

Vizel v Vitale
2018 NY Slip Op 32319(U)
September 18, 2018
Supreme Court, Kings County
Docket Number: 502107/2016
Judge: Pamela L. Fisher
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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 18th day of September, 2018.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

-----X
AVI VIZEL,

Plaintiff,

-against-

BRIAN VITALE, AS TRUSTEE FOR
THE ELINORE STERN TRUST,

Defendant.
-----X

Index No.: 502107/2016

Motion Seq # 6 & 8

DECISION & ORDER

2018 SEP 19 AM 7:50
KINGS COUNTY CLERK
FILED

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Notice of Motion/Cross Motion/Order to Show Cause and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Other Papers: Memorandums of Law _____

Papers Numbered

1, 3

3

5

2, 4, 6, 7

Defendant, Brian Vitale, moves by notice of motion, sequence number 6, for an order (1) pursuant to CPLR § 3212 granting summary judgment on his first, second, third, fifth and sixth counterclaims as there are no triable issues of fact regarding the expiration of the lease and that a valid option to renew did not exist; (2) scheduling a hearing to determine the amount of fair market use and occupancy and attorney's fees owed; (3) granting landlord a final judgment of possession and issuance of a warrant of

eviction to remove plaintiff forthwith; (4) pursuant to CPLR § 3212 granting summary judgment dismissing plaintiff's first, second and third causes of action; (5) pursuant to CPLR § 3211(b) striking plaintiff's affirmative defenses; and (6) for such other and further relief as this Court deems just and proper.

Plaintiff, Avi Vizel, opposes this application and moves by cross motion, sequence number 8, for an order pursuant to CPLR § 3212 granting summary judgment to plaintiff on all causes of action in the amended verified complaint and dismissing defendant's counterclaims, denying defendant's motion for summary judgment in its entirety, and for such other and further relief as this Court deems just and proper.

Defendant contends that the agreement's option to renew does not identify a rent amount or a methodology for calculating the rent during a renewal, therefore the option is unenforceable. Defendant argues that plaintiff could not exercise the option because he was in default of the agreement by failing to pay the complete buyout debt plus interest and late charges. Lastly, defendant seeks use and occupancy of the premises from the termination of the lease on June 30, 2015 through February 2016 plus late charges.

In opposition, plaintiff contends that the agreement evinces a valid option to renew because the renewal rent would increase by 3% each year as the agreement's rental amounts increased. Plaintiff avers that he exercised his option by serving a notice of intent to renew and continuing to make rental payments until he received a 30 day notice of termination in January 2016. Plaintiff argues that he was not in default of the agreement at the time that he opted to renew. He contends that the buyout debt was premised on his receiving certain equipment at the premises. Plaintiff avers that the

parties agreed to end the buyout payments after December 2011 because he did not receive said equipment. Lastly, plaintiff contends that he is due repayment of the buyout debt.

“A motion for summary judgment ‘shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party’” (*id.*). “To defeat summary judgment, the nonmoving party need only rebut the prima facie showing made by the moving party so as to demonstrate the existence of a triable issue of fact” (*Poon v. Nisanov*, 162 A.D.3d 804, *supra*, citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986]).

“The doctrine of definiteness or certainty is well established in contract law. In short, it means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to” (*166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 575 N.E.2d 104 [1991], citing 1 Corbin, Contracts § 95, at 394). “If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract” (*id.*, quoting *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.*, 74 N.Y.2d 475, 548 N.E.2d 203 [1989], citing *Martin Delicatessen v. Schumacher*, 52 N.Y.2d 105, 417 N.E.2d 541 [1981]). “Further, ‘a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable’” (*id.*, quoting *Martin Delicatessen v. Schumacher*, 52 N.Y.2d 105, *supra*; see *Total Telecom Grp. Corp. v. Kendal on Hudson*, 157 A.D.3d 746, 68 N.Y.S.3d 491 [2 Dept., 2018]).

The Court of Appeals in *Martin Delicatessen* “identified two ways in which the requirement of definiteness could be satisfied in the absence of an explicit contract term: (1) an agreement could contain ‘a methodology for determining the [missing term] * * * within the four corners of the lease, for a [term] so arrived at would have been the end product of agreement between the parties themselves’; or (2) an agreement could “invite [] recourse to an objective extrinsic event, condition or standard on which the amount was made to depend”” (*166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, *supra*; quoting *Martin Delicatessen v. Schumacher*, 52 N.Y.2d 105, *supra*; see *Total Telcom Grp. Corp. v. Kendal on Hudson*, 157 A.D.3d 746, *supra*).

The parties’ agreement sets forth the renew option in paragraph 65, which states in relevant part,

Option to Renew:

A. At the option of the Tenant, the term of the Lease shall extend for an additional five (5) year period from July 1, 2015 to June 30, 2020 provided Tenant provides written notice to the Owner by certified mail, with return receipt to be received by the Landlord no later than April 1, 2015 provided the Tenant is not in default of any provisions of the Lease as amended and modified.

(*id.*).

In the instant matter, the agreement does not contain a methodology within its four corners to determine the missing rent for the renewal period nor invite recourse to an objective extrinsic event, condition or standard on which the amount was made to depend. Here, the renewal clause is completely silent as to a renewal rent. Thus, the lease option to renew is missing an essential element and is therefore void and unenforceable.

As the lease expired on June 30, 2015 plaintiff is a holdover tenant. Defendant is entitled to the holdover rent as set forth in paragraph 57 of the parties' agreement from the expiration of the agreement on June 30, 2015 until plaintiff vacates the premises.

Pursuant to paragraph 67 of the parties' agreement, plaintiff agreed to purchase all property/inventory in the premises and assume an outstanding debt. In addition to sums paid upon execution of the lease, on August 1, 2010, plaintiff commenced paying monthly additional rent until full payment of the balance. In support of his motion, defendant annexed a "Buyout Debt Ledger" evincing that the additional monthly payments ceased with the November 2011 payment and there remains an outstanding balance.

In opposition, plaintiff raised a triable issue of fact. Plaintiff submitted supporting documentation, seeking to evince that monthly additional rent was not sought after November 2011 due to the parties consensus. Plaintiff contends that the buyout debt was conditioned on receipt of property and inventory in the premises when plaintiff took possession, which he did not receive. Thus, the parties consented that the buyout debt was no longer due. Plaintiff argues that the invoices and emails sent by defendant which fail to contain a demand for the payment, after November 2011, evinces in writing that the parties had come to an agreement regarding repayment of the buyout debt.

Accordingly, defendant's motion pursuant to CPLR § 3212 granting summary judgment on his first counterclaim for a declaratory judgment is granted. Defendant's second counterclaim for use and occupancy is granted to the extent that defendant is entitled to holdover rent as set out in paragraph 57 of the parties' agreement. The matter

is set down for a framed issue hearing regarding the balance due and/or credit of any additional rent and late charges.

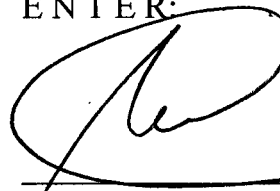
Plaintiff's cross motion pursuant to CPLR § 3212 granting summary judgment to plaintiff on all causes of action in the amended verified complaint and dismissing defendant's counterclaims is denied.

In light of the foregoing, a warrant of eviction will issue 30 days after notice of entry of this order.

All other relief request and not expressly granted is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Pamela L. Fisher
J.S.C.

HON. PAMELA L. FISHER

KINGS COUNTY CLERK
FILED
2018 SEP 19 AM 7:58