SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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SYDNEY SOL GROUP LTD.,

Plaintiff,

DECISION AND ORDER

- v -

Index No. 155843/2018

THE MODERNS LTD. and JANINE JAMES

MOT SEQ 001

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action for breach of a commercial lease, the plaintiff-landlord, Sydney Sol Group Ltd., moves (i) pursuant to CPLR 3211(b) to dismiss the three affirmative defenses asserted by tenant-defendant, The Moderns Ltd. (Moderns), and defendant-guarantor, Janine James (James), in their answer, (ii) pursuant to CPLR 3212 to dismiss the two counterclaims asserted in the defendants' answer, (iii) pursuant to CPLR 3212 awarding summary judgment on the complaint and entering a judgment in the amount of $256,139.37, representing rent and additional rent owed through October 31, 2019 pursuant to the terms of the lease and guaranty, and (iv) for attorneys' fees. The defendants oppose the motion. The motion is granted in part to the extent discussed herein.

II. BACKGROUND

It is undisputed that Moderns entered into a 5-year commercial lease with the plaintiff for a term running from November 1, 2014 to October 31, 2019, for the 6th floor office space located at 544 West 27th Street in Manhattan. The plaintiff owns the building. The monthly base rent was approximately $20,000.00. During the lease term, Moderns failed to pay rent and real estate taxes when due, violated the permitted uses clause of the lease by holding unapproved events and attempted to sublet the space without the landlord's permission.

According to Moderns, in December 2017, Janine James met with the owner of the plaintiff, Shimon Milul, to discuss Moderns' financial situation and the rent arrears, at which time Milul threatened to evict Moderns unless it immediately came current with its obligations. Moderns claims that during that meeting it requested that Milul give it three months to seek a subtenant for the premises and represented that if it was not successful it would vacate by the end of March 2018. James avers that Milul agreed. Moderns contends that this constituted was their notice to vacate under the notice provisions of the lease. Moderns further claims that in January 2018, James met with Milul, at which time Milul agreed that so long as Moderns caught

up with rental payments and found a subtenant to take over the entire space he would call the rental situation "even" and apply the three-month security deposit to Moderns' back rent. Moderns further alleges that while attempting to find a sublessee, Milul interfered with their search by not communicating with, and attempting to lease other spaces to interested companies Fintech and Chainalysis. After Moderns' attempts to find a party to sublet the premises failed, Moderns vacated the premises on April 29, 2018. Moderns contends that while vacating the premises, Milul told them that they could leave the furniture, fixtures and equipment it had installed in the premises for a credit against any rent due and owing, and that they purposefully left their installations on the premises in reliance upon that representation.

Moderns further alleges that Milul engaged in a litany of harassing behavior throughout the duration of the lease ranging from entering the premises during work hours and yelling at James to pay Moderns' back-rent in front of employees to threatening her with physical violence in an elevator.

Milul denies all of these claims, and now moves to dismiss the three affirmative defenses and two counterclaims asserted by Moderns. The answer asserts three affirmative defenses, (i) that Moderns provided a proper termination of the lease, (ii) that

the plaintiff has unclean hands, and (iii) that the plaintiff intentionally interfered with Moderns' efforts to find a subtenant, and, as such, contributed to its own damages. The first counterclaim alleges that Milul improperly told Moderns that if it left its installations after Moderns vacated, then Moderns would receive a credit against any rent due and owing, and that they never received any such credit. The second counterclaim alleges that Milul intentionally interfered with Moderns' attempts to sublet the premises, and therefore, caused the damages alleged in the complaint.

III. DISCUSSION

A. Motion to Dismiss Affirmative Defenses

In moving to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541 (1st Dept. 2011). The allegations set forth in the answer must be viewed in the light most favorable to the defendant (see 182 Fifth Ave. v Design Dev. Concepts, 300 AD2d 198 [1st Dept. 2002]), and "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is

to be liberally construed." 534 E. 11th St., 90 AD3d at 542. Further, the court should not dismiss a defense where there remain questions of fact requiring a trial. Id.

1. Termination of the Lease

The tenant and guarantor's first affirmative defense alleges that the tenant gave proper notice of termination of the lease, during Moderns' December 2017 meeting with the landlord wherein Milul agreed to permit Moderns three months to find a subtenant for the premises and if it was unsuccessful, it would vacate the premises by the end of March 2018. Although Moderns did not actually vacate the premises until April 29, 2018, Moderns contends that its initial notice to vacate should end its obligations under the lease.

In support of its motion to dismiss this affirmative defense, the plaintiff submits the lease and the guaranty. The lease has no provision that permits the tenant to terminate the lease or accelerate the expiration date in the lease. As such, Moderns, is liable for all rent and additional rent due until the lease expired on October 31, 2019, as the Milul affidavit expressly avers that the plaintiff did not rent the premises for a monthly rent that is the same or greater as the monthly rent set forth in the lease.

Moreover, according to the plaintiff, under the guaranty signed by James, which was incorporated into the lease, James guaranteed the payment of all rent and additional rent accruing under the lease, and the guaranty remained in full force and effect until Moderns provided the landlord with 90 days written notice of its intent to vacate in accordance with the lease. As the defendants only contend that they gave a verbal notice to vacate during its December 2017 discussions with the plaintiff about attempting to find a sublet, the defendants' first affirmative defense is dismissed. See Marina Towers Assocs. by Hudson Towers Hous. Co. v Stacy's Landing, No. 570134, 2003 WL 22519603, at *1 (1st Dept. 2003); see also LeVine v Catskill Reg'l Off-Track Betting Corp., 57 AD3d 624 (2nd Dept. 2008). Compare 27th St. Assocs., LLC v Lehrer, 4 AD3d 165 (1st Dept. 2004)

2. Unclean Hands

The tenant and guarantor's second affirmative defense, alleging that the plaintiff "engaged in improper conduct to force the defendants to vacate the premises and has unclean hands" is likewise without merit. An affirmative defense alleging unclean hands under a breach of lease action rooted in a landlord's stated desire to evict defendant is an equitable defense and unavailable against a complaint solely seeking rent

arrears and legal fees. See 518 E. 80th St. Co., LLC v Smith, 251 AD2d 215 (1st Dept. 1998). The landlord's purported improper conduct is not a defense to the tenant's failure to pay rent. The tenant agreed in paragraph 1C(i) that "commencing as of the rent commencement date, and continuing each lease year throughout the term, tenant shall pay landlord the annual rent payable without demand, on or in advance of the first day of each month...without any set-off, offset, abatement or deduction whatsoever." As such, the defendants' second affirmative defense is dismissed.

3. Intentional Interference with Moderns' Efforts to Find a Subtenant, Contributing to Damages

The defendants' third affirmative defense, that the landlord interfered with Moderns' attempts to find a party to sublet the premises is also without merit. Tortious interference with prospective economic advantage is not an affirmative defense enumerated CPLR 3211. Instead, it is a cause of action requiring a party to allege, *inter alia*, malice, which the Court of Appeals has limited to alleged conduct that was either criminal, independently tortious, or was solely for the purpose of inflicting intentional harm. See Carvel Corp. v Noonan, 3 NY3d 182 (2004). However, the only allegations raised by the defendants are that the plaintiff interfered with the plaintiff's ability to sublease the property by communicating

with, and attempting to lease other space Milul owned to companies otherwise being pursued by Moderns as subtenants, which is neither criminal nor independently tortious, and as the conduct would be economic in nature, not solely for the purpose of inflicting intentional harm. See id.

To the extent that the defendants' intention was to allege a claim for interference, any such claim is wholly belied by the deposition testimony that the plaintiff submitted in support of its motion. For example, in the deposition transcript of Matthew Fisher, the real estate broker who worked with Chainalysis in attempting to sublet the premises, Fisher testifies that the landlord did nothing to dissuade Chainalysis from subletting the premises and that the only reason that Chainalysis did not enter into the sublease was because a different property, which was Chainalysis' first choice, due to a better location and better price, became available.

Furthermore, to the extent that the defendants assert that the plaintiff's conduct constitutes a failure to mitigate its damages or that the plaintiff unreasonably withheld consent for a sublet that it was never presented with, these allegations are without merit. It is well settled in that a landlord has no obligation to mitigate a tenant's damages in a commercial lease absent a lease provision requiring them to do so. See 11 Park

Place Assocs. v Barnes, 202 AD2d 292 (1st Dept. 1994); Mitchell & Titus Assocs. v Mesh Realty Corp., 160 AD2d 465 (1st Dept. 1990). Moreover, even if the tenant could somehow establish a claim that the landlord improperly delayed or refused to give consent or approval for a potential sublease or assignment, despite no allegation that any potential sublease was ever presented to it, paragraph 42(K) of the lease provides that tenant's sole remedy would be an action or proceeding for specific performance, injunction, or declaratory judgment. As such, the plaintiffs' third affirmative defense is dismissed.

B. Motion to Dismiss Counterclaims

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to

warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

In support of its motion to dismiss the plaintiffs first counterclaim alleging that Milul improperly told Moderns that if it left its installations after vacating they would receive a credit against any rent due and owing, and that they never received any such credit, and the second counterclaim alleging that Milul intentionally interfered with their attempts to sublet the premises, and therefore, caused the damages alleged in the complaint, the plaintiff submits, *inter alia*, the lease agreement, the guaranty, the deposition transcript of Matthew Fisher. These submissions demonstrate, *prima facie*, the plaintiff's entitlement to relief.

Inasmuch as the defendants allege that there was an oral modification of the lease agreement between the plaintiff and the defendants, as Mulil stated that the defendants could leave their fixtures and receive a credit against their outstanding rent, the plaintiff says that such an argument is completely defeated by the lease, as the lease prohibits the amendment or modification of the terms of the lease without written agreement signed by both parties.

Specifically, paragraph 42(E) states in pertinent part that:

> "The Lease may not be amended except by instrument in writing signed by Landlord and Tenant. No provision of this Lease shall be deemed to have been waived by Landlord unless such waiver is in writing signed by Landlord, and no custom or practice which may evolve between the parties in the administration of the terms hereof shall waive or diminish the right of Landlord to insist upon the performance by Tenant in strict accordance with the terms hereof."

Since the parties did not execute a written surrender agreement or a lease modification agreement, the plaintiff claims that the terms set forth in the lease control. The plaintiff further points out that there is no provision of the lease providing for a rent credit for a tenant's installations, and in fact, paragraph 3B of the lease affirmatively requires a tenant to remove all of the furniture, furnishings and moveable fixtures and removable partitions prior to its expiration.

Paragraph 3B further states that:

> "All furniture, furnishings and movable fixtures and removable partitions installed by Tenant must be removed from the Premises by Tenant, at Tenant's expense, prior to the Expiration Date. All Alterations in and to the Premises .... shall become the property of Landlord upon the Expiration Date or earlier end of the Term, and shall not be removed from the Premises by Tenant, unless Landlord, at landlord's option by notice to Tenant prior to the expiration Date, elects to have them removed from the Premises by Tenant, in which event same shall be removed from the Premises by Tenant, at Tenant's expense, prior to the Expirations Date."

The plaintiff contends that absent any written modification, of which there are none, the defendants are not entitled to any credit against rent owed and the fixtures that were left by the tenants are the property of the landlord.

However, in opposition, the defendants raise a triable issue of fact. Specifically, the defendants contend that Mulil orally agreed that he would give them a rent credit if they left their fixtures and they did so in reliance upon the oral agreement. In support of their position, the defendants submit James' affidavit, wherein she avers that Milul told her that Moderns could vacate and leave the fixtures that Moderns put in place during their renovation of the premises during the terms of the lease, and that he would credit those fixtures against some of Moderns outstanding rent obligations. James further

avers that she left those fixtures in reliance on her conversation with Milul.

Where a contract requires modification to be in writing, oral modifications are barred. See General Obligations Law § 15-301; Richardson & Lucas, Inc. v New York Athletic Club of City of New York, 304 AD2d 462 (1st Dept. 2003). The only exceptions are for partial performance and promissory estoppel. See id. However, neither exception is available unless a party can establish part performance or acts taken in detrimental reliance are "unequivocally referable" to the new oral agreement. See Rose v Spa Realty Assocs., 42 NY2d 338 (1977). For detrimental reliance to be "unequivocally referable" to a new oral agreement, the acts taken must be inconsistent with any other explanation. Id.; see Joseph P. Day Realty Corp. v Jeffrey Lawrence Assocs., 270 AD2d 140 (1st Dept. 2000).

Here, as stated above, Moderns claims that Milul told them to leave their fixtures for a rent credit, and that Moderns complied in reliance on the agreement with Milul, leaving their installations and fixtures that they had put in place. This is sufficient to raise a triable issue of fact, as Moderns performance under the purported oral agreement is inconsistent with any other explanation inasmuch as Moderns purposefully left the installations and fixtures that it was entitled to remove,

and that would not otherwise be reimbursable under the lease, while it was vacating the premises. Therefore, the plaintiff's motion for summary judgment on the defendants' first counterclaim is denied.

However, as to the defendant's second counterclaim, alleging that Milul intentionally interfered with their attempts to sublet the premises, the counterclaim is identical to Moderns third affirmative defense and therefore summary judgment dismissing the second counterclaim is warranted the reasons already stated herein.

C. Motion for Summary Judgment on Rent Owed

The plaintiff moves pursuant to CPLR 3212 for summary judgment on the complaint seeking a judgment in the amount of $256,139.37, representing rent and additional owed through October 31, 2018 pursuant to the terms of the lease and guaranty, and for attorneys' fees. In support of its motion, the plaintiff submits, *inter alia*, the lease, the guaranty, and the affidavit of Mulil detailing the $256,139.37 that remains due under the lease. These submissions demonstrate, *prima facie*, the plaintiff's entitlement to summary judgment on the matter of liability under the lease and guaranty, and for attorneys' fees. Specifically, these demonstrations show that Moderns stopped paying rent and additional rent and unilaterally vacated the

premises in April 2018 prior to the expiration of the term of the Lease on October 31, 2019, breaching the lease, and entitling the plaintiff to the damages thereunder.

Moreover, the plaintiff establishes that defendant James is liable for the amounts due and owing under the lease. Paragraph 2 of the Guaranty states in pertinent part that:

> "The purpose of this Limited guaranty is to assure Landlord (and Landlord's successors and assigns) that the payment of all Rent and Additional Rent (including, but not limited to, Rent and Additional Rent for any and all damages, costs, fees and expenses) accruing under the Lease through the Surrender Date shall be made by the Guarantor if the same is not paid by Tenant. Provided Tenant delivers ninety (90) days advance written notice to landlord of the date Tenant shall vacate the Premises, the "Surrender Date" means the date on which Tenant has given Landlord possession of the Premises, broom clean, free of all liens, claims, damages, occupants and personal property...."

Here, it is undisputed that Moderns failed to give written notice to vacate and that the oral notice given at the December 2017 meeting with Mulil is insufficient under the guaranty. As such, James is liable under the guaranty.

In opposition, the defendants' raise no additional arguments other than those already discussed herein regarding their affirmative defenses and their counterclaims. As the first, second, and third affirmative defenses, and the second counterclaim are all dismissed, the only triable issue of fact that the defendants' raise is in regard to whether Moderns is

entitled to a credit for the installations that it left pursuant to its oral agreement with Mulil. As this remaining issue of fact only relates to the amounts due by the defendants, the plaintiff is entitled to summary judgment on liability, with the amount due under the lease, less any applicable credits, to be determined at trial.

Moreover, the plaintiff is entitled to attorneys' fees under the lease. The lease provides that:

> "Tenant hereby agrees to pay, as Additional Rent, all attorneys' fees and disbursements and all other court costs or expenses of legal proceedings) which Landlord may incur or pay out by reason of, or in connection with: (b) any other action or proceeding by Landlord against Tenant (including, but not limited to, any arbitration proceeding); (c) any default by Tenant in the observance or performance of any obligation under this Lease (including, but not limited to, matters involving payment of rent and Additional Rent, computation of escalations, alterations or other Tenants' work and subletting or assignment, whether or not Landlord commences any action or proceeding against Tenant."

As the plaintiff has demonstrated its entitlement to summary judgment on the issue of liability in the lease, an award of contractual attorneys' fees is proper.

IV. CONCLUSION

Accordingly, it is,

ORDERED that the plaintiff's motion seeking (i) to dismiss, pursuant to CPLR 3211(b), the three affirmative defenses asserted by tenant-defendant, The Moderns Ltd. (Moderns), and guarantor-defendant, Janine James (James), in their answer, (ii) to dismiss, pursuant to CPLR 3212, the two counterclaims asserted in the defendants' answer, (iii) awarding summary judgment pursuant to CPLR 3212 on the complaint and entering a judgment in the amount of $256,139.37, representing rent and additional owed through October 31, 2018 pursuant to the terms of the lease and guaranty, and (iv) for attorneys' fees, is granted to the extent that (i) the defendants' three affirmative defenses are dismissed, (ii) the defendants' second counterclaim is dismissed, and (iii) the plaintiff's motion for summary judgment under the lease and guaranty is granted against the defendants on the issue of liability, with the amount due under the lease to be determined at a hearing or trial, and (iv) the plaintiff's motion for attorneys' fees, is granted with the amount to be determined at a hearing or trial and the motion is otherwise denied; and it is further,

ORDERED that the parties are to contact chambers no later than June 30, 2020 to schedule a settlement conference with the court.

This constitutes the Decision, Order, and Judgment of the court.

Dated: 5/20/2020 ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON