

Daval 36 Assoc., LLC v J.S. Blank & Co., Inc.

2021 NY Slip Op 30810(U)

March 16, 2021

Supreme Court, New York County

Docket Number: 155536/2019

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 155536/2019

DAVAL 36 ASSOCIATES, LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

J.S. BLANK AND COMPANY, INC. a/k/a J.S. BLANK & CO., INC.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for SUMMARY JUDGMENT.

In this action seeking damages for the breach of a lease, plaintiff Daval 36 Associates, LLC moves, pursuant to CPLR 3212, for summary judgment against defendant J.S. Blank and Company, Inc. a/k/a J.S. Blank & Co., Inc. Defendant opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an alleged breach of a commercial lease by defendant, a neckwear manufacturer. Docs. 1, 17. On September 9, 2004, plaintiff/landlord leased to defendant/tenant the entire seventh floor at 15 West 36th Street in Manhattan ("the premises") for a term of 10 years and 1 1/2 months, commencing November 16, 2004 and terminating December 31, 2014 ("the initial lease"). Doc. 10. The initial lease required defendant to "use and occupy the demised premises for general and executive offices, design and sample making provided such

use is in accordance with the certificate of occupancy for the building, if any, and for no other purpose." Id. at par. 2.

The initial lease also required defendant to make rental payments on the first day of each month during the term thereof (Id. at 1); to pay monthly water charges of \$40.00 as additional rent (Id. at par. 29); to pay \$40.00 per month in additional rent for "sprinkler supervisory service" (Id. at par. 30); and to pay \$100 per month in additional rent for security guards (Id. at par. 47). It further provided that, if defendant defaulted, it would be obligated to pay plaintiff the entire balance of the rent and additional rent due and that defendant would be responsible to pay as liquidated damages "any deficiency between the rent hereby reserved and or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of [the initial] lease." Id. at par. 18.

In the event it defaulted, defendant was also obligated to reimburse plaintiff for any expenditures plaintiff incurred, "including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any action or proceeding" in which plaintiff prevailed. Id. at pars. 19, 61. Further, the initial lease provided that "no agreement to accept [a] surrender [of the premises] shall be valid unless in writing signed by [plaintiff]." Id. at par. 25.

Defendant took possession of the premises in November 2004. Doc. 9 at par. 15.

In or about July 2014, the parties executed a "Modification and Extension of Lease Agreement" ("the lease extension") pursuant to which the term of the initial lease was extended through December 31, 2019. Doc. 11, at par. 3. The lease extension provided that "[e]xcept as otherwise modified herein, the [initial lease] shall remain in full force and effect according to its terms without any other modifications whatsoever." Id. at par. 1. The lease extension required

defendant to pay rent of \$15,931.25 per month (\$191,175.00 per annum) from January 1, 2019, through December 31, 2019. Id. at par. 4.

At the end of January 2019, defendant vacated the premises and stopped paying plaintiff rent and additional rent. Doc. 9 at par. 15. Defendant made a final rent payment for the month of January 2019 in the amount of \$15,931.25 and a final payment of additional rent for the month of December 2018 in the amount of \$180.00. Doc. 9 at par. 18. Plaintiff did not accept defendant's surrender of the premises, in writing or otherwise, and the premises have not been relet since defendant vacated the same. Id. at pars. 16, 21.

Plaintiff subsequently commenced the captioned action by filing a summons and verified complaint on June 3, 2019. Doc. 1. Plaintiff's first cause of action alleged, in effect, a breach of the initial lease and lease extension and sought damages of \$177,403.75 in rent and additional rent from January 1, 2019 through the expiration of the lease on December 31, 2019. Doc. 1. Specifically, plaintiff sought \$175,243.75 in base rent at the monthly rate of \$15,931.25 from February 1, 2019 through December 31, 2019 pursuant to paragraph 63 of the initial lease; \$1,200 for security guards from January 1, 2019 until December 31, 2019 pursuant to paragraph 47 of the initial lease; \$480 for water charges during the same period pursuant to paragraph 29 of the initial lease; and \$480 for sprinkler charges for the same time period pursuant to paragraph 30 of the lease. Doc. 1. As a second cause of action, plaintiff alleged that, pursuant to paragraphs 19 and 61 of the initial lease, it was entitled to a minimum of \$5,000 in attorneys' fees arising from defendant's breach of the lease.

Defendant joined issue by its verified answer filed September 5, 2019, in which it denied all substantive allegations of wrongdoing and asserted various affirmative defenses. Doc. 3.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on its complaint.

Doc. 8. In support of the motion, plaintiff submits an attorney affirmation; a memorandum of law; the initial lease and the lease extension; the pleadings; and the affidavit of Mel Farrell, Management Supervisor at Walters & Samuels, Inc., plaintiff's managing agent. Farrell, who authenticates the initial lease and lease extension and sets forth plaintiff's rent and additional rent obligations under the said agreements, confirms that defendant owes plaintiff a total of \$177,403.75 in rent and additional rent. Doc. 9.

Plaintiff argues that its motion must be granted because defendant breached paragraph 25 of the initial lease by vacating before the end of the term set forth in the agreement without first obtaining a written acceptance of its surrender from plaintiff and that, because of the breach, it is entitled to collect the rent and additional rent owed by defendant through the end of the term, plus attorneys' fees. Doc. 15.

In its narrowly tailored opposition to the motion, defendant relies on the affidavit of Barbara Blank, its president, who insists that, when she told plaintiff's managing director, Alan Helman, that defendant could no longer afford the rent, Helman "led [her] to believe that [he] had accepted [defendant's surrender]." Doc. 17 at par. 4. Defendant further maintains that the motion must be denied since plaintiff has yet to appear for a deposition it noticed in 2019. Doc. 18.

In reply, plaintiff reiterates that defendant breached the terms of the initial lease by vacating the premises without obtaining plaintiff's acceptance of a written surrender of the premises. Doc. 21. Additionally, plaintiff asserts that defendant has failed to demonstrate why the outstanding deposition of plaintiff warrants denial of the motion. *Id.* Finally, Helman submits an affidavit acknowledging that, although Blank told him that her business was failing,

he never told her that he would accept defendant's surrender or that defendant was excused in any way from its obligations under the lease. Doc. 20.

LEGAL CONCLUSIONS

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*). If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). Only if, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, will summary judgment be denied (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

As noted previously, the complaint herein contains two causes of action: the first for breach of the initial lease and lease extension, and the second for attorneys' fees arising from the breach. The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, plaintiff, through Farrell's affidavit, establishes: the existence and authenticity of the initial lease and lease extension; plaintiff's performance of the contract by allowing defendant to occupy the premises; defendant's breach of the initial lease and lease extension by vacating the premises without

obtaining plaintiff's acceptance of a written surrender; and the damages owed as a result of defendant's failure to pay rent.¹

In opposition, defendant fails to raise a triable issue of fact. Defendant does not submit any evidence showing that it did not owe the rent and additional rent sought by plaintiff or that the damages demanded are incorrectly calculated. Blank's conclusory allegation that Farrell "unambiguously led [her] to believe that he had accepted [her surrender]" (Doc. 17 at par. 4) does not suffice to defeat the motion since, as noted above, any such surrender of the premises could not be valid unless in a writing signed by plaintiff (Doc. 10 at par. 25) (*See generally Dillenberger v Fifth Avenue Owners Corp.*, 155 AD2d 327 [1st Dept 1989]).

Once defendant vacated the premises prior to the expiration of the lease extension, plaintiff "was within its rights under New York law to do nothing and collect the full rent due under the lease" (*Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995] [citations omitted]). According to Farrell, defendant owes base rent of \$15,931.25 per month from February 1, 2019 through December 31, 2019, for a total base rent of \$175,243.75 during those 11 months, plus additional rent of \$40 per month for water charges, \$40 per month for sprinkler charges, and \$100 per month for security guards for the period of January 1, 2019 through December 31, 2019, a total additional rent of \$2,160 during those 12 months, for a total of \$177,403.75 in base rent and additional rent. Thus, these are the damages to which plaintiff is entitled.

Further, plaintiff is entitled to summary judgment on its second cause of action for attorneys' fees insofar as New York recognizes a cause of action allowing a prevailing party to

¹ The Appellate Division, First Department has held that a plaintiff seeking to establish its prima facie entitlement to summary judgment in an action for damages arising from a breach of a lease must submit the lease "and a detailed statement documenting outstanding rent arrears" (*Dee Cee Assoc. LLC v 44 Beehan Corp.*, 148 AD3d 636, 641 [1st Dept 2017]). Although Farrell does not submit a rent ledger, this is of no moment herein since he explains in his affidavit precisely how he calculated the arrears owed. Additionally, defendant neither raises this omission nor disputes the amount which plaintiff claims is owed.

recover the same pursuant to a contractual provision such as that in the initial lease (*see Dee Cee Assoc. LLC*, 148 AD3d at 641-642). The amount of attorneys' fees to be awarded to plaintiff will be determined by a Special Referee or Judicial Hearing Officer.²

Accordingly, it is hereby:

ORDERED that the motion by plaintiff Daval 36 Associates, LLC for summary judgment against defendant J.S. Blank and Company, Inc. a/k/a J.S. Blank & Co., Inc. is granted in its entirety; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff Daval 36 Associates, LLC and against defendant J.S. Blank and Company, Inc. a/k/a J.S. Blank & Co., Inc. in the sum of \$ \$177,403.75; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the issue of the amount of attorneys' fees awardable to plaintiff Daval 36 Associates, LLC as against defendant J.S. Blank and Company, Inc. a/k/a J.S. Blank & Co., Inc.; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax

² Although plaintiff seeks attorneys' fees, it does not demand costs or interest.

(212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff shall serve a proposed accounting of the costs and attorneys' fees he incurred within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

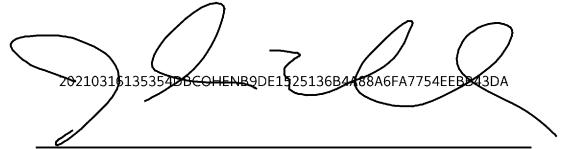
ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the

plaintiff may enter an amended judgment adding the award of attorneys' fees and costs to the amount recovered, if any; and it is further

ORDERED that the plaintiff shall serve a copy of this order upon the defendant within 15 days of the entry of this order.

3/16/2021

DATE



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DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: