

20 St. Marks, LLC v St. Marks NY LLC
2020 NY Slip Op 32512(U)
July 28, 2020
Supreme Court, New York County
Docket Number: 651521/2019
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

20 ST MARKS, LLC,

Plaintiff,

- v -

ST. MARKS NY LLC and ST MARKS B H LLC,

Defendants.

-----X

INDEX NO. 651521/2019

MOTION DATE 11/22/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37

were read on this motion to/for

JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that the branch of plaintiff 20 St. Marks, LLC's motion (sequence number 001) seeking summary judgment on its complaint is denied; and it is further

ORDERED that upon a search of the record pursuant to CPLR 3212(b), the second cause of action for unjust enrichment of the complaint is dismissed; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment dismissing defendants' St. Marks NY LLC and St. Marks B"H LLC's counterclaim for breach of contract is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary discovery conference on August 7, 2020, 12:30 PM via

Skype for Business upon filing of the standard form request for conference (sfc-conference@nycourts.gov) at least two days before such date.

DECISION

In this commercial lease dispute, plaintiff 20 St. Marks, LLC, moves pursuant to CPLR 3212, for an order granting summary judgment against St. Marks NY LLC and St. Marks B"H LLC (together, defendants), as to the causes of action sounding in breach of lease and unjust enrichment. Plaintiff also seeks summary judgment dismissing defendants' counterclaim, which asserts that plaintiff is in breach of the lease for failure to pay rent.

Background

Plaintiff, a bar owner, entered into a commercial lease on December 26, 2017 for the premises located at 20 St Marks Place, New York, New York (hereinafter "the premises"), from defendants (Precious aff, New York St Cts Electronic Filing System [NYSCEF] Doc No. 10 ¶ 10).

Upon signing the lease, plaintiff tendered defendants the sum of \$154,000.00, representing the first month's rent in advance (at \$22,000 per month), and six months' rent as security deposit (totaling \$132,000 in security) (id. ¶ 11).

Structural defects prevented the premises from opening to the public as planned by plaintiff. On February 20, 2019, plaintiff terminated the lease (id. ¶ 14).

The lease states, in pertinent part,

"If for any reason Landlord shall be unable to deliver possession of the Premises to Tenant on any date specified in this Lease for such delivery, Landlord shall have no liability to Tenant therefore and the validity of this Lease shall not be impaired, provided however, to the extent the Premises is delivered after the date provided for herein, the Term of the lease shall be similarly extended day for day. This Section 1.03 shall be an express provision to the contrary for purposes of Section 223-a of the New York Real Property Law and any other law of like import now or hereafter in effect. Notwithstanding the foregoing, if for any reason, Landlord is unable to give possession to Tenant by May 1, 2018, Tenant may, at Tenant's sole option, elect to terminate this Lease upon which, Landlord shall promptly refund any pre-paid rent together with Tenant's Security Deposit" (lease, NYSCEF Doc No. 2 at Article 1.03).

Further, the lease contains a "no waiver" clause that states in part, "[f]ailure by either party to declare any default immediately upon its occurrence or delay in taking any action in connection with such default shall not waive such default but such party shall have the right to declare any such default at any time thereafter" (id. at Article 6.09).

Discussion

It is well-established that to obtain summary judgment, the movant must put forth "proof in admissible form" to "establish [a] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in the

[movant's] favor" (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067 [1979], quoting CPLR 3212 [b]). If the movant fails to meet this initial burden, summary judgment must be denied "'regardless of the sufficiency of the opposing papers'" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets this initial burden, then the burden shifts to the opposition to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues (De Lourdes Torres v Jones, 26 NY3d 742, 763 [2016]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Gross v Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002]).

The elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) resulting damages (Morris v 702 E. Fifth St. HDFC, 46 AD3d 478, 479 [1st Dept 2007], citing Furia v Furia, 116 AD2d 694, 695 [2d Dept 1986]). Plaintiff contends that defendants breached the lease by failing to deliver possession of the premises by May 1, 2018. According to the affidavit executed by Bob Precious, a member of 20 St. Marks, LLC, 14 months after signing the lease,

defendants had yet to deliver possession of the premises (NYSCEF Doc No. 10 ¶ 14).

Defendants disagree. The property manager of the subject premises, Keith Holden, attests that keys were provided to plaintiff immediately after signing of the lease, plaintiff changed the locks, and in March 2018, had its engineer perform exploratory probing into the flooring (Holden aff, NYSCEF Doc No. 21 ¶ ¶ 3, 9, 14). Defendants rely heavily on Pacific Coast Silks, LLC v 247 Realty, LLC (76 AD3d 167, 175 [1st Dept 2010]), wherein the Court held that the commercial tenant had been given possession of the premises when the keys had been delivered and accepted, and the tenant "actively cooperated in the process of readying the place for contemplated future business operations." Defendants claim that plaintiff waived its right to terminate the lease because it failed to exercise that right until 10 months after the May 1, 2018 deadline. Defendants argue that, on that basis, they have raised triable issues of fact that preclude summary judgment. In addition, in their answer, defendants interposed a counterclaim, alleging that plaintiff breached the lease by failing to pay rent and abandoning the premises.

In its reply memorandum, plaintiff claims that the keys were only provided

"for the purpose of monitoring [d]efendants' progress and so that [p]laintiff could access the space with its own contractors and professionals so that [p]laintiff could begin its construction immediately after [d]efendants' work was completed. This was not possession but rather a mere accommodation that was later revoked by [d]efendants which clearly informed [p]laintiff that it was not to enter the Premises" (NYSCEF Doc No. 35 at 4).

In contract cases involving a "battle of the breaches," where each party submits "conflicting affidavits and documentary evidence which cast the other party in the role of the primary contract offender," summary judgment is typically inappropriate (*Boston Concessions Group v Criterion Ctr. Corp.*, 200 AD2d 543, 545 [1st Dept 1994]). Where, as here, either party could be the primary contract offender, questions as to which party breached first may preclude summary disposition (*id.*). Here, summary judgment must be denied due to the aforementioned opposing affidavits (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974] ["the court is not to determine credibility, but whether a factual issue exists"]).

Therefore, plaintiff's motion for summary judgment on its claims, and for dismissal of defendants' counterclaim, sounding in breach of contract, must be denied.

Plaintiff's second cause of action for unjust enrichment is barred by the breach of contract claim under the rule that "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events

arising out of the same subject matter" (Adelaide Prods., Inc. v BKN Intl. AG, 38 AD3d 221, 225-226 [1st Dept 2007] [internal quotation marks and citations omitted]). "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790 [2012]). As such, plaintiff's motion for summary judgment on the cause of action sounding in unjust enrichment must be denied, and upon a search of the record pursuant to CPLR 3212(b), the court summarily dismisses such cause of action. See Abramovitz v Paragon Sporting Goods Co., Inc., 202 AD2d 206, 208 (1st Dept. 1994).

7/28/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE

INCLUDES TRANSFER/REASSIGN