SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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SOLOMON & CRAMER LLP

Plaintiff,

- v -

TIMES SQUARE SUITES LLC,

Defendant.

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INDEX NO. 651507/2021

MOTION DATE 04/19/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment is granted and the cross-motion by defendant for summary judgment is denied.

Background

Plaintiff claims that it entered into a lease with defendant (landlord) on February 3, 2017 although it acknowledges that the agreement was labeled a license agreement. It claims that the lease contained an automatic renewal clause which stated that "Upon expiration of the initial term, or any extension thereof, the term of this agreement herein shall be automatically extended for the same period as the initial term, upon the same terms and conditions as contained here, unless either party gives notice to the other in writing to the contrary at least ninety (90) days prior to the end of the term" (NYSCEF Doc. No. 9, ¶ 3).

Plaintiff maintains that on February 12, 2018, it entered into a letter agreement in which it agreed to renew for an additional year (through February 28, 2019) on the conditions that (1)

the rent not be increased and (2) that it had the right to terminate the lease prior to the end of the lease.

Plaintiff contends that it remained in the space after the termination of the lease but continued to pay the monthly rent (it argues that the lease became a month-to-month lease under the Real Property Law). Plaintiff claims that on January 26, 2021 it provided a notice of its intent to terminate the lease effective February 28, 2021.

Defendant contends that the license agreement goes through February 28, 2022 pursuant to the automatic renewal clause detailed above. It contends that the agreement at issue was not a lease and, therefore, plaintiff is not entitled to the protections afforded to tenants.

Plaintiff argues that the General Obligations Law contains requirements about lease renewals that defendant did not follow; therefore, even if there was an automatic renewal, it is void under that statute. Plaintiff insists it removed its property on February 17, 2021 but defendant sent an invoice for $2,200 (for rent in March 2021).

Plaintiff now moves for summary judgment. It complains that defendant tried to debit money from plaintiff's bank account after plaintiff surrendered the premises and now refuses to return the $3,600 security deposit. Plaintiff concludes that defendant did not give the proper notice for the lease renewal.

In opposition and in support of its cross-motion for summary judgment, defendant argues that the agreement at issue related to a license rather than a lease. It claims that plaintiff was permitted to enter the property but never developed a possessory interest in the premises. Defendant maintains that it is not a landlord and so the notice provisions do not apply. It argues that if the Court finds that the agreement constitutes a lease, plaintiff waived its right to receive renewal notices.

In reply, plaintiff emphasizes that the agreement at issue is a lease rather than a license and denies any suggestion that it waived its right to protections under the General Obligations Law.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The central dispute on this motion is whether the agreement at issue is a license or a lease. "A document calling itself a 'license' is still a lease if it grants not merely a revocable

right to be exercised over the grantor's land without possessing any interest therein but the exclusive right to use and occupy that land" (*Miller v City of New York*, 15 NY2d 34, 38, 255 NYS2d 78 [1964]).

"The nature of the transfer of absolute control and possession is what differentiates a lease from a license whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant, subject to rights specifically reserved by the lessor. The former is cancellable at will, and without cause. The critical question in determining the existence of a lease is whether exclusive control of the premises has passed to the tenant" (*Z. Justin Mgt. Co., Inc. v Metro Outdoor, LLC*, 137 AD3d 577, 578 [1st Dept 2016] [internal quotations and citations omitted]).

Any assessment of whether an agreement is a license or a lease inevitably requires the Court to review the terms of the agreement. The agreement at issue here states that the "Licensee is hereby granted a license to use the Unit within the Premises on an exclusive basis and shall have access thereto twenty-four (24) hours a day, seven (7) days a week. . . . In addition, Licensee will have use of the common area of the Premises facilities on a non-exclusive basis in accordance with the rules and regulations promulgated with respect thereto" (NYSCEF Doc. No. 9 at 3).

The Court finds that this provision yields the conclusion that the agreement was a lease rather than a license. The agreement specifically provides exclusive access to a specific unit within the building and refers to plaintiff's ability to use a common area on a non-exclusive basis. That connotes a lease: plaintiff paid monthly rent for a designated office space, it had 24-hour, 7 days a week access to the unit and the agreement created a distinction between exclusive access to the unit and non-exclusive access to other areas. Unlike the shared co-working spaces

alluded to by defendant in its cross-motion, this agreement does not detail a situation where plaintiff merely had access to "general" office space at its convenience.

That the agreement repeatedly states that it is a license and does not create a possessory interest is of no moment because the undisputed fact is that the agreement gave plaintiff a designated and exclusive office space with around the clock access. Because the Court finds that the agreement was a lease, it also finds that plaintiff was entitled to receive the required notices under the General Obligations Law. Defendant does not dispute this point or that it did not send these required notices. Instead, defendant claims that plaintiff somehow waived its right to receive these notices because it did not complain when the agreement was extended in 2018, 2019 and 2020.

That argument is without merit. Plaintiff argues that it entered into a letter agreement for 2018—therefore, the Court is unable to find that a laches-type argument could apply to that year. And the Court cannot find that plaintiff waived its right to receive notice based on two years in which it apparently did not complain about the lack of notice. During those two years the parties were apparently happy—plaintiff kept paying the rent and stayed in the premises. There was no reason to complain about a lack of notice. And defendant did not cite any binding caselaw in support of its claim that a tenant could waive its right to these notices after two (or even three years).

Moreover, the Court dismisses defendant's affirmative defenses and the counterclaim for attorneys' fees based on the analysis above. Plaintiff is entitled to the return of its security deposit.

The Court observes that although plaintiff did not mention punitive damages in its papers, it demanded punitive damages in its complaint. The Court denies that request—there is no basis

to find that defendant's conduct was outrageous. Defendant simply believed that it entered into a license agreement. Although the Court disagrees, that does not make its belief worthy of imposing punitive damages.

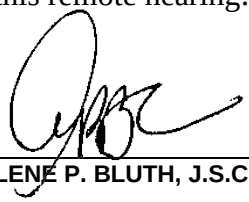
Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $3,600 plus interest from the date of this decision and order along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the affirmative defenses and counterclaim by defendant are severed and dismissed, and the cross-motion by defendant is denied; and it is further

DECLARED that the lease at issue terminated on February 28, 2021; and it is further

ORDERED that the issue of reasonable legal fees owed to plaintiff is severed and shall be determined at a hearing, and the Clerk of this part shall schedule this remote hearing.



4/20/2021
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**