Harlem Capital Ctr., LLC v Rosen & Gordon, LLC
2015 NY Slip Op 30733(U)
May 5, 2015
Supreme Court, New York County
Docket Number: 156113/2014
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

HARLEM CAPITAL CENTER, LLC

Plaintiffs,

-against-

ROSEN & GORDON, LLC and OLAM TRADING CORP., ARTHUR ROSEN and LETA GORDON,

Defendants.

INDEX NO. 156113/2014
MOTION DATE 04-22-2014
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 11 were read on this motion to dismiss and for summary judgment, and cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 7, 8 - 9
Replying Affidavits	10 - 11

Cross-Motion: X Yes ☐ No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion for summary judgment as to the cause of action for conversion is denied, plaintiff's motion dismissing defendants' counterclaims and cross-claims is granted, defendants' cross-motion for summary judgment as to their counterclaims and cross-claims is denied as moot.

Harlem Capital Center, LLC (herein "Harlem") entered a lease agreement commencing on September 12, 2002 and ending on September 30, 2050 (herein "Lease"), in which Harlem leased buildings located at 4-6 West 125th Street and 8-14 West 125th Street, New York, New York (herein "Buildings") from defendants Rosen & Gordon, LLC and Olam Trading Corp., and Arthur Rosen and Leta Gordon as principals of the corporate defendants (herein "Landlords").

Landlord alleges that on June 20, 2013, Harlem vacated the Buildings without Landlord's consent, and thirty-seven (37) years prior to the termination of the Lease. Landlord commenced an action by summons and complaint dated January 31, 2014 (herein "First Action") alleging that Harlem breached the Lease by not returning possession of the Buildings free and clear of all occupants, and that the Guarantors are personally liable for Harlem's breach. Landlord seeks monetary damages for the alleged breach for unpaid base rent, taxes, Business Improvement District fees, water charges, expenses incurred for operating the Buildings, and attorneys fees as against Harlem and the individually named defendants in the First Action (herein "Guarantors") that acted as guarantors of Harlem pursuant to a guarantee agreement (herein "Guarantee"). The Defendants and Guarantors in the First Action filed an answer dated February 2, 2015. There has been no Preliminary Conference held and no discovery schedule set up in the First Action.

Harlem and the Guarantors allege that they provided written notice to the Landlords of their intention to surrender the Lease and the Buildings and that they subsequently provided the Landlords with a surrender certificate, keys to the premises, the original leases for the Buildings' subtenants, a security deposit schedule, checks for all subtenants' security deposits, subtenants arrears schedule, and a vacancy list. Harlem and the Guarantors further allege that the Landlords then took possession of the Buildings without objecting, and that the Landlords breached a condition precedent of the Lease by failing to provide Harlem and the Guarantors with notices of alleged defaults.

Harlem commenced a separate action by summons and complaint dated June 18, 2014 against Landlords alleging that they commingled Harlem's $275,000 security deposit (herein "Deposit") as of the date the Lease was executed by failing to maintain the Deposit in a segregated account. Harlem asserts causes of action for breach of fiduciary duty, breach of lease, and conversion. Landlords appeared in the Second Action by filing an answer dated August 19, 2014. The Answer asserts counter-claims against Harlem and cross-claims against the Guarantors, who were not named in the Second Action. There has been no Preliminary Conference held and no discovery schedule set up in the Second Action.

Harlem now moves pursuant to CPLR § 3212 for summary judgment in its favor as to the conversion cause of action, and pursuant to CPLR § 3019, and § 3211(a)(1), (4), (6), (7) and (8) dismissing the counterclaims asserted against Harlem and the Guarantors. Harlem alleges that the Landlords converted the Deposit from the beginning of the Lease term by not depositing the Deposit into a segregated account in violation of General Business Law § 7-103(1) and (2), and that Harlem is entitled to the Deposit. Guarantors argue that cross-claims are improper and impermissive because the counter-claims against Harlem are based upon the Lease and the cross-claims against the Guarantors are based on the Good Guy Guarantees, which is being litigated in the First Action and should not be litigated in the Second Action.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

"A conversion occurs when a party, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (Lynch v. City of New York, 108 A.D.3d 94, 101, 965 N.Y.S.2d 441 [1st Dept., 2013] citing to, Colavito v. N.Y. Organ Donor Network, Inc., 8 N.Y.3d 43, 49–50, 827 N.Y.S.2d 96, 860 N.E.2d 713 [2006]). General Obligations Law § 7–103(1) "prohibits the commingling by a landlord

of funds deposited by a tenant as security or prepaid rent" (Eujoy Realty Corp. v. Van Wagner Communications, LLC, 73 A.D.3d 546, 549, 901 N.Y.S.2d 227, 203 [1st Dept., 2010]). A Landlord functions as a "trustee of the deposit, not a debtor, any debts owed by a tenant could not be offset against the commingled security deposit funds. Nor [can a landlord] raise [a tenant's] breach of the lease as a defense to [a tenant's] action to recover the commingled funds" (Tappan Golf Drive Range, Inc. v. Tappan Property, Inc., 68 A.D.3d 440, 441, 889 N.Y.S.2d 580, 581 [1st Dept., 2009]).

In support of the instant motion for summary judgment, Harlem annexes a copy of the pleadings; the Lease; the surrender letter dated January 28, 2013 sent by Harlem to the Landlords; the demand letter dated February 12, 2013 sent by Harlem to the Landlords requesting the return of the Deposit and requesting the name and banking information where the Deposit was being held; and a July 2013 statement (herein "Statement") from the banking institution where the Deposit is being held.

Harlem relies solely on the Statement as documentary proof that the Landlords never deposited the Deposit in a segregated account as required by the General Obligations Law § 7-103, thereby commingling the Deposit with the Landlords' funds. The Statement alone does not state when the deposit was made or the amount of the deposit. Harlem also makes no showing that the Landlords failed to provide Harlem or the Guarantors with the name and address of the banking organization in which the deposit of security money is made, and the amount of such deposit. Issues of fact remain as to whether the Landlords commingled the Deposit, when the Deposit was allegedly commingled, and whether the Landlords cured the commingling prior to the termination of the Lease.

Further, one of the issues being litigated in the First Action is whether Harlem terminated the Lease in June of 2013 and whether the Landlords consented to the termination. There has been no discovery in either the First Action or Second Action. Summary judgment in favor of Harlem as to the cause of action for conversion is denied.

Harlem and the Guarantors also move to dismiss the counterclaims and cross-claims. CPLR 3211(a)(4) permits a party to move for dismissal of claims where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." "New York courts generally follow the first-in-time rule, which instructs that the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere" (L-3 Communications Corp. v. SafeNet, Inc., 45 A.D.3d 184, 1 N.Y.S.2d 82, 87-88 [1st Dept., 2007] citing to, City Trade & Indus., Ltd. v. New Cent. Jute Mills Co., 25 N.Y.2d 49, 58, 302 N.Y.S.2d 557, 250 N.E.2d 52 [1969]). "However, it is also clear that determining the priority of pending actions by dates of filing is a general rule that should not be applied in a mechanical way, and that special circumstances may warrant deviation from this rule where the action sought to be restrained is vexatious, oppressive or instituted to obtain some unjust or inequitable advantage" (Id., citing to, White Light Prods., Inc. v. On The Scene Prods., Inc., 231 A.D.2d 90, 96-97, 660 N.Y.S.2d 568 [1st Dept., 1997]).

The Landlords commenced the First Action against Harlem and the Guarantors seeking unpaid base rent, taxes, water charges, business improvement district charges, expenses incurred in operating the building after Harlem vacated the Building, and seeks to hold the parties jointly and severally liable pursuant to the Guaranty. The Landlords' counterclaims and cross-claims asserted against Harlem and the Guarantors in essence seeks the same relief as the First Action, except that the dates for said relief differ.

The Landlords' counterclaims and cross-claims are dismissed in the Second Action pursuant to CPLR 3211(a)(4) as the First Action is pending before this court between the same parties and for the same causes of action.

The Landlords cross-move for summary judgment as to the counterclaims and cross-claims asserted in Landlords' Answer dated August 19, 2014. The counterclaims and cross-claims were dismissed, and the cross-motion for summary judgment is denied as moot.

Accordingly, it is ORDERED that plaintiffs' motion for summary judgment as to the cause of action for conversion is denied, and it is further,

ORDERED, that plaintiff's motion dismissing defendants' counterclaims and cross-claims is granted, the counterclaims and cross-claims are hereby severed and dismissed, and it is further,

ORDERED, that defendants' cross-motion for summary judgment as to the counterclaims and cross-claims is denied as moot, and it is further,

ORDERED, that the moving parties, within 30 days from the date of entry of this order, serve a copy of this order with Notice of Entry upon all parties and upon the Clerk of the Court, who is directed to enter judgment accordingly, and it is further,

ORDERED, that the parties appear for a Preliminary Conference in IAS Part 13 located at 71 Thomas St., Room 210, New York, N.Y. on June 3, 2015 at 9:30AM.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: May 5, 2015

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE