

501 Fifth Ave. Co. LLC v Drudy
2019 NY Slip Op 31926(U)
June 28, 2019
Supreme Court, New York County
Docket Number: 157481/18
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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501 FIFTH AVENUE COMPANY LLC,

Plaintiff,

-against-

Index No. 157481/18

DR. JOHN DRUDY,

Motion Sequence No.: 001

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27

were read on this motion to/for

JUDGMENT - SUMMARY

DORIS LING-COHAN, J.:

Plaintiff 501 Fifth Avenue Company LLC (Owner) moves, pursuant to CPLR 3025 (c) to amend the pleadings to conform to the evidence, and, pursuant to CPLR 3212 for summary judgment against defendant Dr. John Drudy, in the amount of \$23,579.92, plus costs, fees and disbursements, and, setting the matter down for a hearing to determine plaintiff's reasonable attorneys' fees.

The complaint alleges that defendant Dr. John Drudy, who has appeared in this case *pro se*, breached his commercial lease (Lease), by vacating the leasehold prior to the termination date. Owner represents that, although the Lease does not require it to mitigate its damages, it has, in fact, relet the premises, albeit at a lower rent, than provided for in the Lease.

In seeking to amend the pleadings pursuant to CPLR 3025 (c), plaintiff seeks to take into account the additional damages accruing to plaintiff, from the time that it filed its complaint, to the time of this Court's judgment.

Leave to amend a pleading is to be freely given, absent prejudice to the other party (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 410 [2014]; *Mack v City of N.Y.*, 165 AD3d 443, 443 [1st Dept 2018]), and such leave may be given for the purpose of taking account of additional damages. *Nassau County v Incorporated Village of Roslyn*, 182 AD2d 678, 679 (2nd Dept 1992). Here, as there has been no showing of prejudice by defendant, plaintiff's motion to amend the complaint to add additional damages, which have accrued since the filing of the within complaint, is granted.

With respect to that portion of plaintiff's motion which seeks summary judgment, the Lease, which has a term of five years (from September 1, 2015 to August 31, 2020), provides, in relevant part, as follows that:

"No provision of this lease shall be deemed to have been waived by Owner unless such waiver be in writing signed by Owner. . . . No act or thing done by Owner or Owner's agent during the term hereby devised shall be deemed an acceptance of a surrender of the demised premises, and no agreement to accept such surrender shall be valid unless in writing signed by Owner."

(Abramson Reply Affirmation, Exhibit C, at ¶ 25 [emphasis supplied]). Consequently, defendant's assertion, that, "[o]n or about April 1, 2018[,] the Plaintiff and I agreed to terminate my lease" (Affidavit in Opposition, ¶ 3), does not suffice to show that the Lease was legally terminated, as no writing signed by Owner has been supplied by defendant. Moreover, while

defendant does not indicate specifically when he abandoned the leased premises, his claim that he did not do so on July 11, 2018, is belied by a letter that he wrote to the building's management office, dated July 1, 2018, in which he writes that he left the premises on that date, and that, "all keys [are] enclosed" (Abramson Reply Affirmation, Exh. A). Notably, defendant does not challenge the authenticity of such letter, nor that he vacated the lease prior to its termination date.

Defendant contends that Owner is holding a \$6,000 deposit. The Lease provides that defendant's deposit, a sum of \$4,184.28, not \$6,000, as defendant alleges, may be used by Owner:

"to the extent required for the payment of any rent and additional rent or any other sum as to which Tenant is in default or for any sum which Landlord may expend ... by reason of Tenant's default in respect of any of the terms, covenants and conditions of this lease, including . . . any damages or deficiency in the reletting of the premises."

(Abramson Reply Aff, Exhibit C, at ¶ 43). Defendant incorrectly states that Mr. Abramson's affidavit "admits that the new tenant is paying more in base rent than I did" (Drudy Aff in Opp, ¶ 9). To the contrary, Mr. Abramson's affidavit states that, while the base rent charged to the new tenant, for the months of August 2018 through November 2018, is more than the base rent that defendant would have been charged, the base rent owed by the new tenant, over the remaining time of the Lease, will total \$115.68 less than the sum defendant would have been charged in that time period.

Defendant further argues that summary judgment should not be granted in plaintiff's favor, because his discovery demand has not been answered. Defendant's Interrogatories seek, primarily, a calculation of the charges at issue here. An explanation of those charges, however, is

given in the affidavit of Adam Abramson, submitted by plaintiff in support of the within motion. Defendant takes issue with Mr. Abramson's calculations, specifically, that the new tenant took possession of the premisses in September 2018 and that he is not responsible for the amount being billed which pertains to a flood of water, caused by a burst pipe.

The standards for summary judgment are well settled. It is "a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" or "where the issue is even arguable" (4 Weinstein-Korn-Miller NY Civ Prac ¶ 3213.05). In seeking summary judgment, the movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 853 [1985]). To grant summary judgment, it must be clear that no material and triable issue of fact is presented (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court should draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dept 1990]).

Applying such principles herein, summary judgment is granted in favor of plaintiff and against defendant on the issue of liability with respect to defendant's breach of the subject commercial Lease, by his premature vacatur. The issue of damages, including an award of attorneys' fees incurred in litigating this action (warranted pursuant to paragraph 19 of the Lease) are

respectfully referred to a Special Referee to hear and determine, in accordance with CPLR 4317(b). There are factual issues with respect to plaintiff's damages claim, including with respect to alleged "renovation charges", listed in the supplied affidavit, which defendant disputes.

Based upon the above, it is

ORDERED that the within motion by plaintiff (001) for an order amending the complaint to add additional damages accruing since the filing of the complaint and awarding it summary judgment against defendant is granted with respect to the issue of liability; it is further

ORDERED that the issue of damages is respectfully referred to a Special Referee, in accordance with CPLR 4317(b), to hear and determine; it is further

ORDERED that *within 30 days of entry of this order*, plaintiff shall serve a copy of this order with notice of entry upon defendant and upon the Clerk of the Judicial Support Office (Room 119), to arrange a calendar date for the reference to a Special Referee; and it is further

ORDERED that **this case is scheduled for a control date on September 12, 2019 (no appearances), to monitor compliance with this order.**

Dated: June 28, 2019



Hon Doris Ling-Cohan, J.S.C.