

Sixth Ave. W. Assoc. LLC v A. Marcus Group LLC
2020 NY Slip Op 32758(U)
August 24, 2020
Supreme Court, New York County
Docket Number: 656391/2019
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

-----X

INDEX NO. 656391/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

were read on this motion to/for DISMISS

Background

Defendants insist that on February 28, 2019, they delivered a notice to plaintiff that they intended to vacate the premises on May 31, 2019. They argue they paid the rent, additional rent and other charges due through May 31, 2019, moved out, left the premises broom clean and delivered the keys to plaintiff on May 17, 2019. Defendants maintain that this action is an

attempt by plaintiff to recover money five months later despite the fact that plaintiff found a new tenant after defendants left.

Defendants also insist that plaintiff's purported accrual of \$54,310.63 in cleaning costs is unjustified; they point out that five desks and chairs were left to plaintiff's agent at his request (they state that the night security guard who works for plaintiff asked if he could have these items and they left it for him).

In opposition and in support of its cross-motion for summary judgment, plaintiff asks the Court to treat defendants' motion as one for summary judgment. Plaintiff insists that defendants admitted they did not leave the premises in broom clean condition because they left the five chairs and desks. It insists that it does not matter that a security guard stated that he wanted these items.

Discussion

The Court denies both motions. There is clearly an issue of fact as to whether the security guard permitted defendants to leave the chairs and desks in the premises. Ms. Goldstein claims that Jesse (the security guard) asked for the chairs and desks and then later, when defendants called him on May 27, 2019 to confirm that these items were taken, he "for the first time, advised us that he no longer wanted the desks and chairs" (NYSCEF Doc. No. 7, ¶ 15). Mr. Baldeo (an office manager for defendants) claims that Jesse agreed to take the chairs and when he changed his mind, defendants had no way to remove them since they had already turned over the keys (NYSCEF Doc. No. 8). The security guard, Jesse Singh, claims that he never spoke with anyone associated with defendants about the chairs and desks (NYSCEF Doc. No. 21).

On a motion to dismiss, the Court cannot make a credibility determination and choose to believe defendants or Mr. Singh. That compels the denial of both the motion to dismiss and the

cross-motion for summary judgment (even assuming the Court ignores the fact that issue has not been joined and decides to treat defendants' pre-answer motion to dismiss as one for summary judgment).

The Good Guy Guarantee provides that the guarantors would:

“advise Owner of Tenant’s intention of vacate the Demised Premises a minimum of three (3) months in advance and that they will pay to Owner all Minimum Rent, Additional Rent and any and all other charges that have accrued or may accrue under the terms of the Lease . . . to the latest date that Tenant and its sublessees, if any, will have completely performed the following (1) Vacated and surrendered the Demised Premises in broom clean condition to Owner pursuant to the terms of the Lease, and (2) Delivered the keys to the Demised Premises to Owner, and (3) Paid to Owner all Accrued Rent to and including the date which is the later of (a) the actual receipt by Owner of said Accrued Rent, (b) the surrender of the Demised Premises, or (c) receipt by Owner of the keys to the Demised Premises” (NYSCEF Doc. No. 10).

The issue of whether Mr. Singh wanted the desks and chairs is critical because plaintiff’s papers do not definitively demonstrate that defendants breached the Good Guy Guarantee. It claims, vaguely, that there was furniture (which appears to be the desks and chairs), a phone system, room dividers and wiring left behind and points to photos (NYSCEF Doc. No. 28). The Court cannot tell from these grainy photos whether the space was left in broom clean condition.

Plaintiff submits the affidavit from one of its members (Ryan Mehra) who admits that defendants notified plaintiff of the intention to vacate on February 28, 2019 and vacated on May 31, 2019 (NYSCEF Doc. No. 20, ¶ 8); although defendants claim the keys were returned earlier in the month. Plaintiff claims that defendants are liable for base rent, lobby attendant charges, intercom charges, sprinkler charges, water charges, late fee charges all accruing from June 2019 through September 2019. Plaintiff also seeks a conditional rent abatement given to defendant from March 2016 to April 2016, a rent concession given to a new tenant, a brokerage fee incurred to re-let the premises as well as renovation and cleaning costs after defendants moved

out. All of these charges accrued after defendants moved out. Even if the corporate tenant is liable for anything, the real issue in this case is whether the individual defendants complied with the terms of the Good Guy Guarantee.

Summary

The Court recognizes defendants' position that five chairs and desks allegedly left at the request of plaintiff's security guard cannot justify the more than \$150,000 that plaintiff now seeks against the guarantors, especially because they had already returned the keys and could not get back in to remove them. But at this stage of the litigation, the Court cannot determine that leaving those desks and chairs breached the Good Guy Guarantee. And plaintiff's claim that Mr. Singh had no authority to make a "side deal" is of no moment. Plaintiff is not entitled to summary judgment by simply asserting in response to a pre-answer motion to dismiss that Mr. Singh's purported representations should be ignored. The story, as represented by the papers here, cries out for exploration of the facts, motives, timing and credibility.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants Goldstein and Middleton is denied; and it is further

ORDERED that the cross-motion by plaintiff for summary judgment is denied.

Defendants to answer pursuant to the CPLR.

Remote Conference: September 16, 2020; time to be determined.

<u>8/24/2020</u>			
DATE		ARLENE F. BLUTH, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE