SPUSV5 1540 Broadway, LLC v Whatley, Drake & Kallas, LLC
2015 NY Slip Op 31079(U)
June 22, 2015
Supreme Court, New York County
Docket Number: 651745/2011
Judge: Arthur F. Engoron

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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SPUSV5 1540 BROADWAY, LLC,

Plaintiff,

- against -

WHATLEY, DRAKE & KALLAS, LLC,

Defendants.

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Index Number: 651745/2011

Decision and Order

Motion Seq. 003

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Affidavit - Exhibits 1
Notice of Cross-Motion - Affidavit - Exhibits 2
Reply Affidavit in Opposition to Cross-Motion and in Further Support of Motion 3
Reply Affidavit in Further Support of Cross-Motion 4

Upon the foregoing papers, plaintiff's motion is granted and defendant's cross-motion is denied.

Background

Plaintiff, the owner of condominium office space in mid-town Manhattan, sues defendant, its former tenant, for rent. The parties now move, and cross-move, for summary judgment, on some, but not all, of their claims and counter-claims. The following facts are undisputed unless otherwise indicated.

Plaintiff SPUSV5 1540 Broadway, LLC ("SPUSV5") owns the commercial condominium office unit encompassing several floors in the building located at 1540 Broadway, New York, New York (the "Building"). Pursuant to an "Office Lease Agreement" dated October 11, 2006 (the "Lease"), defendant Whatley, Drake & Kallas, LLC ("Whatley"), a law firm, leased the entire 37th Floor of the Building from SPUSV5 for the period from October 1, 2006 through March 31, 2017 (Lease, Section 1.06).

The Lease required Whatley to "continuously maintain[] in effect (whether through replacement, renewal or extension)," a "standby, unconditional, irrevocable, transferable" Letter of Credit "as collateral" for Whatley's "full performance of all of its obligations under the Lease" (Lease, Exhibit F, "LETTER OF CREDIT," ¶1.01). If, when necessary, Whatley failed to furnish a replacement Letter of Credit, SPUSV5 could "draw upon [the] Letter of Credit then held by [it], and ... hold the proceeds thereof" (Ibid., ¶1.02). Thereafter, SPUSV5 could apply the proceeds it

held to "any Rent payable by [Whatley] under this Lease that is not paid when due" (Ibid., ¶1.03). Further,

> If, as a result of any application or use by Landlord of all or any part of the Letter of Credit, the amount of the Letter of Credit shall be less than the Letter of Credit Amount, *Tenant shall, within 5 days thereafter, provide Landlord with additional letter(s) of credit in an amount equal to the deficiency (or a replacement letter of credit in the total Letter of Credit Amount) ... and if Tenant fails to comply with the foregoing, notwithstanding anything to the contrary contained in this Lease, the same shall constitute an incurable Default by Tenant* (Ibid., ¶1.04 [emphasis added]).

The Lease provided that, upon any default by Whatley, SPUSV5 could terminate either (1) the Lease, or (2) Whatley's right to possession of the premises; and in either case, Whatley would be obligated to pay SPUSV5 the "Costs of Reletting and any deficiency that may arise from reletting or the failure to relet the Premises" (Lease, Section 19.01(a), (b)). Whatley's liability to pay rent under the Lease survived "repossession or re-entering of all or any part of the Premises" by SPUSV5 (Section 19.03), and the Lease required Whatley to surrender possession and return the keys upon early termination of the Lease (Section 25; Exhibit E, ¶5). Additionally, if Whatley occupied the Premises "after termination" of the Lease (defined therein as "tenancy at sufferance"), its "occupancy shall be subject to all of the terms and provisions of this Lease, and Tenant shall pay an amount ... equal to 150% of the sum of the Base Rent and Additional Rent due for the period immediately preceding the holdover." Section 26.02 of the Lease provided that SPUSV5's failure to "declare a default immediately upon its occurrence" and SPUSV5's "acceptance of rent with knowledge of a default" shall not constitute a waiver of the default or an estoppel.

In July 2010, Whatley advised SPUSV5 that its Letter of Credit issued by Wachovia Bank in the face amount of $693,845 would expire on October 1, 2010 and would not be renewed. On September 27, 2010, having not received a replacement Letter of Credit from Whatley, SPUSV5 drew down on the entire amount of the Letter of Credit and held the $693,845 proceeds in accordance with its rights under Exhibit F, ¶1.02 of the Lease. At around the same time, Whatley began to fall behind in paying rent and, by the beginning of May 2011, owed $656,771.71 in rent.

On May 2, 2011, SPUSV5 applied $656,771.71 of the Letter of Credit proceeds to the arrears in accordance with Exhibit F, ¶1.03 of the Lease, leaving a balance of $37,073.29. On the same date, SPUSV5 served Whatley with a Notice of Termination of Tenancy (the "Notice"). The Notice advised Whatley that if it failed to provide a replacement Letter of Credit in the sum of $693,845 by May 9, 2011, "a date that is not less than five (5) days after service of the notice," SPUSV5 would sue to "recover possession of the Premises" and damages, including remedies set forth in Sections 19.01 and 19.02. Whatley did not provide a replacement Letter of Credit by May 9, 2011 or anytime thereafter.

Consequently, this, and other, litigation followed, and soon thereafter Whatley vacated the premises. The order of events is, briefly, as follows. On May 10, 2011, SPUSV5 commenced a

summary commercial holdover proceeding in Civil Court, New York County (Index No. 067241/2011), in which it sought a judgment of possession and use and occupancy from May 9, 2011. On May 23, 2011, Whatley filed its answer asserting a general denial and raising various affirmative defenses, including, inter alia, lack of subject matter jurisdiction. Approximately two weeks later moved to dismiss the proceeding and for summary judgment. On June 23, 2011, SPUSV5 commenced the instant action. The initial complaint (NYSCEF Doc. No. 1) contained causes of action for ejectment based upon the Lease's termination on May 9, 2011 and, pursuant to Section 22 of the Lease, for use and occupancy at the holdover rate (first cause of action), breach of Lease damages from July 5, 2011 through the end of the lease term in 2017 (second cause of action), and, pursuant to Section 26.02 of the Lease, attorneys fees (third cause of action). Whatley vacated the premises on July 1, 2011 and returned the keys to SPUSV5 on July 5, 2011. By Stipulation So-Ordered on September 14, 2011, this action and the summary holdover proceeding were consolidated, and Whatley withdrew its motion to dismiss the summary holdover proceeding.

On November 8, 2011, SPUSV5 filed an amended verified complaint which omitted the request for ejectment from the first cause of action – that request having become moot, Whatley having vacated the Premises on July 5, 2011. On November 17, 2011, Whatley filed its answer, in which it asserted fourteen affirmative defenses and four counter-claims. As here pertinent, the second, fourth, fifth, and eighth affirmative defenses challenge the first cause of action for holdover damages, arguing that the Notice is "null and void" as not in accordance with certain Lease provisions, and because the failure to provide an additional Letter of Credit is not "an event of default," and because a violation of Exhibit F is not a "conditional limitation." The third, sixth and seventh affirmative defenses also challenge the first cause of action and sound in "ratification, estoppel and waiver," based upon SPUSV5's having drawn down the Letter of Credit in September 2010 and collected rent from Whatley thereafter. Three of the counter-claims arise out of SPUSV5's alleged bad faith in preventing Whatley from sub-letting the premises: breach of the Lease, unlawful interference with business relations, and intentional infliction of harm. The last counter-claim seeks a declaration that Whatley "surrendered the premises by operation of law" on July 5, 2011. During the past four years, the parties have exchanged documents, but no depositions have been held. Each party claims outstanding discovery from the other.

SPUSV5 now moves for summary judgment on its first cause of action to recover holdover damages at the rate of $186,021.09 per month (or 150% of the base and additional rent in the sum of $124,014.06) pursuant to Section 22 of the Lease, for May 9, 2011 through July 5, 2011, and dismissing Whatley's second, third, fourth, fifth, sixth, seventh, and eighth affirmative defenses. In support of the motion, SPUSV5 submits, inter alia, the Lease, the Notice, and the affirmation of Jeffrey Ram, SPUSV5's real estate managing agent (the "Ram Aff."), attesting to the amount of base and additional rent due in May 2011 and calculating holdover damages. SPUSV5 argues that: the Lease terminated on May 9, 2011 due to Whatley's "incurable Default" in failing to provide a replacement Letter of Credit; Whatley admittedly "held over in possession of the premises" after the Lease's termination through July 5, 2011; and, therefore, SPUSV5 is entitled to holdover damages under Section 22 of the Lease, at the rate of $186,021.09 per month for the period from May 9, 2011 to July 1, 2011, plus interest from July 1, 2011. SPUSV5 argues that Whatley's second, fourth, fifth, and eighth affirmative defenses are barred by the

clear and unequivocal language of the Lease and the Notice; and the third, sixth and seventh affirmative defenses are barred by the express "no waiver" and "no estoppel" clauses in Section 26.02 of the Lease. SPUSV5 requests that its first cause of action be severed from its two remaining causes of action and Whatley's four counter-claims, for discovery and trial, and judgment immediately entered on the first cause of action in the sum of $372,042.18 ($186,021.09 per month for two months), plus interest from July 1, 2011, without set-off.

In opposition to the motion, Whatley argues that SPUSV5 is not entitled to summary judgment on its first cause of action because: discovery is outstanding; the Ram Aff. is "conclusory"; the affirmation of SPUSV5's attorney lacks evidentiary value; and there are material questions of fact on its counter-claims which are "inextricably intertwined" with SPUSV5's claims. Whatley also cross-moves for summary judgment dismissing the complaint, and severing its counter-claims for discovery and trial. In support of the cross-motion, Whatley argues that the first cause of action for holdover damages should be dismissed because SPUSV5 did not "properly" terminate, pursuant to RPL § 228 (via service of a thirty-day notice), Whatley's "tenancy by sufferance" created on May 9, 2011 and therefore SPUSV5 is not entitled to recover holdover damages under Section 22. Whatley also argues, in support of dismissal of the first cause of action, that Section 22 of the Lease, entitling SPUSV5 to 150% of rent upon Whatley's continued possession following termination of the Lease, is an "unenforceable penalty." As to the second cause of action, Whatley argues that SPUSV5 is not entitled to breach of lease damages for the period from July 5, 2011 through the end of the Lease on March 31, 2017, upon the ground that Whatley surrendered the premises "by operation of law," thus relieving it of further liability under the Lease subsequent to July 1, 2011. Finally, Whatley argues that the third cause of action for attorneys fees should be dismissed because SPUSV5 is not the "prevailing party" herein.

Discussion

This Court's function on a summary judgment motion is issue finding, not issue determination. See Farias v. Simon, 122 AD3d 466, 468 (1st Dep't 2014) ("A court's function on a motion for summary judgment involves issue finding rather than issue determination"). Because summary judgment is a drastic remedy, it should not be granted where triable issues of fact exist, even if such issues are only "arguable" or "debatable." See Stone v Goodson, 8 NY2d 8, 12-13 (1960) ("It now seems well established that if the issue is fairly debatable a motion for summary judgment must be denied."). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Once that burden is met, the opponent must tender evidence in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim ...mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Zuckerman v City of New York, 49 NY2d 447, 562 (1980).

I. SPUSV5 Is Entitled to Summary Judgment on the First Cause of Action and Dismissing Whatley's Affirmative Defenses Related Thereto

SPUSV5 met its initial burden of establishing that there are no questions of fact and, as a matter of law, it is entitled to summary judgment on its first cause of action for use and occupancy in the holdover amount pursuant to Section 22 of the Lease, and dismissal of Whatley's second, third, fourth, fifth, sixth, seventh and eighth affirmative defenses. The Lease, the terms of which are

clear and unambiguous, contains four pertinent provisions, as follows: (1) Exhibit F, ¶1.04 – pursuant to which Whatley's failure to provide a replacement Letter of Credit within 5 days of SPUSV5's use of the proceeds of the Letter of Credit then in existence, constituted an "incurable Default"; (2) Section 22 – which entitles SPUSV5 to "holdover" damages when Whatley "fails to surrender" the premises at the termination of the Lease, at 150% of base and additional rent for the month preceding the holdover; (3) Section 26.02 – the "no waiver" and "no estoppel" provision; and (4) Sections 19.03, 25 and Exhibit E, ¶5 – pursuant to which Whatley's liability to pay rent under the Lease survives Whatley's surrender of possession and return of the keys upon early termination. The Notice made manifest SPUSV5's intention to terminate the Lease on a fixed date, May 9, 2012, if Whatley failed to provide a replacement Letter of Credit. And the Ram Aff. sets forth a precise calculation of holdover damages as provided for in Section 22.

In opposition, Whatley fails to raise any triable issues of fact sufficient to deny the motion. Whatley does not dispute the pertinent terms of the Lease, or that it failed to provide a replacement Letter of Credit by May 9, 2011 resulting in an "incurable Default," or that it remained in possession of the premises from May 9, 2011 through July 5, 2011 without paying any rent. Whatley also does not refute that, as shown in the Ram Aff., its May 2011 base rent was $115,640.83 and additional rent was $8,373.23, amounting in all to $124,014.06, and that 150% of that number is $186,021.09. As shown below, Whatley's arguments that: (1) SPUSV5 failed to "properly" terminate the Lease by serving an RPL § 228 notice; (2) Section 22 constitutes an "unenforceable penalty"; and (3) the first cause of action is "inextricably intertwined" with Whatley's counter-claims, are without merit and do not defeat SPUSV5's entitlement to summary judgment.

Whatley is correct on one issue: Exhibit F, ¶1.04 of the Lease contains a "condition subsequent," the breach of which allowed SPUSV5 to declare the lease at an end as of May 9, 2011 and bring an action in ejectment, and not a "conditional limitation," the breach of which would have given SPUSV5 the option to terminate the Lease after further notice and commencement of a summary proceeding. See 451 Rescue LLC v Rodriguez, 15 Misc3d 1140(A) (Civil Court, New York County 2006) (Engoron, J.) ("If a leasehold can be terminated because the tenant's breach of a condition of the lease gives the landlord the option to declare the lease at an end, thereby exercising his right of forfeiture, a condition [subsequent] exists pursuant to which the landlord must enforce the forfeiture by reentry in an action for ejectment [citations omitted]. If, however, the landlord has the option to terminate the lease by serving a notice fixing a time after the lapse of which the lease will automatically expire, a conditional limitation of the leasehold exists, pursuant to which a summary holdover proceeding will lie"). Whatley's failure to provide a replacement Letter of Credit by May 9, 2012 amounted to an "incurable Default," allowing SPUSV5 to declare the lease at an end as of that date and bring an appropriate action in ejectment, both of which it did. SPUSV5's summary holdover proceeding, however, is subject to dismissal. See, 451 Rescue LLC v Rodriguez, supra (summary holdover proceeding predicated upon breach of condition subsequent dismissed for lack of subject matter jurisdiction).

The Notice, served upon Whatley on May 2, 2011 (the same day that SPUSV5 applied the proceeds of the Letter of Credit to Whatley's rent arrears in accordance with Exhibit F, ¶1.04), did not transform the "condition subsequent" to a "conditional limitation." Rather, consistent with the five day cure period afforded to Whatley in Exhibit F, ¶1.04, the Notice advised

Whatley that it could replace the Letter of Credit within five days thereof or "immediately surrender the premises." In other words, the Notice announced SPUSV5's intention to exercise its option to terminate the Lease on a fixed date, May 9, 2012, if Whatley failed to meet a precise condition – replace the Letter of Credit. See South St. Seaport Ltd. Partnership v Jade Sea Rest., Inc. 151 Misc2d 725, 729 (Civil Court New York County 1991) ("Paragraph 3 of the third amendment creates a condition subsequent and not a conditional limitation. The notice of termination is the announcement of the landlord's decision or intention to exercise his option to terminate the lease.").

Whatley's successful argument that the Lease contains a condition subsequent does nothing, however, to advance its efforts to avoid the imposition of "holdover" damages at the rate of 150% of rent and additional rent under Section 22 of the Lease. The Lease terminated on May 9, 2011 and Whatley remained in possession of the Premises until July 5, 2011, triggering holdover damages under Section 22. Moreover, Whatley held over without paying any rent and, thus, did not become a month-to-month tenant within the meaning of RPL § 232-a. Therefore, SPUSV5 was not required to serve Whatley with a thirty day notice to quit pursuant to RPL § 288 in order to "properly" terminate the Lease prior to commencing the instant ejectment action. See 430 Broome St. Realty Corp. v Bonnouvrier, 17 Misc3d 1128(A) (Supreme Court, New York County 2007) ("A distinction has been recognized between a month-to-month tenancy and an ejectment action that is brought when a fixed term tenancy expires. When a fixed term expires and the landlord does not extend it by thereafter accepting rent, no notice is required. Where the landlord accepts rent after the lease has expired and thereby creates a month-to-month tenancy, a statute (RPL § 232–a) specifically requires a 30–day Notice of Termination").

Whatley has failed to support its argument that Section 22 amounts to an "unenforceable penalty" as a matter of law, and this Court sees no reason why it would be. Nor has Whatley raised a question of fact on this issue by way of its attorney's affirmation, or the cases cited in its memorandum of law, which are either distinguishable on their own facts, see Gettinger Assoc. v One Move Upward, Inc. 19 Misc3d 1118(A) (Supreme Court New York County 2008) (issue of fact raised as to whether holdover damages of "double the rental" constituted "a reasonable prediction of the losses Landlord would suffer"); Grand Baldwin Assoc. v Birnak, 21 Misc3d 1129(A) (District Court Nassau County 2008) (holdover damages of "treble the Minimum Annual Rent for such period" is "grossly disproportionate to any harm" landlord actually suffered by tenant's breach of lease), or support the conclusion that "the amount stipulated by the parties as damages bears a reasonable relation to the amount of probable actual harm and is not a penalty." Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc., 41 NY2d 420, 425 (1977) (upholding liquidated damages in truck lease agreement requiring lessor to pay one-half rental value for all trucks in event of breach); 225 Fifth Ave. Retail LLC v. 225 5th, LLC, 78 AD3d 440, 442 (1st Dep't 2010) (party seeking to avoid imposition of liquidated damages of $7,000 per day failed to show damages were "grossly disproportionate to the probable loss"). Whatley failed to explain how damages in the sum of 150% of its monthly rent does not bear a "reasonable relation" to SPUSV5's damages if Whatley remained in possession of the Premises after termination of the Lease.

Whatley's affirmative defenses that are the subject of the instant motion apply only to the first cause of action to recover holdover damages, and they are subject to dismissal. The second,

fourth, fifth, and eighth affirmative defenses, which allege that the May 2, 2011 Notice is "null and void" and ineffective to terminate the Lease, are without merit for the reasons set forth above. The third, sixth and seventh affirmative defenses, which allege that SPUSV5 is estopped from, and waived its right to, invoke the "incurable Default" provision contained in Exhibit F, ¶1.04 because SPUSV5 drew down the Letter of Credit in September 2010, thereafter collected rent from Whatley, and "did nothing" for approximately seven months to enforce its rights, are equally without merit. Even if these defenses were factually accurate – and they are not: SPUSV5 established that it did not apply the proceeds of the Letter of Credit until May 2, 2011 as it was entitled to do under the Lease – they are all barred by the express "no waiver" and "no estoppel" clauses in Section 26.02 of the Lease.

Finally, Whatley's counter-claims are not "inextricably intertwined" with the first cause of action for holdover damages. The facts surrounding SPUSV5's alleged bad faith in preventing Whatley from sub-letting the premises are separate and distinct from Whatley's admitted holdover from May 9, 2011 to July 5, 2011. The fourth counter-claim for a declaration that Whatley "surrendered the premises by operation of law" on July 5, 2011, relates solely to the second cause of action for rent owed from July 5, 2011 through the end of the Lease term, and, in any event, is subject to dismissal (as discussed below).

The Lease having terminated on May 9, 2011, and Whatley having remained in possession of the premises thereafter until July 5, 2011 without paying rent, SPUSV5 is entitled to recover "use and occupancy" at the rate of 150% of base and additional rent due for May 2011 (the period immediately preceding the holdover). The Ram Aff., which is unrefuted, establishes that: Whatley's base and additional rent for May 2011 amounted to $124,014.06, 150% of which is $186,021.09 (thus, there is nothing conclusory about it). Accordingly, SPUSV5 is entitled to $186,021.09 per month for the two months between May 9, 2011 through July 5, 2011, amounting in all to $372,042.18, plus interest from July 5, 2011.

SPUSV5, as the prevailing party on its first cause of action, is entitled, under Section 26.02 of the Lease, to recover from Whatley attorneys' fees, costs and expenses incurred in prosecuting this cause of action. However, a determination of the amount of such attorney's fees, costs and expenses incurred shall be made upon resolution of the party's remaining claims, whether by motion, hearing or trial.

II Whatley Is Not Entitled to Summary Judgment Dismissing the Complaint

Whatley failed to meet its burden of establishing, prima facie, entitlement to summary judgment dismissing the complaint. The Court has herein awarded SPUSV5 summary judgment on its first cause of action, and dismissing Whatley's affirmative defenses related thereto. The Court has also found that SPUSV5 is entitled to recover attorneys fees, as alleged in the third cause of action, which it incurred in prosecuting its first cause of action.

As for the second cause of action, Whatley failed to demonstrate that, as a matter of law, it validly surrendered the premises "by operation of law" on July 5, 2011, thereby relieving it of further liability under the Lease. To the contrary, the Lease clearly and unambiguously required Whatley, in the event of a default (as herein), to surrender the premises and return the keys, while keeping alive Whatley's liability to pay rent under the Lease following such surrender. See,

Sections 19.01(a), (b), 19.03, 25; Exhibit E, ¶5. Thus, Whatley's surrender defense is "barred by the lease provision requiring a surrender … and further providing that delivery of the keys to the landlord shall not constitute a surrender." 230 Park Ave. Holdco, LLC v Kurzman Karelsen & Frank, LLP, supra 124 AD3d at 477; Lexington Ave. & 42nd St. Corp. v Pepper, 221 AD2d 273, 274 (1st Dep't 1995) ("The 'survival of liability' clause in the parties' lease agreement specifically provided that in the event of a reentry, repossession or termination of the lease prior to the expiration date thereof, the tenant remained liable, at the option of landlord, for, *inter alia,* any rent and additional rent reserved for the balance of the term"). Accordingly, Whatley's fourth counter-claim, for a declaration that Whatley "surrendered the premises by operation of law" on July 5, 2011, is subject to dismissal.

However, as noted above, there are questions of fact as to: (1) the amount of SPUSV5's damages for the period subsequent to July 5, 2011; (2) whether SPUSV5 itself breached the contract and interfered with Whatley's attempts to sub-let the premises; and (3) the amount of Whatley's damages, if any, as a result of SPUSV5's alleged breach, which require further discovery.

The Court has considered the parties remaining arguments and finds them to be unavailing.

Conclusion

Accordingly, the Clerk is directed to consolidate the summary holdover proceeding entitled, SPUSV5 1540 Broadway, LLC v Whatley, Drake & Kallas, LLC, et al., Civil Court, New York County, Index No. L&T 67241/2011, with the instant action.

Furthermore, the Clerk is directed to enter judgment as follows:

(1) Granting SPUSV5 summary judgment on its first cause of action, for holdover damages, and dismissing Whatley's second, third, fourth, fifth, sixth, seventh and eighth affirmative defenses with prejudice;

(2) Awarding SPUSV5 a money judgment against Whatley on its first cause of action in the sum of $372,042.18, plus interest from July 5, 2011, and providing for immediate entry thereof;

(3) Dismissing Whatley's fourth counter-claim; and

(4) Severing, for continued discovery and trial, SPUSV5's second and third causes of action and Whatley's first, second and third counter-claims.

Dated: June 22, 2015

Arthur F. Engoron, J.S.C.