, additional rent, late charges and other charges and fees, pursuant to Article 36 of the lease. Article 36A, entitled "Damages", provides, in pertinent part, that: "If this Lease and the Demised Term shall expire and come to an end as provided in this Lease or by or under any summary proceeding, or any other action or proceeding or if Landlord shall re-enter the Demised Premises under any summary proceeding, or any other action or proceeding then, in any of said events:..." the tenant shall be liable for additional rent and other charges under the lease, for liquidated damages including attorney's fees and costs, and for re-letting expenses.

Article 34 of the lease defines default events, and includes a "default in payment when due of any installment of the rent or in the payment when due of any additional rent", and "[i]f the Demised premises shall become vacant, deserted or abandoned". Article 34(B) provides that if "at any time prior to or during the Demised Term, any one or more of such Events of Default, Landlord, at any time thereafter, at Landlord's option, may give to Tenant a five(5) days notice of termination of this Lease, in which event, this Lease and Demised Term shall come to an end and expire... upon the expiration of said five (5) days with the

same effect as if the date of expiration of said five(5) days were the Expiration Date of the lease but Tenant shall remain liable for damages as provided in this Lease."

Article 34(E) provides that if the tenant defaults in payment of any installment of the rent or additional rent when due, or if the lease and the demised term expired and come to an end as provided in Article 34, the landlord has a right to re-enter, with notice, by summary proceedings or by any other applicable action or proceeding and after obtaining a court order may repossess the premises and dispossess the tenant and remove any and all of their property and effects; that landlord at its option could re-let the premises; that re-letting the Demised Premises, or the failure to re-let would not operate to relieve the Tenant from any liability under the lease; and that the landlord could make "repairs, replacements, alterations, additions, improvements, decorations and other physical changes in the Demised Premises... without relieving Tenant of any liability under this Lease or otherwise affecting any such liability."

Here, the lease term did not expire, nor did the lease term come to an end under any provisions of the lease. There is no evidence that the landlord gave the tenant a 5 day notice that the lease term had been terminated due to its default in paying rent or its abandonment of the premises. Nor did the landlord re-enter the premises pursuant to a notice, or in connection with a summary proceeding or other action or proceeding. Rather, defendant abandoned the premises and ceased paying rent, and the plaintiff entered into an agreement with another tenant to re-let the portion of the premises previously occupied by the defendant. However, the lease does not contain an acceleration clause making the defaulting tenant liable for liquidated damages based upon an abandonment or the failure to pay rent. Therefore, as none of the events set forth in Article 36 occurred, the landlord may not recover as liquidated damages unpaid rent, additional rent, late charges and other charges pursuant to Article 36 of the lease, and may only seek to recover actual damages.

Accordingly, that branch of the plaintiff's motion which seeks to dismiss the second, third, fourth, fifth, sixth, eighth and ninth affirmative defenses is granted. That branch of the plaintiff's motion which seeks summary judgment on its first and second causes of action is denied.

Dated: April 8, 2015

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J.S.C.