

214 W. 39th St. LLC v Fashion Transcript LLC
2019 NY Slip Op 31934(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 160935/2017
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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214 WEST 39TH STREET LLC,
Plaintiff,

- v -

FASHION TRANSCRIPT LLC, SAADIA YAKOUB
Defendant.

INDEX NO. 160935/2017
MOTION DATE 04/28/2019
MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 58, 59, 60, 61, 62 were read on this motion to/for JUDGMENT - SUMMARY.

In this commercial landlord-tenant action, plaintiff 214 West 39th Street LLC (“landlord”) moves pursuant to CPLR 302(c) to amend the pleading to conform to the evidence; pursuant to CPLR 3212 for summary judgment against both defendant Fashion Transcript, LLC (“tenant”) and defendant Saadia Yakoub (“guarantor”) for pre- and post-vacatur rent and for a hearing on attorneys’ fees and costs; and pursuant to CPLR 3211(a) dismissing defendants’ affirmative defenses.

Landlord is the owner of the building known as 214 West 39th Street, New York, New York (“the premises”). Tenant was the former commercial tenant of Suite 401A pursuant to a written lease agreement dated December 14, 2011 which provided that the lease commenced on January 1, 2012 and ended on December 31, 2016. Saadia Yakoub is the guarantor of the lease pursuant to a written guaranty agreement dated December 14, 2011. This action was commenced in December 2017 to collect damages for unpaid rent and additional rent.

Landlord argues that it is entitled to summary judgment as a matter of law as no material facts are disputed. First, landlord argues it should be permitted to amend the

pleadings to conform to the evidence, including updating amounts of rent, additional rent, and liquidated damages now owed by tenant and guarantor. Second, landlord argues it is entitled to summary judgment as defendants' answer fails to controvert plaintiff's claims of monies owed due to tenant's lease default in failing to pay rent and vacating the premises mid-lease without notice or authorization. Third, landlord argues that guarantor is liable for tenant's obligations by virtue of agreeing to guaranty tenant's performance of the terms of the lease, including tenant's monetary obligations. Further, landlord alleges that defendants' 35 affirmative defenses should all be dismissed as they are boilerplate and inapplicable and, even if they are considered individually, each defense fails. Finally, landlord avers that it is entitled to an award of attorneys' fees and costs and a hearing to determine their amount.

Defendants oppose the motion for summary judgment, asserting that there are material issues of fact. These issues of fact include the correctness of the rider and the guaranty provided in landlord's moving papers. Defendants assert that summary judgment should be denied here because landlord breached the lease and constructively evicted tenants by cutting off their electricity without notice. In addition, defendants claim that the plain language of the guaranty limits the liability of the guarantor to obligations and payments that accrue up to the date that the tenant vacates and surrenders the premises, without setting forth conditions precedent. Further, defendants argue that further discovery is needed to determine whether landlord re-let the premises prior to the end of the lease term, which would limit defendants' liability. Defendants also assert that the interest rate discussed in the papers is different from the rate listed in the attached lease, raising an issue that precludes summary judgment. Finally, defendants argue that their affirmative defenses are valid and require discovery to be properly developed.

In response to defendants' opposition, landlord asserts that there is only one lease that contains the rider and the guaranty, tenant was not constructively evicted, and the guarantor's liability is absolute and ongoing.

"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 showing, "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.*).

It is noteworthy that plaintiff served a Notice to Admit on January 26, 2018, requesting defendants admit or deny the truth of the signatures of Saadia Yakoub in representative or personal capacity as tenant on the lease and rider as well as the signature of Saadia Yakoub as guarantor on the rider.

A notice to admit is proper where it involves admissions on matters about which there cannot reasonably be substantial dispute and which are not within the unique knowledge of other parties (*see Fetahu v New Jersey Tr. Corp.*, 167 AD3d 514, 515 [1st Dept 2018]). A party that fails to timely respond to a notice to admit is deemed to have admitted the genuineness of the matters requested to be admitted (*see New Image Const., Inc. v TDR Enterprises Inc.*, 74 AD3d 680, 681 [1st Dept 2010]).

The veracity of Saadia Yakoub's signature is within the knowledge of defendants and cannot reasonably be substantially disputed, thus as defendants failed to timely respond to the notice to admit, the signatures on the lease, lease rider, and guaranty, and thereby the documents themselves, are deemed admitted.

Similarly, the discrepancy in the interest rate averred to in plaintiff's affidavit and that in the lease does not preclude summary judgment here. The affidavit refers

directly to paragraph 61 of the lease which maintains that the interest rate “shall be equal to the lesser of (i) eighteen percent (18%) and (ii) the highest rate of interest permissible to be charged under the laws of the State of New York.” Any discrepancy regarding this provision is merely a scrivener’s error and would not preclude summary judgment.

The Court next addresses the issue of alleged constructive eviction alleged to have occurred when plaintiff cut off of electricity to the premises. The parties dispute the meaning of Article 42 of the lease, specifically, the correct interpretation of provisions relating to notice requirements prior to shutting off electricity. It has been held that “when parties set down their agreement in a clear, complete document, their writing . . . should be enforced according to its terms,” (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). This rule is all the more applicable in the context of real property agreements where the contract was negotiated by sophisticated parties (*see id. quoting Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]). On the issue of shutting off electricity to the leased premises for failure to timely pay electric bills, Article 42 of the lease provides, in part:

“In the event that such bills are not paid within five (5) days after the same are rendered, Owner may, without further notice, discontinue the service of electric current to demised premises without releasing Tenant from any liability under this Lease and without Owner or Owner’s agent incurring any liability for any damage of loss sustained by Tenant by such discontinuance of service.”

Such provisions, precluding landlords’ liability for failing to provide electric, have been upheld by courts (*see Four Cees Jewelry Inc. v 1537 Realty LLC*, 11 Misc 3d 1056[A] [Sup Ct 2005]; *see also 85 John St. Partnership v Kaye Ins. Assoc., L.P.*, 261 AD2d 104, 105 [1st Dept

1999]). The Court in *Four Cees Jewelry Inc. v 1537 Realty LLC* held that a party cannot negotiate a lease, which provides for the unilateral right to disconnect electricity, and then claim a breach of lease upon exercise of that same right (11 Misc 3d 1056[A] [Sup Ct 2005]). Accordingly, the provision allowing landlord to shut off electricity without notice within five days after bills are rendered and not paid should be enforced, and defendants cannot maintain a claim for constructive eviction based on exercise of this right. As such, defendants' claim for constructive eviction fails.

As to the obligations of the guarantor, the guaranty here states that liability is limited to obligations and payments that "accrue up to the date that Tenant vacates and surrenders the demised premises in the condition required under this lease." The lease provides that the only valid form of surrender is an agreement that is in writing and signed by the landlord. The lease further provides that delivery and acceptance of keys shall not operate as a termination of lease or surrender of premises. Lease provisions requiring acceptance of surrender by writing signed by the landlord and not authorizing employees to accept keys or terminate the lease have been upheld (*see 47 W. 14th St. Corp. v New York Wigs & Plus, Inc.*, 106 AD3d 527 [1st Dept 2013]; *see also 99 Realty Co. v Eikenberry*, 242 AD2d 215, 216 [1st Dept 1997]). Here, tenant vacated the premises prior to expiration of the lease, unilaterally informed landlord of the vacatur, and delivered keys. The guaranty specifically states that obligations and payments are only limited to the date of surrender if such surrender is performed as required under the lease. Tenant did not do that here, so the guarantor's liability extends to the end of the lease term.

The tenant raises a question as to whether the premises were re-let prior to the end of the lease term, which could limit damages in this action if true. On a motion for summary judgment, 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]). Nevertheless, it has been held that “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, defendants assert that landlord re-let the premises in December 2016 at the latest and provide photographs claimed to support of this contention. Defendants request further discovery on the issue. Defendant Saadia Yakoub, in his affidavit states, “I know and I have photographic evidence that plaintiff re-let the premises soon after defendant vacated the premises.” The evidence most favorable to defendants on this issue consists of photographs of a door with the number “401A” on it which leads to a room with boxes inside; a box with a shipping label that is addressed to a business, with no demonstrated connection to defendants, with the buildings’ address on it; and a sign for a sample sale to be held December 12-22nd 2016 placed on a door with the number “400” on it. Defendants produced these photographs with the intent to substantiate their allegations that the premises were re-let. However, what this evidence does not show is the presence of a new tenant in Suite 401A in December 2016, none of the photographs make the essential connection between the demised premises and the date it was supposedly re-let. Thus, taken together, and without more, these photographs and statements are insufficient to raise a material issue of fact as to when (or to whom) the premises were re-let.

Finally, defendants thirty-five affirmative defenses are dismissed as they represent a mere catch-all attempt to prevent summary judgment. Under CPLR 3031, affirmative defenses must be more than bare legal conclusions without supporting facts (*Commissioners of State Ins. Fund v Ramos*, 63 AD3d 453 [1st Dept 2009]).

Accordingly, it is

ORDERED that the plaintiff's motion for leave to amend the complaint herein to conform to the evidence is granted; and it is further

ORDERED that the plaintiff's motion for summary judgment against defendant Fashion Transcript LLC on the first cause of action herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$260,023.25, together with interest at the rate of 9% per annum from the date of June 30, 2015 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the plaintiff's motion for summary judgment against defendant Saadia Yakoub, as guarantor, on the third and fourth causes of action herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$275,023.25, together with interest at the rate of 9% per annum from the date of June 30, 2015 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion to dismiss defendants' affirmative defenses is granted and each of defendants' thirty-five affirmative defenses are dismissed; and it is further

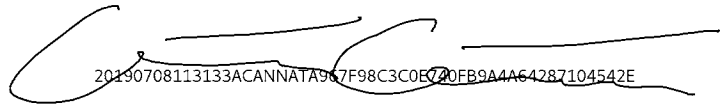
ORDERED that an immediate trial on attorneys' fees and costs shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with

said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

7/8/2019
DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE