

VBGO Penn Plaza, LLC v Salon Media Group, Inc.
2019 NY Slip Op 30512(U)
March 1, 2019
Supreme Court, New York County
Docket Number: 654955/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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VBGO PENN PLAZA, LLC,

INDEX NO. 654955/2017

Plaintiff,

MOTION DATE N/A

- v -

SALON MEDIA GROUP, INC., d/b/a SALON
MEDIA GROUP,

MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

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HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 001)
8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34,
35, 36, 37, 38, 39, 40

were read on this motion PARTIAL SUMMARY JUDGMENT.

Plaintiff VBGO Penn Plaza, LLC (VBGO), is the net lessee and landlord of the commercial building located at 31 Penn Plaza a/k/a 132 West 31st Street in Manhattan. As part of its net lease, plaintiff was assigned the previous landlord’s lease agreement with defendant Salon Media Group, Inc. (Salon), the tenant of certain office space at the building, known as Suite 604. After Salon defaulted on its rental payments, plaintiff evicted it from the premises, and commenced this action against defendant for unpaid rent, additional rent, liquidated damages, and attorney’s fees. Plaintiff now moves pursuant to CPLR 3211 and/or 3212, to dismiss defendant’s affirmative defenses and counterclaim, and for partial summary judgment on the issue of liability. Plaintiff

further asks the Court to set the matter down for a hearing to determine the amounts Salon owes for damages and fees. Defendant opposes the motion arguing that plaintiff has not established defendant's liability as a matter of law.

Salon leased the premises for a five-year term, which was set to expire on September 30, 2019. In October 2016, after Salon began defaulting on its rental payments, plaintiff commenced a non-payment proceeding in the Civil Court of the City of New York seeking \$90,565.18 in rent and additional rent due through September 30, 2016. Salon defaulted in the non-payment proceeding and plaintiff obtained a default judgment of possession and a warrant of eviction. Salon was evicted from the premises on January 12, 2017. Since Salon's eviction, the premises have not been re-let, and Salon has not made any payments to plaintiff.

In opposition to plaintiff's motion, Salon argues that plaintiff's complaint impermissibly seeks liquidated damages in the form of accelerated rent. Salon also argues that plaintiff is not entitled to summary judgment on liability because plaintiff refused to consider a proposal by Salon to sublet the space made in or around December 2016, which arguably would have mitigated the amount owed to plaintiff. Plaintiff counters that it is not seeking accelerated rent, and that Salon's proposal to sublet is of no moment because it did not comply with the lease requirements for such a proposal.

On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to

eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When there are no triable material issues of fact, it is incumbent upon a court, in the interests of judicial economy, to grant summary judgment (*Andre v Pomeroy*, 35 NY2d 557 [1980]).

As to plaintiff's claim for rent and liquidated damages, plaintiff is seeking these damages pursuant to Article 26 of the lease, which provides, in pertinent part:

In the event of any such default, re-entry, expiration and/or dispossess by summary proceeding ... the rent shall become due thereupon and be paid up to the time ' of such re-entry, dispossess and/or expiration ... Tenant [] shall also pay Landlord as liquidated damages ... any deficiency between the rent hereby reserved [] and the net amount , if any, of the rents collected on account of the lease or leases of the Premises for each month of the period which would otherwise have constituted the balance of the term of this Lease ... 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 Landlord to collect the deficiency for any subsequent month by a similar proceeding.

Contrary to defendant's argument, in seeking to recover under this provision, plaintiff is not seeking to recover accelerated rent. Instead, plaintiff is seeking to recover the rent for the balance of the lease "in monthly installments," as the rent would have come due had defendant never defaulted on its obligations. Plaintiff is entitled to these amounts, as a commercial tenant's obligation to pay rent through the term of the lease is fixed, and a landlord is not obligated to mitigate its damages upon a tenant's decampment during the lease term (*Holy Props., Ltd. v Kenneth Cole Prods. Inc.*, 87 NY2d 130, 133-34 [1995]; *BP 399 Park Ave. LLC v PRET 399 Park Inc.*, 150 AD3d 507 [2017]). Clauses such as Article 26 are routinely enforced (*see Vornado 40 East 66(TM) Street Member LLC v Krizia Spa*, 2014 WL

2439291 (Sup Ct, NY County 2014) (Sherwood, J.); *see also Carlyle, LLC v Quik Park Beekman II, LLC*, 59 Misc3d 35 [App Term 1st Dept 2018].

As to defendant's argument that plaintiff refused to consider defendant's proposed sublet, a review of the affidavits from both parties makes clear that Salon did not comply with the requirements of Article 15 of the lease, which governs subletting. Article 15 (k) requires that the tenant not be in default of its obligations in order to be eligible to sublet the premises. It is undisputed that at the time of the alleged proposal here, Salon was in default of its payments, and that plaintiff had already instituted the non-payment proceeding against it. Additionally, Article 15 (h) of the lease requires the tenant to provide written notice to the landlord of its intention to sublet. Such notice must include the proposed sublease and information regarding the identity of the proposed subtenant including the nature of its business, its proposed use of the premises, and its financial information. Salon provided no such writing or information. Further, Salon's contention that plaintiff agreed to wait for Salon's sublet proposal before seeking possession of the premises is rebutted by an affidavit from plaintiff's agent. Besides which, any oral modification of the terms of lease governing sublet requirements, such as the one alleged by defendant, is expressly barred by Articles 28 and 43 of the subject lease.

There being no valid defense on the issue of defendant's liability for rent, additional rent, and liquidated damages, plaintiff is entitled to partial summary judgment. Additionally, pursuant to Article 27 of the lease, plaintiff is entitled to legal fees. As such, the matter will be set down for a hearing to determine the amount of damages and legal fees due to plaintiff.

For the reasons discussed above, defendant's first, second, and fourth defenses, and its counterclaim, are each without merit and are dismissed. The liquidated damages clause is not unconscionable, defendant's eviction did not extinguish its

liability for rental payments, plaintiff's claims are not barred by its voluntary termination of the lease, and plaintiff did not breach the lease in rejecting defendant's alleged proposed subtenant. As to defendant's third affirmative defense, that plaintiff's damages are speculative, the Court will await the hearing on damages before determining whether that claim has any merit.

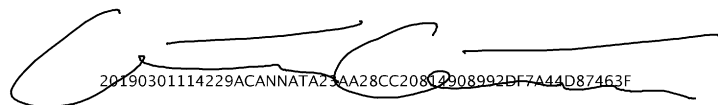
Accordingly, it is

ORDERED that plaintiff motion summary judgment in its favor on the issue of liability for rent, additional rent, expenses, and fees is granted, and the amount of damages and attorney's fees to which plaintiff is entitled shall be determined at a hearing, and it is further

ORDERED that defendant's first, second, and fourth defenses, and the counterclaim contained in the answer, are dismissed, and it is further

ORDERED that the Clerk shall enter judgment accordingly, and it is further,

ORDERED that the parties shall appear for scheduling of a fees hearing in Part 41 at 2:15 p.m. on March 13, 2019.



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3/1/2019

DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: