SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice PART 13

ROY COSME d/b/a ARCOS COMMUNICATIONS,

Plaintiff,

-against-

CENTRAL PROPERTIES, LLC,

Defendant.

INDEX NO. 651441/2013
MOTION DATE 06-17-2015
MOTION SEQ. NO 002
MOTION CAL. NO

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 5
Replying Affidavits	7 - 8

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered, that defendant Central Properties, LLC's motion for summary judgment dismissing the complaint is granted, the complaint is dismissed.

Roy Cosme d/b/a Arcos Communications (herein "Tenant") entered into a lease (herein "Lease") with defendant Central Properties, LLC (herein "Landlord") dated October 10, 2003 for a commercial space located at 341 West 38th Street, Suite 1200, New York, N.Y. (herein "Premises"). The Lease commenced on November 20, 2003 and expired on November 30, 2008. In August 2008, Marc Newell, Tenant's agent, contacted Gregory Sutherland, Landlord's agent in order to negotiate an extension of the Lease.

By email dated August 15, 2008, Sutherland offered Newell terms for a lease extension which included a renewal rent at the rate of $36.00 per square foot and extended the Lease term to February 28, 2014 (see Moving Papers, Exhibit N). By email dated August 19, 2008, Newell sent a counteroffer in regards to the renewal rent in the amount of $33.00 per square foot (Id., Exhibit O). Newell did not counter or object to the five-year Lease extension, instead, Newell concluded the email by writing "I hope you do agree with out assessment so we can continue as a tenant and extend our relationship for another five years" (Id.). After this email, the parties did not further discuss the term of the Lease extension. At his deposition, Newell admits that he never requested a four-year term for the Lease extension and that the parties never discussed a four-year term (see Newell EBT, Moving Papers, Exhibit H, Pg. 15).

The parties concluded their negotiations for an extension of the Lease and exchanged various drafts of the Lease extension. Tenant requested that a service elevator in the lobby of the Premises and the lobby floors be replaced. Landlord agreed, revised the Lease extension to reflect the requests, and corrected by hand a typographical error made in the original draft of the Lease extension stating the Lease extension term ended on

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

February 28, 2013 instead of 2014. The final Lease extension was executed by Landlord's agents by initialing where the hand-written correction crossing out 2013 and writing 2014 was made, and initialed by handwriting similar to Tenant's initials (see Moving Papers, Exhibit M). On December 4, 2008, upon receipt of the Lease extension containing the hand-written correction, Tenant's receptionist took the Lease extension and put it in a file (see Newell EBT, Moving Papers, Exhibit H, Pg. 21-22). Newell "only confirmed, without reviewing the [Lease extension] again, that [Landlord] had signed it before he then filed it" (see Aff. In Opp., PP 19).

On December 7, 2012, four years after receipt of the Lease extension that included the hand-written correction, Tenant sent Landlord a letter contesting the February 28, 2014 expiration date on the Lease extension (see Moving Papers, Exhibit V). By email dated December 13, 2012, Landlord informed Tenant that Article 2(A) of the Lease stated that the Lease term was for five (5) years, not four (4) years, and that the term expiration was February 28, 2014. On February 28, 2013, Tenant moved out of the Premises and stopped paying the Landlord rent for the Premises.

Tenant commenced this action by summons and complaint asserting causes of action for a (1) declaratory judgment declaring that the Lease extension expired on February 28, 2013; (2) promissory estoppel enjoining Landlord from asserting that the Lease extension term did not expire on February 28, 2013; (3) that the February 23, 2014 expiration date is unconscionable pursuant to UCC § 2-302 and RPL § 235-c; and (4) a declaratory judgment declaring that Landlord cease the alleged deceptive business practice and entitle Tenant to costs and attorneys' fees pursuant to General Business Law § 349.

After serving an Answer asserting counterclaims for breach of contract and attorneys fees, Landlord now moves for summary judgment dismissing the Complaint in its entirety. Landlord argues that the contract clearly states that the Lease extension is for a term of five (5) years and that the handwritten correction clearly states that the Lease extension termination date is February 28, 2014. Landlord also moves for summary judgment as to the breach of contract counterclaim.

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]).

It is undisputed that Landlord's agents made changes to the Lease extension whereby they corrected the typographical error. Article 2(a) of the Lease extension states:

> Extension of Term. The Term of the Lease is extended for a period of five years, to commence on December 1, 2008 and end on February 28, 2013 (the "Expiration Date"). Any references in the Lease to the term "Expiration Date" (whether or not capitalized) shall be deemed to mean February 28, 2013. (see Moving Papers, Exhibit M).

After changing 2013 to 2014, Landlord signed the Lease extension and initialed the changes. Tenant does not dispute receiving the Lease extension. Tenant admits that it did not review the executed Lease extension until four years after receiving the Lease extension, and prior to Tenant entering into a new lease and moving out of the Premises.

The Lease extension is a valid, binding, and enforceable contract entered into between the parties. By delivering an executed copy of the Lease extension to Tenant, Landlord complied with the prerequisites for the Lease extension to take effect (219 Broadway Corp. v. Alexander's, Inc., 46 NY2d 506, 511-512, 387 N.E.2d 1205, 1207, 414 N.Y.S.2d 889, 891 [1979]; One Ten W. Fortieth Assocs. v. Isabel Ardee, Inc., 124 A.D.3d 500, 998 N.Y.S.2d 620 [1st Dept., 2015]).

The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance (MatlinPatterson ATA Holdings LLC v. Federal Express Corp., 87 A.D.3d 836, 841-842, 929 N.Y.S.2d 571 [1st Dept., 2011]). Tenant received an executed copy of the Lease extension stating that the Lease extension term end date was February 28, 2014. Tenant is unable to show that Landlord promised the Lease extension term end date was 2013, and that it reasonably relied, to its detriment, on a February 28, 2013 term end date.

"An unconscionable contract has been defined as one which "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms" (Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 534 N.E.2d 824 [1988]; Dabriel, Inc. v. First Paradise Theaters Corp., 99 A.D.3d 517, 952 N.Y.S.2d 506 [2012]). Tenant is unable to show Landlord undertook deceptive or high-pressure tactics in order to obtain the Lease extension. Tenant is also unable to show that the terms of the Lease extension were unreasonably favorable to the Landlord.

Tenant does not oppose dismissal of causes of action premised on violations of the General Business Law § 349.

Landlord is also entitled to summary judgment on its counterclaims for breach of contract and for costs and attorneys' fees. "The elements of [a breach of contract] claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (Harris v. Seward Park Housing Corp., 79 A.D.3d 425, 426, 913 N.Y.S.2d 161, 162 [1st Dept., 2010]). Landlord establishes the existence of a valid contract [the Lease extension], that Landlord performed under the Lease extension, and that the Tenant breached the Lease extension by vacating the Premises prior to the Lease extension expiration date. Landlord sustained losses in the form of unpaid rent and additional rent pursuant to the Lease and Lease extension.

Further, Article 19 of the Lease, incorporated into the Lease extension, entitles Landlord, upon prevailing in an action against Tenant, to costs and reasonable attorneys' fees incurred in prosecuting an action against Tenant for any defaults (see Moving Papers, Exhibit L, PP 19). However, Landlord has not submitted proof showing the exact amount of damages it sustained.

Landlord makes a prima facie showing of entitlement to judgment as a matter of law dismissing the Complaint in its entirety. Tenant fails to rebut Landlord's prima facie showing.

Accordingly, it is ORDERED, that defendant Central Properties, LLC's motion for summary judgment dismissing the Complaint is granted, the Complaint is dismissed, and it is further,

ORDERED, that summary judgment in favor of defendant Central Properties, LLC's on its counterclaims for breach of contract and costs and attorneys' fees is granted, and it is further,

ORDERED, that an assessment of damages and attorneys' fees is Ordered, and it is further,

ORDERED, that defendant Central Properties, LLC serve a copy of this Order with Notice of Entry upon plaintiff, and upon the General Clerk's Office (Room 119) and the Special Referee Clerk's Office (Room 119M), who upon the filing of a Note of Issue and payment of the appropriate fees, if any, shall assign this matter to a Special Referee to hear and report the amount of damages and costs and reasonable attorneys fees to be awarded to defendant Central Properties, LLC.

MANUEL J. MENDEZ
J.S.C.

Enter:

Dated: June 26, 2015

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST X REFERENCE