

<b>13th St. Assoc., L.P. v Spiderbands LLC</b>
2020 NY Slip Op 31928(U)
May 1, 2020
Supreme Court, New York County
Docket Number: 654684/2018
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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13TH STREET ASSOCIATES, L.P.,
Plaintiff,

- v -

SPIDERBANDS LLC, JOSEPH COHEN
and FRANCES SHOMER a/k/a FRANCES COHEN

Defendants.

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INDEX NO. 654684/2018
MOTION DATE 11/16/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 33, 34, 35, 36, 38, 39, 40, 41

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

In this action to recover \$1,118,777.98 in unpaid rent and additional rent, the plaintiff property owner moves (1) pursuant to CPLR 3025 to amend the complaint to increase the amount of unpaid rent and additional rent accrued since commencement of the action, and (2) pursuant to CPLR 3212 for summary judgment on the complaint and dismissal of the defendant's counterclaims. The defendants, the former commercial tenant, and its principals and guarantors on the lease, oppose the motion. The motion is denied without prejudice.

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, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). 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, 68 NY2d 320 [1986]; 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 at 480 (1<sup>st</sup> Dept. 1990) quoting Nesbitt v Nimmich, 34 AD2d 958, 959 (2<sup>nd</sup> Dept. 1970).

On February 8, 2017, the plaintiff and defendant Spiderbands LLC entered into a lease for space on the ground floor of the building located at 12 East 14<sup>th</sup> Street in Manhattan. Defendants Frances Cohen and her husband, defendant Joseph Cohen, executed a guaranty. Spiderbands, a small start-up company, intended to build out and open a gym on the premises, using the unique Spiderbands equipment and methodology, which includes hanging bands from the ceiling. The plaintiffs were made aware of the defendants’ plans. However, according to Spiderbands, the plaintiff and its agents interfered with and delayed the construction by making unreasonable demands regarding the HVAC work, soundproofing, plumbing and installation of the Con Edison meter. The defendants claim to have spent approximately \$1,300,000 renovating the premises, and the renovations were completed in November 2017. Spiderbands closed its doors in June 2018. According to the defendants, the closure was due in part to the delays in opening and monies lost in the protracted renovation process.

In the meantime, the plaintiff had commenced a non-payment summary proceeding in the Civil Court, New York County, entitled *13<sup>th</sup> Street Associate v Spiderbands LLC*, Index No. 61092/2018. The Civil Court proceeding was resolved by a Stipulation of Settlement wherein defendant Spiderbands consented to a money judgment in the sum of the \$196,880.72, which represented rent and additional rent through June 13, 2018. The terms of the settlement required the defendant Spiderbands to continue to pay the monthly base rent and additional rent under the lease. Spiderbands failed to make the first payment by July 1, 2018. The plaintiff served a Notice of Default. Spiderbands did not cure the default and was evicted on July 24, 2018. The plaintiff represents that it has not re-let the premises, and that the defendant’s failure to pay a contractor resulted in a mechanic’s lien on the property in the amount of \$363,410.22. This action ensued.

The complaint alleges causes of action for breach of contract, breach of guaranty agreement and contractual attorney’s fees. In their answer, the defendants assert three counterclaims, breach of contract, unreasonably and unjustly withholding consent to various aspects of the buildout, breach of the implied covenant of good faith and fair dealing, arising

from the same, and unjust enrichment based on the improvements made to the property by the defendants and retained by the plaintiff. In support of the summary judgment motion, the plaintiff submits, *inter alia*, the pleadings, the subject lease and guaranty agreements, a rent ledger, the mechanic's lien, and the judgment entered in the Civil Court proceeding. The plaintiff has a solid contractual basis for the relief it is seeking. The terms of the contract and guaranty are clear, and not disputed by the defendants. The plaintiff's claim for attorney's fees is supported by Section 19 of the lease. Indeed, the defendants consented to entry of a money judgment in the sum of \$196,880.72, to resolve the Civil Court proceeding. The court may enforce that settlement. See CPLR 3215(i).

However, the parties' submissions raise factual issues concerning, *inter alia*, the defendants' counterclaim that the plaintiff contributed to the failure of the business and caused their default under the lease and guaranty terms. The affidavit of defendant Frances Shomer sets for details of the defendants' claim that the plaintiff repeatedly interfered with the renovations and unreasonably refused to approve the submitted plans for the ceiling soundproofing, flooring installation, plumbing and installation of the Con Edison meter. In his affidavit, Arnold Turen, President of ELJEF Management Corp, a general partner of the plaintiff, denies that the plaintiff unreasonably withheld its approval of the renovations in that it ultimately approved the defendants' plans. The submissions also present a triable issue as to the value of the improvements made by the defendants to the plaintiff's premises. The plaintiff's argument that the lease terms preclude the defendants' counterclaims is made for the first time in reply.

Further, where, as here, it appears that the facts essential to oppose a motion for summary judgment "exist but cannot then be stated" (CPLR 3212[f]), a court may deny the motion. See Schlichting v Elliquence Realty, LLC, 116 AD3d 689 (2<sup>nd</sup> Dept. 2014); Wesolowski v St. Francis Hospital, 108 AD3d 525 (2<sup>nd</sup> Dept. 2013). "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." Wesolowski v St. Francis Hospital, supra at 526 [internal quotation marks omitted]; see Belziti v Langford, 105 AD3d 649 (1<sup>st</sup> Dept. 2013); Blech v West Park Presbyterian Church, 97 AD3d 443 (1<sup>st</sup> Dept. 2012). Discovery is ongoing in this case. At the last discovery conference, January 30, 2020, the plaintiff withdrew its Note of Issue and the parties agreed to provide supplemental discovery responses and to schedule depositions on or before April 30, 2020. In light of the court's emergency closure, the parties shall proceed with discovery and contact

chambers for a status/settlement conference on or before July 31, 2020. The Note of Issue date is extended to September 18, 2020.

Accordingly, and upon the foregoing papers, it is


ORDERED the plaintiff's motion to amend the complaint and for summary judgment is denied without prejudice to renew both branches of the motion upon completion of discovery, and it is further,

ORDERED that the parties shall proceed with discovery and contact chambers for a status/settlement conference on or before July 31, 2020, and it is further

ORDERED that the Note of Issue date is extended to September 18, 2020.

This constitutes the Decision and Order of the court.

5/1/2020  
DATE

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

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