

Premier 3 Great Jones, LLC v Hill
2019 NY Slip Op 31409(U)
May 16, 2019
Supreme Court, New York County
Docket Number: 157534/2018
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

PREMIER 3 GREAT JONES, LLC, 825 BROADWAY REALTY, LLC,

Plaintiff,

- v -

DAVID HILL,

Defendant.

-----X

LOUIS L. NOCK, J.

INDEX NO. 157534/2018

MOTION DATE 3/14/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

Upon e-filed documents numbered 1 through 10, plaintiffs' motion for summary judgment on their complaint, is decided in accord with the following memorandum.

BACKGROUND

Plaintiffs are the owners of commercial property located at 3 Great Jones Street, Store B, New York, New York. The property was licensed by defendant for use as a picture frame retail store, by license agreement, subject to expiration by its own terms on January 31, 2019 (Motion Ex. A). Plaintiffs served a three-day notice of termination on defendant, dated March 2, 2018, due to nonpayment of license fees aggregating \$85,010.85. Thereafter, a summary holdover proceeding was commenced by plaintiffs on March 22, 2018, due to defendant's failure to surrender the premises. Defendant defaulted in that proceeding and was lawfully evicted from the premises on July 24, 2018.

The instant action was commenced by plaintiffs, seeking outstanding license fees pursuant to the terms of the license agreement. Defendant served and e-filed a verified answer asserting nothing more than a general denial. Plaintiffs now move for summary judgment, seeking judgment in the principal sum of \$325,089.77, representing the total amount owed under

the license agreement through October 1, 2018,¹ as well as legal fees incurred in the prosecution of this action. The motion is unopposed.

DISCUSSION

Summary judgment is appropriate when there are no triable issues of fact (*e.g.*, *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851 [1985]). If the moving papers establish the relevant facts, and no material factual issues exist, summary judgment can be entered in favor of the movant (*e.g.*, *Hamilton Mut. Realty Fund Inc. v Bond Realty Co.*, 41 NY2d 936 [1977]). To defeat the motion, defendant would have had to produce evidence in opposition to show a material issue of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). No opposition whatsoever has been served or filed, to the instant motion.

Defendant's terse answer, containing nothing but a general denial, is insufficient to raise an issue of fact (*see, e.g., Bethlehem Steel Corp. v Solow*, 51 NY2d 870 [1980]; *Iandoli v Lange*, 35 AD2d 793 [1st Dept 2002]).

Here, in the absence of any detail in the answer, and absent any opposition to the motion, the court is left with plaintiff's submission of its account ledger, itemizing what it asserts are outstanding license fees (\$160,000), interest charges (\$34,534.39), and holdover charges (\$126,774.19) referable to the parties' license agreement, through October 1, 2018 (*see*, Motion Ex. D; *see also*, Affidavit of Uzi Ben Abraham [the "Ben Abraham Aff."] [NYSCEF Doc. No. 5] ¶¶ 10-15]).

The court has examined the relevant provisions of the license agreement (NYSCEF Doc. No. 6) in its review of the foregoing figures proffered in plaintiff's aforementioned account ledger. Paragraph 2 of the agreement fixes monthly license fee at \$10,000, plus interest at 18%

¹ Plaintiff's affiant attests that the premises remained vacant as of October 1, 2018 (Affidavit of Uzi Ben Abraham [NYSCEF Doc. No. 5] ¶ 9). No detail on possible mitigation efforts has been provided to the court.

through date of fee payment. Plaintiffs' affiant asks the court to assess the fee default period as spanning 16 months – April 2017 through July 2018 (*see*, Ben Abraham Aff. ¶ 11). The papers are not clear as to the basis for that selected timeframe. Plaintiffs then ask the court to assess the interest accrual period as spanning 18 months – April 2017 through October 2018 (*see, id.*, ¶ 13). The papers are not clear as to the basis for *that* selected timeframe.

Plaintiffs ask the court to assess a holdover fee in accord with paragraph 11 of the license agreement, which provides: “Licensee shall be liable to pay to Licensor as liquidated damages an amount which is three hundred (300%) percent of the then fair market value of the License Area (the ‘Holdover Fee’) measured from the Expiration Date until the date Licensee actually surrenders the License Area” Plaintiffs’ affiant conclusorily states that such fair market value is \$4,516.23, and then proceeds to apply that figure to a period starting in March 2018 – the license termination month (Ben Abraham Aff. ¶¶ 14-15). However, plaintiffs present no evidence from any witness who identifies him or herself as an expert on relevant real property licensing or rental market values.

Plaintiffs next ask the court to add a figure for what it casts as a “previous balance” in an amount of \$3,704.58 (Ben Abraham Aff. ¶ 16). However, it is unclear whether the complaint in this action actually includes a claim for that category of loss.

Plaintiffs next ask the court to award attorneys’ fees incurred in the course of this action. To be sure, an attorneys’ fee provision *is* included in the license agreement, at paragraph 31. However, an award at this time would be premature in light of the ambiguities noted hereinabove.

Therefore, it is

ORDERED that plaintiffs' motion for summary judgment is denied, without prejudice to renew via submission of affidavit material providing the needed clarifications noted hereinabove, including an expert affidavit addressing fair market value for the subject premises.

This shall constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>5/16/2019</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE