

M & E Christopher LLC v Ananadam Inc.
2019 NY Slip Op 30920(U)
April 3, 2019
Supreme Court, New York County
Docket Number: 656562/2017
Judge: Anthony Cannataro
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

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INDEX NO. 656562/2017

M & E CHRISTOPHER LLC,

MOTION DATE 01/20/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

ANANADAM INC., and RAJIV SHARMA

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff, M & E Christopher LLC, moves pursuant to CPLR 3211(b) to strike the affirmative defenses of defendants, Ananadam Inc. ("Ananadam") and Rajiv Sharma ("Sharma"). Plaintiff also moves pursuant to CPLR 3212 for summary judgment on its claim for unpaid rent, seeking an award of \$465,803.41 plus interest, and dismissing defendants' counterclaims.

Plaintiff is the owner and landlord of a commercial premises located at 118 Christopher Street, East Store, New York, NY 10014. On March 13, 2006 plaintiff and Ananadam entered into a written lease agreement with a term commencing April 1, 2006 and ending March 31, 2021. The lease obligated Ananadam to pay fixed monthly rent on a graduated schedule through March 31, 2021 and additional rent for late fees, real estate taxes, and utilities. The lease agreement also provided for Ananadam to pay legal fees incurred in the event of its default under the lease. By agreement dated March 16, 2006 Sharma personally guaranteed the strict performance of all of Ananadam's rent and additional rent obligations under the lease. Ananadam has not

paid any rent since January 1, 2017. On July 20, 2017, Ananadam vacated the premises and it has remained vacant at all relevant times.

Plaintiff claims that it has made reasonable efforts to re-rent the premises to another tenant. As for damages, plaintiff claims that defendants owe \$58,626.15 in fixed rent for the period from January 2017 through July 2017. Plaintiff also claims that after the application of defendant's security deposit, defendants owe \$15,323.86 in additional rent for real estate taxes (\$8,699.68), water utilities (\$4,523.06), late fees (\$11,651.12), and legal fees (\$450.00) for this same period. In addition, plaintiff claims defendants owe \$67,848.24 for fixed rent from August 2017 through March 2017; \$104,825.52 for fixed rent from April 2018 through March 2019; \$107,970.24 for fixed rent from April 2019 through and including March 2020; and \$111,209.40 for fixed rent for April 2020 through and including March 2021. In total, plaintiff claims defendants now owe \$465,803.41.

Defendants argue that summary judgment cannot be granted at this time as material issues of fact remain. Specifically, defendants assert that there are issues of fact concerning overcharges for utilities, real estate taxes, and late fees which require additional discovery. Defendants further assert that plaintiff cannot charge for future outstanding rent and that plaintiff has failed to mitigate its damages.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has met this requirement, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*). The court must view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable

inferences that can be drawn (*Benjamin v City of New York*, 55 Misc3d 1217[A], 2017 NYSlipOp 50619[U] [Sup Ct, NY County 2017]). Summary judgment “is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues” (*Andre v Pomeroy*, 35 NY2d 361, 363 [1974]).

While defendants claim that summary judgment is premature and discovery is outstanding on the issue of overcharges for utilities and real estate taxes, plaintiff has tendered sufficient evidence in the papers before the Court to establish entitlement to these fees.

With respect to water bills, the lease agreement provides the following in Article 43 of the rider:

Landlord shall not be responsible for furnishing electrical, gas, water and other utility service to the demised premises. Tenant shall, at Tenant’s sole cost and expense, arrange to receive electric current, gas, water (inclusive of water for ordinary lavatory purposes) and other utilities directly from the public utility company...

Defendants fail to rebut with any particularity why the amount plaintiff claims is due, \$4,523.06 for December 2016 through July 2017, is inconsistent with the lease agreement or actual usage. Defendants further fail to state the amount of the overcharge or the time period in which the alleged overcharge occurred. In addition, defendants did not object to any prior water charges issued consistently with the method used to calculate charges now and fail to explain why only these months’ charges were excessive. Thus defendants have failed to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact with regard to water charges.

As to real estate taxes, the lease agreement provides under Article 42 of the rider, that defendant must pay real estate taxes as additional rent if the taxes for any given

year during the lease term were higher than the taxes during the base year. The lease specifies that the amount of taxes to be paid would be 33% of the difference between the amount charged for taxes during the given year and the amount charged during the base year, with a cap of \$15,000. In addition, paragraph 42 of the rider provides:

Landlord's failure to prepare and deliver any of the tax bills, statements, notices, or bills set forth in this Article 42, or Landlord's failure to make a demand, shall not in any way cause Landlord to forfeit or surrender its rights to collect any of the additional rent that may have become due during the term of this lease pursuant to this Article 42.

Once again defendants assert that discovery remains outstanding as they have not received tax bills or statements and are therefore unaware of how plaintiff determined that the amount of taxes due on July 17, 2017 was \$8,699.68. Pursuant to the lease, however, plaintiff does not forfeit its right to collect real estate taxes despite a failure to prepare and deliver related bills and statements. In addition, the amount sought for taxes was furnished to defendants in the tenant ledger. Defendants did not object to any prior tax charges which were issued consistently with this method, and now fail to explain why only these months' taxes were excessive. Thus, once again, defendants have failed to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact concerning real estate taxes.

On the question of an alleged overcharge for late fees, parties to a contract have the right to agree to liquidated damages, provided that the clause is neither unconscionable nor contrary to public policy (*see Truck Rent-A-Ctr., Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 424 [1977]). "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the

probable loss, the provision calls for a penalty and will not be enforced" (*id.* at 425 [internal citations omitted]). Courts have held that a late fee of 5% per month on the amount overdue is not unconscionable in a commercial setting (*see K.I.D.E. Assoc., Ltd. v Garage Estates Co.*, 280 AD2d 251, 254 [1st Dept 2001]).

Here, the lease agreement provides in section 45 (b) of the Rider

If tenant is late in making any payment under this lease for five (5) or more days, then Tenant shall pay to landlord, as additional rent and as a late charge, a sum equal to 5% of the amount overdue

Ananadam was charged late fees of \$11,651.12 after it failed to pay rent for the months of January 2017 through July 2017. As this is a commercial setting in which the lease is negotiated between sophisticated parties, a 5% late fee is neither unconscionable nor contrary to public policy. Thus, there is no remaining issue of fact regarding excessive late fees and plaintiff is entitled to collect the outstanding \$11,651.12 fee.

Defendants argument concerning mitigation of damages is also unpersuasive in the context of the facts presented here. "Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages" (*Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130, 133 [1995]). Under the terms of the lease, defendants are obligated to pay rent and additional rent through and including March 31, 2021. Defendants failed to pay rent beginning on January 1, 2017. Plaintiff apparently attempted to re-let the premises, but has not done so yet. In any event, defendants are obligated to pay rent according to the terms of the lease regardless of whether attempts to re-let the premises.

Notwithstanding the above, while there is no duty to mitigate damages, accelerated damages in the form of undiscounted future rent due in a single lump sum

that are grossly disproportionate to actual losses can constitute an unenforceable penalty (see *172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Ass'n, Inc.*, 24 NY3d 528, 536-537 [2014]). Moreover, any such damages might be considered overly speculative insofar as they relate to future rent. Accordingly, the issue of mitigated damages will be sent to a Special Referee to determine actual damages.

As for legal fees, Article 71 of the rider provides as follows:

Tenant hereby agrees to pay within thirty (30) days of demand, as additional rent, all reasonable attorney's fees and disbursements (and all other court costs or expenses of legal proceedings) which landlord may incur or pay out by reason of, or in connection with: (A) Any action or proceeding by Landlord to terminate this lease for reasonable cause; (B) Any other action or proceeding by Landlord against Tenant...

While plaintiff has provided evidence of entitlement to legal fees, no information has been provided about the amount of legal fees at issue in this case. As such, this matter will also be referred to a Special Referee.

Finally, the Court addresses the guarantor's obligation. On a motion for summary judgment to enforce a written guaranty, a creditor must prove the existence of an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Here, a copy of the written guaranty signed by Sharma has been provided as Exhibit 4 to plaintiff's affirmation in support. Plaintiff has demonstrated the existence of underlying debt due to Ananadam's failure to pay rent. It has been sufficiently demonstrated that Sharma, as guarantor, has failed to perform his obligation to pay rent. For these reasons, plaintiff is entitled to summary judgment to enforce Sharma's written guaranty.

Defendants' other affirmative defenses and counterclaims are dismissed as they lack merit. Accordingly, it is

ORDERED that plaintiff's motion to strike defendants' affirmative defenses is granted; and it is further

ORDERED that plaintiff's motion for summary judgment as to defendants' counterclaims is granted; and it is further

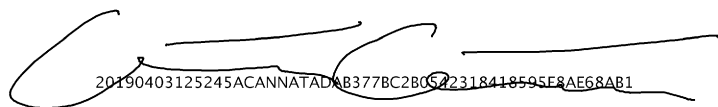
ORDERED that plaintiff's motion for summary judgment is granted as to the second cause of action for breach of the guaranty agreement; and it is further

ORDERED that plaintiff's motion for summary judgment is granted as to liability on the first cause of action for breach of lease agreement and the third cause of action for attorneys' fees; and it is further

ORDERED that the issues of mitigated damages and attorneys' fees shall be severed and referred to a Special Referee to determine; and it is further

ORDERED that within 15 days of the date of this order, counsel for plaintiff shall serve upon the Special Referee Clerk (60 Centre Street, Room 119) a copy of this order with notice of entry and a completed Information Sheet which may be accessed at www.nycourts.gov/supctmanh (under "References") and such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* which may be accessed at www.nycourts.gov/supctmanh (under "E-Filing").

4/3/2019
DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER

APPLICATION:

- SETTLE ORDER

- SUBMIT ORDER

CHECK IF APPROPRIATE:

- INCLUDES TRANSFER/REASSIGN

- FIDUCIARY APPOINTMENT REFERENCE