

**511 W. 25th St. Owner LP v WESTKiDS25, LLC**

2019 NY Slip Op 32056(U)

July 15, 2019

Supreme Court, New York County

Docket Number: 159460/2017

Judge: William Franc Perry

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

*Justice*

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INDEX NO. 159460/2017

511 WEST 25TH STREET OWNER LP,

MOTION DATE 3/7/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

WESTKIDS25, LLC, BOX LTD, PASCAL DANGIN

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

In this action seeking unpaid rent, damages, and fees, plaintiff 511 west 25<sup>th</sup> Street Owner LP (“Plaintiff” or “Landlord”) moves, pursuant to CPLR 3212(e), for partial summary judgment in favor of Plaintiff and against defendants WESTKiD25, LLC (“West” or “Tenant”), Box, Ltd (“Box”), and Pascal Dangin (“Dangin”) (Box and Dangin, together, “Guarantors”) (collectively, “Defendants”), jointly and severally, on Landlord’s first cause of action for unpaid rent and additional rent then due and owing by Tenant on the date Tenant vacated the subject premises, September 6, 2017.<sup>1</sup> Defendants oppose the motion.

**BACKGROUND**

Plaintiff was and is the owner and landlord of the building located at 541 West 25th Street, New York, New York (the “Building”). On or about December 23, 2014, Plaintiff and West executed a lease agreement (the “Lease”) pursuant to which West leased certain portions of the ground floor and lower level of the Building (the “Premises”). On or about December 22,

<sup>1</sup> The branch of Plaintiff’s motion, pursuant to CPLR 3215, to amend the caption to change the name of Defendant Box from “BOX LTD.” to “BOX, LTD.” is granted without opposition.

2014, Box executed a guarantee (the "Box Guaranty") pursuant to which Box guaranteed the full performance of Tenant's obligations under the Lease. On or about December 22, 2014, Dangin executed a guarantee (the "Dangin Guarantee") pursuant to which Dangin guaranteed the performance of Tenant's obligations under the Lease up to the date that Tenant vacated the Premises (Complaint, NYSCEF Doc. No. 15, ¶¶ 3-9).

Under to the Lease, Tenant was required to pay Landlord fixed annual rent, in equal monthly installments, at rates starting at \$706,750.00 per annum. Tenant was also required to pay Landlord certain sums as additional rent for, *inter alia*, real estate taxes and electric charges. In addition, Tenant was required to deposit \$235,583.33 as security (the "Security Deposit"). The term of the Lease was for one hundred and twenty-six months commencing on December 23, 2014. Accordingly, the Lease was to expire on June 22, 2025 (Lease, NYSCEF Doc. No. 9, pp. 1-3, 57).

Tenant ceased paying rent and additional rent in May 2017. On or about July 26, 2017, Landlord commenced a non-payment proceeding against Tenant seeking unpaid rent for May through July of 2017, a judgment of possession, and a warrant of eviction. After Tenant failed to appear or answer the petition, a judgment was entered, on default, on September 21, 2017, awarding Landlord possession of the Premises and directing issuance of a warrant of eviction (Judgment, NYSCEF Doc. No. 14). After failing to oppose the petition but before judgment was entered, Tenant vacated the Premises on September 6, 2017 (the "Surrender Date").

In light of Defendants' failure to pay the amounts due and owing under the Lease, Landlord commenced this action on October 24, 2017. The Complaint seeks (1) unpaid rent and additional rent for the months of May 2017 through September 2017, against all Defendants, jointly and severally, in the amount of \$322,284.09, (2) a lump sum payment under Article 20.1(i) of the lease, against Tenant and Box, jointly and severally, in the amount of \$2,442,133.40; and (3) reimbursement for

other damages pursuant to Article 20.1(ii) of the Lease, against Tenant and Box, including but not limited to Landlord's attorney and brokerage fees. On January 31, 2018, Defendants filed an amended Answer denying the material allegations of the Complaint and asserted a number of affirmative defenses.

On October 3, 2018, Landlord filed the instant motion seeking partial summary judgment on Landlord's first cause of action for unpaid rent and additional rent for May 2017 through September 2017. On December 5, 2018, Defendants filed opposition to the motion. The motion was fully submitted on March 7, 2019.

### DISCUSSION

Landlord moves, pursuant to CPLR 3212(e), for partial summary judgment on its first cause of action against all Defendants, under the Lease and Guarantees, for unpaid rent and additional rent from May 2017 through September 2017 in the amount of \$322,284.09.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted]). Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, Landlord establishes the material facts of its claim, that Tenant executed a valid Lease and that Tenant defaulted in its obligations thereunder when it ceased paying rent in May of 2017. Landlord further establishes that, under the terms of the Dangin Guarantee and Box Guarantee, both Guarantors are liable for Tenant's obligations until the date Tenant surrendered the Premises on September 6, 2017. In support of the amount claimed to be owed, \$322,284.09, Landlord provides the affidavit of Robert McClary, VP of Asset Management of L&L Holding Company, LLC, the managing agent for the Building (NYSCEF Doc. No. 7, ¶ 14). The total amount owed consists of four months of unpaid rent plus additional rent including charges for Electric Usage, Sales Tax-Electric, Landlord's Administrative Fee – Electric, and Real Estate Tax Reimbursements. (*id.*). In addition to Mr. McClary's affidavit, Landlord provided an account statement showing the unpaid rent and additional rent that became due by Tenant between May and September 2017, as well as copies of applicable tax and electricity bills (NYSCEF Doc. Nos. 28-30).

In opposition, Defendants argue that there are questions of fact regarding the actual amount due for the period between when Tenant stopped paying rent and the Surrender Date and that, regardless, the amount sought by Landlord under the first cause of action in the Complaint should be offset in the amount of Tenant's security deposit of \$235,583.33. Defendants' arguments are unavailing.

Defendants' contention that Landlord's proofs are inadequate to support summary judgment because Landlord fails to proffer sufficient evidentiary proof of its calculations is without merit. As discussed above, Landlord's managing agent adequately described each of the charges, including unpaid rent, electricity charges, and real estate taxes, that comprise the total sum sought by Landlord. Defendants' cited cases deal solely with the issue of conclusory

allegations of the amount of late fees, which fees often require additional factual support as to the dates certain payments were made to determine the late fees alleged were properly calculated. (*see MSMC Residential Realty, LLC v Himani*, 60 Misc 3d 1223(A) [Sup Ct NY Cnty 2018]). Moreover, in MSMC, unlike here, defendants provided documentary evidence consisting of rent checks and certified mail return receipt labels showing that they mailed payments to plaintiff within the time required by the lease, contradicting plaintiff's allegation that the payments were late. By contract, the rent owed by Tenant and the fees to which Landlord is entitled under the Lease are not contingent upon any facts that are in dispute. It is uncontested that Tenant ceased paying rent in May of 2017 and vacated the Premises on September 6, 2017. Defendants offer not such evidence in this action to dispute Landlord's claims.<sup>2</sup>

Defendants' second contention that summary judgment is inappropriate because Landlord's damages under its first cause of action must be offset by the amount of the Security Deposit is also without merit. Here, the Lease provides in relevant part:

If Tenant defaults in the full and prompt payment and performance of any of Tenant's covenants and obligations under this Lease beyond any applicable cure or grace period, including, but not limited to, the payment of fixed annual rent and additional rent, Landlord may, but shall not be required to, use, apply or retain the whole or any part of the security so deposited and the interest accrued thereon, if any, to the extent required for the payment of any fixed annual rent and additional rent or any other sums as to which Tenant is in default or for any sum of which Landlord may expend or may be required to expend by reason of Tenant's default in respect of any of the terms, covenants and conditions of this Lease, including, but not limited to, any damages or deficiency in the reletting of the demised premises, whether such damages or deficiency accrue before or after summary proceedings or other re-entry by Landlord...

(Lease, NYSCEF Doc. No. 9, Article 40.1[a]). Accordingly, Landlord, by the clear and unambiguous terms of the Lease and the Guarantees, may elect to apply the security deposit

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<sup>2</sup> Defendants' contention that Dargin is not liable for the entirety of the rent due for the month of September 2017 is without merit as the terms of the lease expressly provide that the obligation to pay rent accrues on the first of the month.

cover post-vacatur damages because the Dangin Guarantee only covers the Tenant's Lease obligations until Tenant vacated the Premises. (*501 Fifth Ave. Co., LLC v Aslam*, 136 AD3d 535, 536 [1st Dept 2016] [reversing decision that offset judgment against security deposit and holding that plaintiff was permitted to advise that it intended to apply the deposit towards the tenant's post-vacatur damages so that it could see to collect the full amount owed under the guarantee that only covered the tenant's lease obligates until the tenant vacated the premises]). In the event that Plaintiff fails to establish its entitlement to additional damages in excess of the Security Deposit under Landlord's second and third causes of action, Tenant may be entitled to a refund of the remaining balance of the Security Deposit.

#### CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of Landlord's motion to amend the caption to change the name of defendant Box from "BOX LTD." to "BOX, LTD." is granted; and it is further

ORDERED that the branch of Landlord's motion for partial summary judgment on its first cause of action for unpaid rent and additional rent due from Defendants under the Lease and Guarantees for the period from May 2017 through September 6, 2017, is granted; and it is further

ORDERED that the clerk enter judgment in favor of plaintiff 511 WEST 25TH STREET OWNER LP and against defendants WESTKIDS25, LLC, BOX, LTD., and PASCAL DANGIN, jointly and severally, in the amount of \$322,284.09, plus interest at the rate of nine percent (9%) from the date of September 6, 2017 through the date of entry of judgment by the clerk, as calculated by the clerk, without costs and disbursements; and it is further

ORDERED that the remainder of the action is severed and shall continue; and it is further

ORDERED that counsel for all parties in the action are directed to appear for a preliminary conference in IAS Part 23, in Room 307 of the courthouse located at 80 Centre St, New York, York, on October 1, 2019, at 9:30 am.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

7/15/2019

DATE

W. FRANC PERRY, 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