

Subway Real Estate Corp. v Ved
2019 NY Slip Op 32760(U)
September 19, 2019
Supreme Court, New York County
Docket Number: 152208/2018
Judge: W. Franc Perry
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**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. 152208/2018

SUBWAY REAL ESTATE CORP.,

MOTION DATE 07/23/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

DIVYANG VED,

DECISION AND ORDER

Defendant.

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

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

In this action for unpaid rent and associated costs and fees, plaintiff Subway Real Estate Corp. (“SREC” or “Plaintiff”) moves, pursuant to CPLR 1018, 1021, 3212, 3013, and 3211(b), for an order: (1) permitting substitution of Subway Realty, LLC (“SR”), in place of SREC as Plaintiff; (2) dismissing Defendant’s affirmative defenses for failure to plead with the requisite specificity; (3) granting summary judgment in favor of Plaintiff and against defendant Divyang Ved (“Defendant”) on Plaintiff’s first cause of action in the amount of \$40,000.00; and (4) directing an inquest on Plaintiff’s second cause of action to ascertain the reasonable attorneys’ fees due to Plaintiff under the subject lease agreements. The motion is submitted without opposition.

BACKGROUND

On November 24, 2008, SREC, as tenant, and 51 United Corp. (“Landlord”), as overlandlord, executed a Lease Agreement (the “Master Lease”) for a retail Subway shop located at 51 Murray Street, New York, New York (the “Premises”) (NYSCEF Doc. No. 16). On December 23, 2018, SREC, as sublessor, and Robit Sawhney, as sublessee, executed a Sublease Agreement (the “Sublease”) for the Premises (NYSCEF Doc. No. 17, p. 6).

On June 30, 2011, SREC, Mr. Sawhney, as assignor, and Defendant, as assignee, executed an Assignment and Assumption of Sublease Agreement (the "Assignment") and an Addendum to Sublease (the "Addendum") by which Defendant assumed all of the obligations of Mr. Sawhney and SREC under the Master Lease and Sublease with 51 United Corp., including the payment of rent and additional rent under the Master Lease (NYSCEF Doc. No. 17, p. 1-4). The Addendum provides, in relevant part, that:

The purpose of this Sublease is so that the Sublessee, Divyang Ved, can operate a SUBWAY® restaurant under the terms of his Franchise Agreement with Doctor's Associates Inc. dated June 30, 2011 under Franchise Agreement #19265. If at any time during the term of this Sublease, Sublessee shall default in the performance of any of the terms of the Master Lease or the Franchise Agreement, Sublessor may terminate this Sublease on ten (10) days written notice to Sublessee, and upon such termination, Sublessee shall quit and surrender the lease premises to Sublessor but Sublessee shall remain liable for the balance of the rent due as provided in this Sublease.

(NYSCEF Doc. No. 17, p. 3). Defendant further agreed to "hold the Sublessor [SREC] harmless from any claim occurring prior to or after the date of the Assignment and Assumption Agreement (*id.* at p. 1).

On August 16, 2017, Defendant closed the Subway shop he had been operating since he took possession of the Premises on June 30, 2011, pursuant to the Master Lease, Sublease, Assignment, and Addendum, and surrendered possession of the Premises. In connection therewith, Defendant signed and delivered a Notice of Surrender, which states in relevant part, that "Subtenant acknowledges that SREC's acceptance of his/her surrender of possession of the Store does not serve to waive any of the rights, claims and remedies of SRES and its successors and assigns and affiliates as against Subtenant, all of which are expressly reserved." (NYSCEF Doc. No. 19).

After Defendant entered into possession of the Premises on June 30, 2011, but before he surrendered possession on August 16, 2017, on or about July 6, 2017, Landlord served a rent

demand on SREC seeking the payment of unpaid rent and additional rent that accrued during the period of Defendant's possession and use of the Premises in the amount of \$488,852.34 (see NYSCEF Doc. No. 18, p. 2). On July 24, 2017, Landlord commenced a non-payment proceeding against SREC based on Defendant's failure to pay the rent due to Landlord under the lease agreements. On September 28, 2017, the non-payment proceeding was resolved by a stipulation, whereby SREC agreed, *inter alia*, to pay to Landlord the sum of \$40,000.00.

On or about March 12, 2018, SREC commenced this action against Defendant to recover the \$40,000.00 paid to Landlord in satisfaction of the unpaid rent and additional rent that Defendant had failed to pay while he operated the Subway shop at the Premises. The Complaint seeks recovery of the \$40,000.00 paid by SREC to Landlord to settle Defendant's unpaid rent and additional rent, plus the attorneys' fees incurred by SREC in the prior non-payment proceeding, and in this action. On or about July 23, 2018, Defendant filed an Answer to the Complaint denying the material allegations in the Complaint and asserting nineteen affirmative defenses.

On or about November 1, 2018, pursuant to internal corporate restructuring, Subway Real Estate Corp. was legally converted from a Delaware corporation to a Delaware limited liability company known as Subway Realty, LLC (NYSCEF Doc. No. 14).

DISCUSSION

Now, Plaintiff moves, pursuant to CPLR 1018, 1021, 3212, 3013, and 3211(b), for an order (1) permitting substitution of SR in place of SREC as Plaintiff, (2) dismissing Defendant's affirmative defenses, (3) granting summary judgment in favor of Plaintiff and against Defendant in the amount of \$40,000.00, and (4) directing an inquest on Plaintiff's second cause of action to ascertain the reasonable attorneys' fees and expenses due to Plaintiff under the Master Lease, Sublease, Assignment, and Addendum.

I. Substitution of Party.

CPLR 1018 provides that “[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action.” “The determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court” (*GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1174 [2d Dept 2012], quoting *NationsCredit Home Equity Servs. v Anderson*, 16 AD3d 563, 564 [2d Dept 2005]). Pursuant to CPLR 1021, “[a] motion for substitution may be made by the successors or representatives of a party or by any party.”

SREC’s request to substitute SR in place of SREC as Plaintiff is granted on the ground that SREC, a Delaware corporation, was legally converted to the Delaware limited liability company, SR, pursuant to an internal corporate restructuring on November 1, 2018 (NYSCEF Doc. No. 14) (see, e.g., *Gottbetter v Crone Kline Rinde, LLP*, 2019 N.Y. Slip Op. 30873(U), 2019 WL 1437899, *3 [Sup Ct New York Cnty 2019] [granting request to omit entity from the caption to reflect the entity’s unconditional assignment of its rights to individual plaintiff]).

II. Dismissal of Affirmative Defenses.

The nineteen affirmative defenses asserted in Defendant’s answer, dated July 23, 2018, are: (1) the complaint fails to state a cause of action; (2) plaintiff failed to mitigate its damages; (3) the doctrine of laches, estoppel/collateral estoppel and/or unclean hands; (4) improper service of process; (5) mutual mistake; (6) Plaintiff’s breach of the contracts; (7) Plaintiff’s bad faith; (8) contrary to documentary evidence;¹ (10) statute of frauds; (11) parole evidence rule; (12) Plaintiff suffered no damage; (13) amounts claimed by Plaintiff are grossly inflated; (14) failure to join necessary and indispensable parties; (15) lack of subject matter jurisdiction; (16) statute of

¹ Defendant’s answer does not include a ninth affirmative defense due to a typo in numbering.

limitations; (17) Plaintiff does not have standing; (18) no contract between the parties; and (19) Defendant reserves rights to amend his pleadings (NYSCEF Doc. No. 5, pp. 4-6).

CPLR 3211(b) provides, in relevant part, that “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” Defenses that plead conclusions of law without supporting facts are insufficient (see *Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317, 319 [1st Dept 2006] [“Defendant’s affirmative defenses of waiver, laches, unclean hands, unconscionability and negligence per se were all properly dismissed as, *inter alia*, conclusory”]; see also *Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996] [reversing trial court and dismissing affirmative defenses as conclusory since “bare legal conclusions are insufficient to raise an affirmative defense”]).

Here, not one of Defendant’s affirmative defenses is supported by facts contained in the record. Moreover, the affirmative defenses are bare legal conclusions or contradicted by the terms of the Master Lease, Sublease, Assignment, and Addendum (see *Gettinger Assoc. v One Move Upward, Inc.*, 19 Misc 3d 1118(A), *4 [Sup Ct New York Cnty 2008] [dismissing commercial tenants’ affirmative defenses because “the affirmative defenses [were] bare legal conclusions or contradicted by the terms of the Lease and Guaranty”]). Accordingly, Defendant’s first through nineteenth affirmative defenses are dismissed.

III. Summary Judgment.

“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 NYS2d 557, 562 [1980]).

Here, Plaintiff establishes the material facts of its claims, that Defendant validly executed the Assignment and Addendum whereby he assumed the obligations under the Master Lease and Sublease to, *inter alia*, pay rent for the Premises starting on June 30, 2011, and to hold SREC, as sublessor, harmless from any claim occurring prior to or after the date of the Assignment and Assumption agreements (NYSCEF Doc. No. 17). Plaintiff further establishes that, to settle claims in excess of \$400,000.00 caused by Defendant’s failure to make the required rent payments under the Agreements, on October 12, 2017, Plaintiff paid to Landlord 51 United Corp. the sum of \$40,000.00.

In addition, Plaintiff establishes that, under the terms of the Sublease, Assignment, and Addendum, that “Sublessee [Defendant] agree[d] to pay to the Sublessor [Plaintiff] upon demand, as additional rent, any fees, costs or charges, including attorneys’ fees and legal costs, incurred by Sublessor in enforcing any of the terms or provisions of this Sublease, including without limitation for collecting any unpaid rent or late rental amounts of eviction proceedings.” (NYSCEF Doc. No. 17, p. 3). However, Plaintiff fails to provide sufficient evidence of the amounts incurred for attorneys’ fees in the prior non-payment proceeding and in this action. Accordingly, Plaintiff’s motion for summary judgment on its second cause of action for attorneys’ fees is granted on the issue of Defendant’s liability only. In lieu of a hearing, Plaintiff is directed to submit proof of the attorneys’ fees incurred by Plaintiff in defending the prior non-payment

proceeding and in this action within fifteen (15) days of service of a copy of this order with notice of entry. In the event that Plaintiff fails to produce such documents, Plaintiff's cause of action for attorneys' fees will be dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of Plaintiff's motion to amend the caption to substitute Subway Realty, LLC, in place of Subway Real Estate Corp. as Plaintiff is granted; and it is further ORDERED that the action shall bear the following caption:

SUBWAY REALTY, LLC,

Plaintiff,

-v-

DIVYANG VED,

Defendant.

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the changes to the caption; and it is further

ORDERED that such service upon the County Clerk and the Clerk of 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 <http://www.nycourts.gov/courts/1jd/supctmanh/>); and it is further

ORDERED that the branch of Plaintiff's motion to dismiss Defendant's affirmative defenses is granted and Defendant's first through nineteenth affirmative defenses are dismissed; and it is further

ORDERED that the branch of Plaintiff's motion seeking summary judgment on Plaintiff's first cause of action is granted and the clerk is directed to enter judgment in favor of Plaintiff and against Defendant in the amount of \$40,000.00, plus interest at the rate of 9% from the date of October 12, 2017, through the date of entry of judgment by the Clerk, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further


ORDERED that the branch of Plaintiff's motion seeking summary judgment on Plaintiff's second cause of action is granted on the issue of Defendant's liability for the attorneys' fees incurred by Plaintiff in this action and the prior non-payment proceeding; and it is further

ORDERED that Plaintiff is directed to electronically file evidentiary proof by affidavit of the amount of attorneys' fees incurred by Plaintiff in this action and the prior non-payment proceeding within fifteen (15) days of service of a copy of this order with notice of entry; and it is further

ORDERED that Plaintiff is directed to serve a copy of this decision and order with notice of entry on all parties within thirty (30) days.

Any requests for relief not otherwise discussed herein have nonetheless been considered by the court and are hereby denied and this constitutes the decision and order of the court.

9/19/2019
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <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