

<b>Trinity Ctr. LLC v Stern &amp; Montana, LLP</b>
2017 NY Slip Op 32565(U)
December 4, 2017
Supreme Court, New York County
Docket Number: 650726/2016
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

-----x  
TRINITY CENTRE LLC,

Plaintiff,

Index Number: 650726/2016

- against -

Sequence Number: 001

STERN & MONTANA, LLP,

Decision & Order

Defendant.  
-----x

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on plaintiff's motion, pursuant to CPLR 3212, for summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Affidavit - Exhibits .....	1
Affirmation in Opposition - Exhibits .....	2
Reply Affirmation - Affidavit - Exhibit .....	3

Upon the foregoing papers, plaintiff's motion for summary judgment is granted.

**Background**

Plaintiff, Trinity Centre LLC, and defendant, Stern & Montana, LLP, entered into an initial commercial lease agreement ("Lease") dated July 10, 2003. Pursuant to the Lease, defendant agreed to lease and occupy certain commercial space located on the 20<sup>th</sup> and 21<sup>st</sup> floors ("Commercial Space") of the building at 111 Broadway in Manhattan ("Building") for a term of 10 years and 10 months. Thereafter, the parties entered into four separate written lease amendments between 2004 and 2012 ("Lease Amendments") wherein the parties agreed to modify the Lease period and terms, and added storage space on the 22<sup>nd</sup> floor of the Building ("Storage"; together with "Commercial Space," collectively "Premises"). The Lease Amendments state the following obligations: (1) defendant was to pay a base rent of \$650,673.60 for the fiscal year of 2014 for the Premises; (2) defendant was to pay a base rent of \$663,688.55 for the fiscal year of 2015 for the Premises; (3) defendant was to pay rent in equal installments, plus certain other costs, expenses, and charges, as additional rent, including electric charges, certain real estate taxes, late charges, maintenance fees, and other fees; (4) defendant would be allowed to pay rent arrears over a period of time; and (5) plaintiff was entitled to reasonable attorney's fees if it was the prevailing party in any action arising out of a breach of the Lease by defendant.

From August 1, 2014 to February 1, 2015, plaintiff alleges that it rendered and delivered to defendant invoices for rent and other amounts due and owing under the Lease Amendments. Plaintiff alleges that payment obligations under these invoices were not fully satisfied. On December 11, 2014, pursuant to the Lease, plaintiff executed and duly served upon defendant a seven-day Notice of Default for nonpayment ("Notice of Default"). On the same day, plaintiff drew against defendant's security deposit that had been held under the Lease to pay for rent arrears. Plaintiff subsequently served defendant with a demand for a security deposit replacement. The parties agree that on or about February 1, 2015, defendant vacated the Premises.

Defendant alleges that it surrendered the Premises pursuant to an oral modification agreement, in which plaintiff permitted the early termination of the Lease, effective upon defendant's surrender. Robert Stern, a partner at defendant's law firm, alleges that the oral agreement came about through in-person negotiations and email communications between himself and Washawn Cooper, plaintiff's vice president and officer. Stern alleges that his first meeting with Cooper occurred in July 2014, wherein he advised Cooper that defendant was unable to continue paying rent and proposed that Cooper either

reduce defendant's rent, or allow it to terminate the Lease prior to the expiration date. Cooper allegedly indicated that he would speak to plaintiff's other representatives and get back to Stern. In or about September 2014, Stern and Cooper met, again, and Cooper apparently stated that plaintiff was not prepared to reduce defendant's rent, but that plaintiff would like to receive a surrender of the Premises in order to use the space to provide other amenities to the Building's tenants. Stern alleges that the parties agreed that defendant would be free to search for a new commercial space and to surrender the Premises when it was ready to move. Defendant further notes that in an October 3, 2014 email to Cooper, Stern stated that "if it turns out that any of the tenants that [plaintiff was] thinking of are seeking to sublet, [to] please let [him] know." Stern alleges that Cooper did not respond directly, but also did not refute the fact that they had a conversation about subletting the Premises.

In that same September 2014 meeting, defendant alleges that Cooper agreed to let defendant come up with a proposal under which the debts for unpaid rent in August and September of 2014, as well as deferred rent from earlier periods, would be paid for a period of time after defendant vacated the Premises. Defendant's proposal ("Proposal") called for monthly payments on a total debt of \$296,948, with 8% interest. Cooper responded with a counter-proposal, which allegedly concurred with defendant's \$296,948 debt calculation. Defendant concedes that the parties did not ultimately reach an agreement about repayment of the arrears.

### **The Instant Action**

On February 11, 2016, plaintiff commenced the instant action, alleging causes of action for (1) account stated, (2) breach of contract, and (3) attorney's fees. Plaintiff seeks an award of compensatory damages in the sum of (1) \$772,085.66 for account stated for unpaid base rent and additional rent from April 2014 through June 2015, and (2) an additional \$235,368.39 for unpaid base rent and additional rent from June 2015 through September 2015, for a total sum of \$1,007,454.05. Plaintiff also seeks attorney's fees in the sum of \$15,735.00. Plaintiff's counsel, Chase Vergari, submits an affirmation establishing that he is a commercial litigator with 14 years of experience, specializing in New York City-based commercial landlord-tenant disputes, and bills at a rate of \$395-435/hour, consistent with the prevailing rate among attorneys of his skill and experience in the New York City area. Vergari claims he has spent a total of about 35 hours on this matter, and that his reasonable attorney's fees are \$15,735.00.

On May 27, 2016, defendant e-filed a verified answer denying the allegations set forth in the complaint and asserting various affirmative defenses. Defendant argues, inter alia: that plaintiff failed to mitigate its damages; that it justifiably relied on plaintiff's oral representations that it had agreed to its early termination; that plaintiff misrepresented that it would be released from the Lease's obligations if it vacated the Premises; and that the pursuant to the doctrine of collateral estoppel, plaintiff is estopped from recovering under the Lease for payments due after it vacated the Premises.

Plaintiffs now move, pursuant to CPLR 3212, for summary judgment. Plaintiff argues that it has made out a prima facie case for account stated, breach of contract, and attorney's fees.

### **Discussion**

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1<sup>st</sup> Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980). To recover on an account stated claim, plaintiff must demonstrate that a debtor received and retained a bill without objection. See Morrison Cohen Singer & Weinstein v Ackerman, 280 AD2d 355, 356 (1<sup>st</sup> Dept 2001) ("The receipt and retention of an account, without objection, within a reasonable period of time . . . gives rise to an account stated"). To prove breach of contract, a plaintiff must show: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) defendant's breach thereof; and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425, 426 (1<sup>st</sup> Dept 2010). To recover attorney's fees for enforcement of lease breaches, plaintiff need only show that: (1) the lease provides for the

recovery of attorney's fees in connection with the breaches thereof; (2) the lease was breached; and (3) it incurred attorney's fees in connection with the enforcement of those breaches. See Columbia Corrugated Container Corp. v Skyway Container Corp., 32 NY2d 818 (1973).

Plaintiff has established its entitlement to summary judgment of its causes of action for account stated and breach of contract. Defendant does not dispute that plaintiff, pursuant to the Lease, tendered invoices for rent and additional rent on a monthly basis from August 2014 to February 2015 and delivered those invoices to defendant without any specific objection from defendant in response to those invoices. As such, plaintiff has made out a prima facie case for account stated. See Rosenberg Selsman Rosenzweig & Co., LLP v Slutsker, 278 AD2d 145, 145 (1<sup>st</sup> Dept 2000) ("having received and retained the voice without objection for a reasonable time, defendant's silence gave rise to an actionable account stated warranting summary judgment for plaintiff"). Plaintiff has also submitted sufficient proof on the record to establish each element of a breach of contract cause of action: (1) the Lease demonstrates the existence of a contract; (2) plaintiff performed under the Lease by providing the Premise for defendant's occupancy; (3) the Notice of Default demonstrates defendant's breach of the Lease by failing to pay, and plaintiff's demand thereof; and (4) the unpaid rent bills submitted on the record demonstrate the resulting damages. See Holy Props. v Cole Prods., 87 NY2d 130, 134 (1995) ("Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease"); see also AGFA Photo USA Corp. v Chromazone, Inc., 82 AD2d 402, 403 (1<sup>st</sup> Dept 2011) ("Plaintiff established its prima facie entitlement to judgment as a matter of law on its claims for breach of the ... lease agreement ... and evidence of nonpayment in the form of the demand notices"). Contrary to defendant's argument that plaintiff is at fault for failing to mitigate its damages, New York courts have long held that commercial lessors are under no duty to mitigate damages. See Sage Realty Corp. v Kenbee Mgt.-N.Y., 182 AD2d 480, 481 (1<sup>st</sup> Dept 1992) ("This court has repeatedly held that in a commercial lease the lessor is not under a duty to mitigate damages") (internal quotations omitted).

Defendant's argument that its oral modification agreement is not barred by the Lease, and supersedes all previous Lease Amendments, is unavailing. Article 25 of the Lease specifically states, "No act or thing done by [plaintiff or its agents] during the term hereby demised shall be deemed an acceptance of a surrender of said premises, and no agreement to accept such surrender shall be valid unless in writing signed by [plaintiff]." Given the Lease's plain and ordinary meaning, the oral modification agreement to which defendant cites cannot, as a matter of law, change the Lease. See Ellington v EMI Music, Inc., 24 NY3d 239, 244 (2014) ("The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning"); see also New York Gen. Obligations Law § 15-301(1) ("A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agents"). Moreover, there is nothing in the emails, or the documents attached therein, between Stern and Cooper that demonstrate plaintiff's explicit permission to an early termination of the Lease, as defendant itself concedes in its opposition papers. See Hamilton Heights Funding LLC v 147 W. 129 St. Apt. Inc., 126 AD3d 523, 523 (1<sup>st</sup> Dept 2015) ("even if the agreement permitted oral modification, it would not avail appellant, since there is no evidence that, after appellant defaulted, plaintiff orally agreed to grant him an extension of time to close").

Plaintiff has also established its entitlement to an award of attorney's fees. Plaintiff has demonstrated all elements necessary to recover its attorney's fees: (1) Article 19 of the Lease provides that plaintiff is entitled to reasonable attorney's fees if it is the prevailing party in any action arising out of a breach of the Lease by defendant; (2) the Lease was breached by defendant's nonpayment thereof; and (3) Vergari's affirmation establishes the attorney's fees plaintiff incurred in connection with the enforcement of defendant's breach. See Cier Indus. Co. v Hessen, 136 AD2d 145, 146 (landlord "is entitled to recover legal expenses from a tenant under a standard broad lease provision which holds the tenant responsible for attorney's fees incurred by the landlord in legal proceedings precipitated by the tenant's breach of the lease"). Thus, the Court grants plaintiff's request for an attorney's fees award of \$15,735.00, based on 35 hours of preparatory services rendered at \$395-435/hour, plus additional legal expenses incurred. The Court considers this request reasonable in all respects. Furthermore, defendant does not dispute or object to plaintiff's request for attorney's fees.

The Court has considered the parties' other arguments and finds them unavailing and/or non-dispositive.

Accordingly, plaintiff's motion for summary judgment is granted.

**Conclusion**

Motion granted. The clerk is hereby directed to enter judgment in favor of plaintiff, Trinity Centre LLC, and against defendant, Stern & Montana, LLP, in the sum of \$1,007,454.05, plus interest from February 1, 2015 (see CPLR 5001(d)), plus attorney's fees in the sum of \$15,735.00, plus costs and disbursements.

Dated: December 4, 2017



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Arthur F. Engoron, J.S.C.