

ACAS, LLC v Kessler
2020 NY Slip Op 30690(U)
February 28, 2020
Supreme Court, New York County
Docket Number: 651722/2019
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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ACAS, LLC,

Index No. 651722/2019

Plaintiff

- against -

DECISION AND ORDER

IAN KESSLER,

Defendant

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LUCY BILLINGS, J.S.C.:

Plaintiff sublessor moves for summary judgment on plaintiff's claim against defendant guarantor for breach of his guaranty by failing to pay rent and utility charges due from sublessee VFM Family Management Company Inc. for commercial premises at 505 5th Avenue in New York County. C.P.L.R. § 3212(b) and (e). Plaintiff withdraws its motion to the extent that the motion seeks charges for work orders and attorneys' fees.

Scott Lem, plaintiff's authorized signatory responsible for the sublease, authenticates it and defendant's guaranty. The sublease extended from May 23, 2018, to November 29, 2026, and obligated VFM Family Management to pay plaintiff \$49,414.17 per month as basic rent and to pay "directly to the utility company the costs of its electricity consumption." Aff. of Scott Lem Ex. C § 3(a). In defendant's guaranty defendant undertook to be

fully liable for VFM Family Management's monetary obligations until 90 days after the sublessee notified plaintiff that the sublessee intended to vacate or until the sublessee vacated the subleased premises, whichever was later.

VFM Family Management paid rent through November 22, 2018. On November 12, 2018, VFM Family Management notified plaintiff that the sublessee intended to vacate and actually vacated the premises. Therefore it owed \$129,966.40 in rent through February 10, 2019, and \$7,436.81 in accrued electricity charges as of November 12, 2018.

Defendant claims that plaintiff agreed to provide \$150,000.00 for improvements to the premises, which VFM Family Management never used and therefore inure to plaintiff's benefit, and failed to return VFM Family Management's security deposit of \$592,000.00, so that both amounts more than offset plaintiff's claim for rent and electricity charges. Defendant also cross-moves to compel plaintiff's disclosure regarding its mitigation of damages by attempting to collect the claimed rent and electricity charges from VFM Family Management or attempting to re-rent the premises. C.P.L.R. § 3124.

The authenticated sublease belies defendant's characterization of the provision regarding improvements. It required plaintiff to reimburse VFM Family Management up to \$127,065.00 if the sublessee produced "invoices" and "receipted

bills" showing the sublessee's improvements to the premises by May 23, 2019. Lem Aff. Ex. C § 2(b). Defendant fails to show, and plaintiff denies, any such improvements, bills for improvements, or bills produced to plaintiff. Moreover, defendant's answer includes no affirmative defense or counterclaim alleging a setoff either for any improvements or for its security deposit. The guaranty provides that plaintiff is not required to exhaust any security deposit that the sublessor may hold before enforcing the guaranty. If defendant claims breach of an agreement regarding improvements separate from the sublease or entitlement to return of a security deposit, N.Y. Gen. Oblig. Law § 7-103, defendant is free to commence a timely action to recover on those claims.

The guaranty also provides that plaintiff is not required to proceed against VFM Family Management before proceeding against defendant to enforce the guaranty. See APF 286 Mad LLC v. Chittur & Assoc. P.C., 132 A.D.3d 610, 610 (1st Dep't 2015); Gard Entertainment, Inc. v. Country in N.Y., LLC, 96 A.D.3d 683, 683 (1st Dep't 2012). Nor was plaintiff required to mitigate its damages by attempting to re-rent the commercial premises. 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Assn., Inc., 24 N.Y.3d 528, 535 (2014); Holy Props. v. Cole Prods., 87 N.Y.2d 130, 134 (1995); New 24 W. 40th St. LLC v. XE Capital Mgt., LLC, 104 A.D.3d 513, 514 (1st Dep't 2013); 85 John St.

Partnership v. Kaye Ins. Assoc., 261 A.D.2d 104, 105 (1st Dep't 1999). Therefore disclosure regarding these issues will not defeat plaintiff's motion for summary judgment. C.P.L.R. § 3212(f); Santana v. Danco Inc., 115 A.D.3d 560, 560 (1st Dep't 2014); Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d 562, 563 (1st Dep't 2011); Kent v. 534 East 11th Street, 80 A.D.3d 106, 114 (1st Dep't 2010).

For all the reasons explained above, the court grants plaintiff's motion for summary judgment on plaintiff's claims for \$129,966.40 in rent and \$7,436.81 in electricity charges, a total of \$137,403.21, with interest from March 21, 2019, when those amounts were due pursuant to plaintiff's demand mailed March 12, 2019. C.P.L.R. §§ 3212(b) and (e), 5001; Chip 5th Ave. LLC v. Quality King Distribs., Inc., 158 A.D.3d 418, 418 (1st Dep't 2018); Thor Gallery At S. DeKalb, LLC v. Reliance Mediaworks (USA) Inc., 143 A.D.3d 498, 498 (1st Dep't 2016); Carrera Casting Corp. v. Cord, 106 A.D.3d 422, 422 (1st Dep't 2013); Gard Entertainment, Inc. v. Country in N.Y., LLC, 96 A.D.3d at 683. For the reasons explained above the court also denies defendant's cross-motion to compel disclosure, which, given the summary judgment granted to plaintiff, is now moot. C.P.L.R. § 3124; Astil v. Kumquat Props., LLC, 125 A.D.3d 522, 523 (1st Dep't 2015); Fanning v. Rockefeller Univ., 106 A.D.3d 484, 485 (1st Dep't 2013); Eckhardt v. Starr Bldg. Realty LLC, 106 A.D.3d 477,

478 (1st Dep't 2013); Abetta Boiler & Welding Serv., Inc. v. American Intl. Specialty Lines Ins. Co., 76 A.D.3d 412, 414 (1st Dep't 2010).

DATED: February 28, 2020



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