

315 Hudson LLC v Five Bells, Inc.
2016 NY Slip Op 30948(U)
May 24, 2016
Supreme Court, New York County
Docket Number: 159900/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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315 HUDSON LLC,

Plaintiff,

- against -

FIVE BELLS, INC., F/K/A AMSCO SCHOOL
PUBLICATIONS, INC.,

Defendant.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Index No.
159900/2015
DECISION AND
ORDER
Mot. Seq. #001

This is an action to recover unpaid rent and attorneys' fees under a commercial lease entered between plaintiff 315 Hudson LLC ("Plaintiff"), as owner and landlord of the building located at 315 Hudson Street, New York ("the Building") and defendant, Five Bells, Inc., f/k/a Amsco School Publications, Inc. ("Defendant"), as the commercial tenant.

Before the Court is Plaintiff's motion for summary judgment, pursuant to CPLR § 3212, seeking judgment against Defendant on Plaintiff's first cause of action in the amount of \$335,400.68 for fixed rent due from September 2015 through December 2015, together with interest from September 1, 2015, and in the amount of \$167,700.34 for fixed rent due from January 2016 through February 2016, together with interest from September 1, 2015. Plaintiff seeks to sever and discontinue without prejudice the remainder of the second cause of action which seeks fixed rent for March 2016 through December 2021. Plaintiff also seeks a judgment in the amount of \$8,837.50 in attorneys' fees, and to sever and discontinue without prejudice the remainder of the third cause of action which seeks attorneys' fees for all other defaults under the lease at issue. Defendant opposes.

In support of its motion, Plaintiff submits, *inter alia*, an affidavit from Brett Greenberg, a managing member of Jack Resnick & Sons, Inc., the agent of Plaintiff; the pleadings; an Agreement of Lease, dated February 21, 1995, entered between Plaintiff's predecessor in interest, Van-Hud, and Defendant for a portion of the 4th

Floor and the entire 5th Floor of the Building for a term to expire on January 31, 2015 (“Original Lease”); Amendment and Extension of Lease dated January 8, 2002 (“First Amendment”) under which Defendant surrendered its space on the 4th floor and extend the term of its lease for the 5th floor of the Building; Extension and Modification of Lease Agreement (“Second Amendment”), under which a portion of the 5th floor was surrendered to Plaintiff and the lease term was extended for ten years so as to expire on December 31, 2012; and Third Lease Amendment Agreement (“Third Amendment”) dated February 7, 2011, under which additional space was added to the 5th floor space occupied by Defendant for which Defendant paid an increase in the Fixed Rent; and the Fourth Amendment Lease Agreement (“Fourth Amendment”) entered by the parties on May 16, 2011 (the Original Lease and all four amendments are referred to collectively as the “Lease”).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

Under the Fourth Lease Amendment Agreement, Defendant surrendered additional space to Plaintiff and Fixed Rent for the term was fixed as follows:

- (A) for the period from the Effective Date [January 1, 2012] to but not including the fifth (5th) anniversary of the Effective Date [December 31, 2016], \$1,006,202 per annum; and
- (B) for the period from the fifth (5th) anniversary of the Effective Date [January 1, 2017] to and including the Expiration Date [December 31, 2021], \$1,059,160 per annum.

The Lease states that rent must be paid “on the first day of each month during said term ... without any set off or deduction whatsoever.” The Lease also expressly states that if Defendant vacates the Premises prior to the expiration of the term,

Defendant remains liable for damages if the amount of rent and additional rent then due for the remainder of the term. Article 18 of the Lease, entitled “Remedies of Owner and Waiver of Redemption,” states that if Defendant defaults under the Lease:

... (c) Tenant [Defendant] or the legal representatives of Tenant shall also pay Owner [Plaintiff] as liquidated damages for the failure of Tenant to observe and perform said Tenant’s covenants herein contained, any deficiency between the rent hereby reserved and or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease. The failure of Owner to re-let the premises or any part or parts thereof shall not release or affect Tenant’s liability for damages ... Any such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in this lease and any suit brought to collect the amount of the deficiency for any month shall not prejudice in any way the rights of Owner to collect the deficiency for any subsequent month by a similar proceeding ... Owner shall in no event be liable for any way whatsoever for failure to re-let the demised premises ...

Additionally, Article 19 of the Lease permits Plaintiff to recover attorneys’ fees incurred as a result of Defendant’s breach.

As set forth in Greenberg’s affidavit, Defendant remained in possession of the Premises until August 31, 2015, when without Plaintiff’s knowledge or consent, Defendant vacated and surrendered the keys to the Premises to Plaintiff. Defendant paid its monthly Fixed Rent of \$83,850.17 through August 2015. After August 31, 2015, Defendant failed and refused to honor its contractual obligations under the Lease to pay Fixed Rent of \$83,850.17 per month, which under the Lease is due “in advance on the first day of each month ... without set off or deduction whatsoever.” Greenberg states, to date, Defendant owes Plaintiff Fixed Rent totaling \$503,101.02 for the six months since Defendant vacated the Premises.

Plaintiff has set forth sufficient evidence to prima facie establish that there was a binding lease agreement, that Defendant breached the lease by failing to make payments due under the Lease; that unpaid rents and attorney’s fees and costs are owed to Plaintiff under the terms of the lease; and that Defendant has not paid the amounts due. The burden then shifts to Defendant to assert a defense to the enforcement of the terms of the lease that is sufficient to raise a triable issue of fact.

In opposition, Defendant submit the affidavit of Laurence Beller, the president and treasurer of Defendant. Beller signed the Lease on Defendant's behalf. Defendant does not deny that Defendant failed to pay the monthly rents allegedly due and owing under the Lease. Rather, Defendant contends that summary judgment should be denied based upon Plaintiff's renovations of the Premises after Defendant vacated the Premises. Defendant contends that "there is an issue of fact as to whether Plaintiff's conduct [in making the renovations after Defendant vacated the Premises] constituted an accepted of Defendant's surrender of the Premises."

However, Article 18 of the Lease, which sets forth the rights and obligations of the parties if Defendant defaults and vacates prior to expiration of the Lease term, specifically states:

"Owner, in putting the demised premises in good order or preparing the same for re-rental may, at the Owner's option, make such alterations, repairs, replacements, and/or decorations in the premises as Owner, in Owner's sole judgment, considers advisable and necessary for the purpose of re-letting the demised premises, and the making of such alterations, repairs, replacements and/or decorations *shall not operate or be construed to release Tenant from liability hereunder as aforesaid ...*"

Accordingly, under the Lease, Plaintiff is permitted to make alterations and the parties agreed that "the making of such alterations ... shall not operate or be construed to release Tenant from liability." Defendant has failed to demonstrate by admissible evidence that a factual issue remains to defeat summary judgment.

Nor should Plaintiff's motion be denied pursuant to CPLR §3212(f) on the grounds that the motion is premature. It is well settled that "[s]ummary judgment may not be defeated on the ground that more discovery is needed, where the side advancing such argument has failed to ascertain the facts due to its own inaction" (*Karakostas v. Avis Rent A Car Systems*, 301 A.D.2d 632, 633; 756 N.Y.S.2d 61, 63; 2003 N.Y. App. Div. LEXIS 577, *4-5 [2nd Dept. 2003] (*quoting Meath v. Mishrick*, 68 N.Y.2d 992, 994 [1986])). Defendant argues that Plaintiff has failed to respond to Defendant's Document Request, and Defendant "should be permitted to investigate material facts as to Plaintiff's actions that occurred subsequent to Defendant's surrender of the tenancy." However, any alleged "actions that occurred subsequent to Defendant's surrender of the tenancy," will not "lead[] to evidence that will justify opposition to the motion." (*County Glen, LLC v. Himmelfarb*, 4 Misc.3d 1015(A), *10 [Sup. Ct. N.Y. Co. 2004])

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff, and against Defendant, on Plaintiff's first cause of action in the amount of \$335,400.68 for Fixed Rent due from September 2015 through December 2015, together with interest from September 1, 2015, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff, and against Defendant, on Plaintiff's second cause of action in the amount of \$167,700.34 for Fixed Rent due from January 2016 through February 2016, together with interest from September 1, 2015, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the remainder of the second cause of action which seeks fixed rent for March 2016 through December 2021 is severed without prejudice; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendant, of the date of the hearing.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: MAY 24, 2016

MAY 24 2016



EILEEN A. RAKOWER, J.S.C.