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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

WALNUT ROAD REALTY CORP.,

Plaintiff,

- against -

227 FRANKLIN REALTY, LLC,

Defendant/Third-Party Plaintiff.

TRIAL/IAS PART 5
NASSAU COUNTY

INDEX NO. 601312/19

MOTION SUBMISSION
DATE: 7/11/19

MOTION SEQUENCE
NOS. 2, 3, & 4

227 FRANKLIN REALTY, LLC,

Defendant/Third-Party Plaintiff,

- against -

LONG ISLAND RADIOLOGY ASSOCIATES, P.C., CDP HOLDINGS GROUP LLC, NEIGHBORHOOD RADIOLOGY SERVICES, P.C., DANIEL DIPIETRO, HOWARD GELBER, JAMES R. MCCLEAVEY, GLENN E. SCHWARTZ, MATTHEW A. DIAMENT, DANIEL BEYDA, VICTORIA BEYDA, DENNIS ROSSI, HOWARD TICE, WILLIAM WEINER as the Executor of the Estate of MELVIN WEINER, WELLS FARGO EQUIPMENT FINANCE, INC., HITACHI MEDICAL SYSTEMS AMERICA, INC.,

Third-Party Defendants.

The following papers read on this motion:

Notices of Motion and Affidavits.....	X
Memorandum of Law in Support.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

Relief Requested

The third-party defendants Daniel Beyda and Victoria Beyda move for an order, pursuant to CPLR 3211(a)(1), dismissing the third-party complaint as against them (Motion Sequence No. 2). The third-party defendant Dennis Rosse moves for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the third-party complaint as against him and for sanctions (Motion Sequence No. 3). The plaintiff, Walnut Road Realty Corp. (hereinafter "Walnut"), moves for an order, pursuant to CPLR 3212, granting summary judgment on its causes of actions for a declaratory judgment and for specific performance of contract (Motion Sequence No. 4). The defendant/third-party plaintiff 227 Franklin Realty LLC (hereinafter "Franklin") submits opposition. The movants submit respective reply affirmations.

Background

The plaintiff initiated the instant action to stay a holdover proceeding pending in the District Court of the County of Nassau and to compel the defendant/third-party plaintiff to accept the terms of a renewal option which it had untimely exercised. The subject lease between Franklin as landlord and Walnut as tenant was set to expire on September 30, 2018. The terms of the subject lease provided that the tenant may exercise a five year renewal option via written notice on or before December 27, 2017.

Walnut provided Franklin with a notice of renewal, which was actually received by Franklin on January 15, 2018. The plaintiff claims that the delay in providing its notice of renewal was a *de minimis* error which did not prejudice Franklin, and as such, Franklin should be compelled to accept the notice of renewal.

The defendant/third-party plaintiff initiated the instant third-party action, seeking to hold guarantors of the subject lease responsible for various alleged violations of the subject lease. Franklin claims that these violations include allowing the premises to fall into a state of disrepair and subletting the premises and placing signs without approvals required by the subject lease.

The parties most recently executed a document entitled "Fourth Modification to the Lease Agreement" in October 2013, which provides the following:

> The Guarantees previously granted by the following parties shall remain outstanding and in full force and effect, and shall terminate in accordance with their terms upon

that person giving Landlord written notice that he has resigned from the conduct of any and all business or medical practice at or from the Leased Premises, and then not thereafter through the end of the Lease Term conducting any business or medical practice from or at the Leased Premises (the "existing guarantors"); Dennis Rossi; Daniel Beyda; and Victoria Beyda.

Mr. Rossi submitted a resignation letter pursuant to the terms of the Fourth Modification to the Lease Agreement on October 8, 2014. Mr. Beyda and Ms. Beyda each submitted resignation letters dated March 13, 2019, indicating that they had ceased their professional conduct at the subject premises in March of 2015.

Applicable Law

A motion for failure to state a cause of action "will fail if from [the] complaint's four corners, [its] factual allegations are discerned which taken together manifest any cause of action cognizable of law, regardless of whether the plaintiff will ultimately prevail on the merits" (*Gruen v. County of Suffolk*, 187 A.D.2d 560). However, while the criteria in determining whether a complaint will withstand a motion pursuant to CPLR 3211(a)(7) is whether the pleadings state a cause of action discerned from the four corners of the pleadings (*Guggenheimer v. Ginsburg*, 43 N.Y.2d 268), when the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, and not whether the proponent has merely stated a cause of action (*Meyer v. Guinta*, 262 A.D.2d 463). The test to be applied is whether the complaint "gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved, and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*Moore v. Johnson*, 147 A.D.2d 621). "[I]n considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Sinensky v. Rokowsky*, 22 A.D.3d 563, quoting *Leon v. Martinez*, 84 N.Y.2d 83; *Simos v. Vic-Armen Realty, LLC*, 92 A.D.3d 760).

It is well settled that "[s]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact... or where the factual issue is arguable or debatable" (*International Customs Assocs., Inc. v. Bristol-Meyers Squibb Co.*, 233 A.D.2d 161). A movant in a summary judgment motion is required to set forth a *prima facie* showing of its entitlement to summary judgment, regardless of the sufficiency of the opposing papers (see *Arma Textile Printers, Inc. v. Spectrachem, Inc.*, 254 A.D.2d 382). Where the movant fails to meet his or her burden, the motion for summary judgment must be denied (*Id*).

Discussion

In support of their motions, third-party defendants submit, *inter alia*, the subject lease and their resignation letters. In opposition, Franklin argues that these resignation letters may not be applied retroactively in order to avoid liability. Franklin additionally claims that, in order to accept

a letter of resignation, additional proof was required that these guarantors had informed their patients, hospitals, and various other entities of their retirement.

Contrary to Franklin's claims, the terms of the subject lease do not require such additional information be provided in order for a guarantor's resignation letter to be valid. Further, Franklin has provided no evidence indicating that these guarantors continued to operate out of the subject premises beyond the dates of their resignation letters.

However, as Mr. Beyda and Ms. Beyda's notices were not provided until after the subject lease had already expired and any causes of action as against them had accrued, their letters are insufficient to demonstrate that the third-party complaint fails to state a cause of action as against them. Rather, these submissions confirm that Mr. Beyda and Ms. Beyda had not resigned pursuant to the terms of the Fourth Modification to the Lease Agreement at the time of the alleged breaches of the subject lease. Mr. Beyda and Ms. Beyda are specifically named in the provision regarding individuals with guarantees that "shall remain outstanding and in full force and effect" until "giving [Franklin] written notice that [they have] resigned." The terms of the Fourth Modification to the Lease Agreement make clear that the guarantees of Mr. Beyda and Ms. Beyda remained in full force and effect at the time Franklin's cause of action arose, and even at the time the instant third-party action was commenced. As such, their letters are insufficient to establish a documentary basis for dismissal or that Franklin has no cognizable claim against them (see CPLR 3211[a][1]; see also *Sinensky v. Rokowsky*, *supra*).

With regard to Mr. Rossi's resignation letter, which by contrast was provided on October 8, 2014, plaintiff has offered no evidence indicating that he continued to operate out of the subject premises beyond that date, Franklin has failed to articulate any basis for rejecting Mr. Rossi's resignation. In fact, Franklin now consents to dismissal as against Mr. Rossi, and only opposes the branch of Mr. Rossi's motion regarding sanctions. Counsel for Mr. Rossi notes that it was willing to withdraw the instant motion in exchange for an acknowledgment of the validity of Mr. Rossi's resignation, but the parties were unable to agree to the terms of such a stipulation. Mr. Rossi claims that his involvement in the instant action is a result of harassment from a former landlord following a contentious relationship. In light of the circumstances presented, this Court declines to grant sanctions at this time, but finds that Mr. Rossi is entitled to reasonable attorney fees and costs of defending the instant third-party action.

With regard to plaintiff's motion for summary judgment on its causes of action for a declaratory judgment and specific performance, plaintiff submits proof of its attempt to exercise the subject renewal option and argues that its failure to timely do so is a *de minimis* error that should be forgiven. However, with its submissions, plaintiff acknowledges its own failure to timely renew the subject lease, which had been renewed several times previously, and has not provided any excuse or reason for this delay. As such, the plaintiff has failed to demonstrate, as a matter of law, that it is entitled to a declaratory judgment that its attempted renewal was timely, nor has it eliminated all issues of fact as to whether it is entitled to specific performance of the subject lease (see *International Customs Assocs., Inc. v. Bristol-Meyers Squibb Co.*, *supra*; see also *Mendelson v. Adler*, 133 A.D.2d 615).

Conclusion

In light of the foregoing, it is hereby

ORDERED that the plaintiff's motion for summary judgment (Motion Sequence No. 4) is denied, and it is further

ORDERED that Mr. Beyda and Ms. Beyda's motion to dismiss (Motion Sequence No. 2) is denied, and it is further

ORDERED that branch of Mr. Rossi's motion seeking to dismiss the instant action as against him is granted (Motion Sequence No. 3), and it is further

ORDERED that Mr. Rossi is hereby awarded three thousand dollars ($3,000.00) for costs and reasonable attorneys' fees incurred as a result of the instant motion practice. Franklin shall pay this amount to Mr. Rossi within thirty (30) days from the date of this order.

ENTER:

J.S.C. HON. THOMAS FEINMAN

ORIGINAL

Dated: September 10, 2019

ENTERED
SEP 12 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE