

ESRT 501 Seventh Ave., L.L.C. v Regine, LTD.

2021 NY Slip Op 32524(U)

November 29, 2021

Supreme Court, New York County

Docket Number: Index No. 655960/2020

Judge: Arthur F. Engoron

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR ENGORON PART 37

Justice

-----X

<p>ESRT 501 SEVENTH AVENUE, L.L.C.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>REGINE, LTD.,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>INDEX NO. <u>655960/2020</u></p> <p>MOTION DATE <u>11/24/2021</u></p> <p>MOTION SEQ. NO. <u>002</u></p>
---	--

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents and for the reasons stated hereinbelow, plaintiff's motion is granted.

Background

In an instrument dated June 1, 2003, plaintiff's predecessor-in-interest, 501 Seventh Avenue Associates LLC ("Predecessor"), as landlord, entered into a commercial lease with defendant Regine, LTD, ("Tenant"), as tenant, covering retail space at 501 Seventh Avenue, New York, New York ("the Premises"). NYSCEF Doc. No. 27. That lease was later modified on October 31, 2007, and again on or about December 8, 2009 ("Second Lease Modification"). NYSCEF Doc. Nos. 28 and 29.

On or about October 1, 2013, Predecessor entered into an Assignment and Assumption of Leases with plaintiff ESRT 501 Seventh Avenue, LLC, ("Landlord"). NYSCEF Doc. No. 30.

Under the Second Lease Modification the lease expired June 30, 2020. NYSCEF Doc. No. 29.

Plaintiff alleges and defendant does not deny that Tenant remains in possession of the Premises. NYSCEF Doc. No. 39 ¶ 10 and NYSCEF Doc. No. 40 ¶¶ 1-3.

On November 3, 2020, plaintiff commenced the instant lawsuit asserting a cause of action for unpaid rent (i.e., breach of contract), and seeking back rent, additional rent, damages, and attorney's fees. NYSCEF Doc. No. 1.

On November 12, 2020, Tenant was served with process via the New York Secretary of State. NYSCEF Doc. No. 2.

On June 15, 2021, plaintiff moved for a default judgement. NYSCEF Doc. No. 3. On July 6, 2021, defendant cross-moved to dismiss the complaint. NYSCEF Doc. No. 15. On July 14, 2021, both parties stipulated to withdraw their respective motions. NYSCEF Doc. No. 21.

Also on July 14, 2021, Tenant answered with general denials, six affirmative defenses (failure of condition precedent; overcharge in electrical bills; unenforceable penalty in holdover; unclean hands; failure to state a cause of action and failure to serve proper predicate notices; and lack of personal jurisdiction) and a counterclaim of overcharge on electric bills, seeking a money judgement of \$216,000.

On July 25, 2021, Landlord replied with two affirmative defenses to defendant's counterclaim: failure to state a cause of action upon which relief can be granted and documentary evidence.

On October 29, 2021, plaintiff moved, pursuant to CPLR 3212, for summary judgement on its one cause of action and, pursuant to CPLR 3211(a)(1) and (a)(7), dismissal of defendant's affirmative defenses and one counterclaim. NYSCEF Doc. No. 25.

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 87-88 (1994). And dismissal pursuant to CPLR 3211(a)(7) is warranted when, "afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference," the complaint fails to assert to the court facts that would make out a cause of action. EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

To prevail in a summary judgement action, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact, and entitlement to judgement in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993); CPLR 3212(b). Once the movant's initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgement").

The elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dep't 2010).

Here, plaintiff has made a prima facie showing of breach of contract by providing, inter alia: a copy of the pleadings (NYSCEF Doc. No. 39); the relevant lease (NYSCEF Doc. No. 27); the relevant lease modifications (NYSCEF Doc. Nos. 28 and 29); the relevant assignment and assumption of leases by plaintiff (NYSCEF Doc. No. 30); two affidavits of Maxx Melendez, an Accounts Receivable Collections Associate for plaintiff with personal knowledge of plaintiff's

record keeping and other business practices in support of the pleading (NYSCEF Doc. Nos. 26 and 51); the rent ledger for the Premises (NYSCEF Doc. No. 31); and electric bill and tax documents (NYSCEF Doc. Nos. 33-37). CPLR 3212(b).

It is undisputed that Tenant entered into a lease for, and took possession of, the Premises, that the lease has expired, and that Tenant is still in possession.

In opposition, defendant cites CPLR 4518 and argues plaintiff failed to meet its initial burden of proof regarding the authenticity of its evidence and, therefore, its motion should be denied.

CPLR 4518(a) allows the general admission of evidence if “it was made in the regular course of any business and that it was the regular course of such business to make it” and CPLR 4518(c) further admits evidence bearing an authentication “by an employee delegated for that purpose.”

Here, plaintiff has sufficiently authenticated its evidence with affidavits of its Accounts Receivable Collections Associate regarding those documents, Landlord’s regular course of business, and those documents place in that business. Additionally, any question of the authenticity of the proffered leases is answered by the affidavit of defendant’s own President, Bob Berookhim, who is clear in his own affidavit that “[d]efendant initially took possession of the subject premises ... in June of 2003. For the last two (2) decades, Defendant has had a good relationship with the Landlord and has been a stellar Tenant.” NYSCEF Doc. No. 46 ¶ 5.

Defendant also argues that Landlord has failed to show that it properly billed Tenant for electricity and real estate taxes, claiming “[t]here is no proof whatsoever proffered by Landlord to indicate it even furnished such bills/statements to the Tenant.” NYSCEF Doc. No. 49.

This, too, fails in the face of documentary evidence (the bills are clearly addressed to defendant) and the plaintiff’s reply affidavit attesting to regular mailing (“In the normal course of business, all such bills were routinely sent out to Defendant by regular US Mail on or about the dates on the bills.”). And further bolstering plaintiff’s claim of regular service, the affidavit of defendant’s President acknowledges regular receipt of just the sort of bills defendant now alleges are not authentic: “The Landlord for the last six (6) plus years has overcharged the Defendant. While the Landlord demanded electricity charges each month that Defendant paid, it was for three-fold that which Defendant should have paid.” NYSCEF Doc. No. 8.

Defendant next argues this Court has no personal jurisdiction as a result of improper service. Pursuant to CPLR 311(a)(1) and Business Corporation Law § 306, service upon a corporation may be made by delivering unto the Secretary of State of New York. Defendant is a Domestic Business Corporation registered in the State of New York. NYSCEF Doc. No. 43. Therefore, as the Secretary of State was served the instant complaint, this Court has jurisdiction and defendant’s sixth affirmative defense fails. NYSCEF Doc. No. 2.

Defendant then asserts as an affirmative defense and a counterclaim, that Landlord was non-compliant with a condition precedent, specifically the alleged improper proffering of, and subsequent overcharging in, bills for electricity.

When Predecessor and Tenant entered into the Second Lease Modification in 2009 they agreed to detailed terms as to the submetering of electricity, with instructions for how any dispute among the party's bills should be resolved. The terms of that modification say electrical charges are to be considered Additional Rent, and per Article 42(c): "Tenant shall pay the Base Rent and Additional Rent (collectively, the 'Rents') when due, without notice or demand, and without any abatement deduction or set-off." Also, Article 42(b) says that Landlord "shall have the same remedies for failure to pay Additional Rent as for non-payment of Base Rent."

For electric bill disputes, the manner and time frame in which disagreements over sub-metering would be settled is explained at length in Article 45(C)(i) of the Second Lease Modification (essentially: Tenant must pay now, dispute later) and Article 45(C)(v) says, "Tenant acknowledges that amounts payable pursuant to this Article 45 are not intended merely to reimburse Landlord for Landlord's actual costs."

As electrical bills are Additional Rent by the terms of the lease; the amounts owed to Landlord were contracted between the parties and not merely "actual costs;" the contracted for time to dispute electric charges has expired; and as those same bills have not been not paid; therefore Tenant's affirmative defense that there is a failure of condition precedent on behalf of Landlord fails.

Moreover, for the same reasons, Tenant's overcharge counterclaim must be dismissed. CPLR 3211(a)(7).

Finally, Tenant asserts the 200% of Base Rent holdover rate asserted by Landlord is an unenforceable penalty. In arguing the point both Landlord and Tenant cite the landmark case of Truck Rent-A-Center v Puritan Farms 2nd, 41 NY2d 420, 425 (1977), where the Court of Appeals said, "[a] contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation."

Here, Tenant has not provided any evidence regarding the foreseeability of any loss at the time of the initial lease and, significantly for Landlord, the First Department found in Tenber Assoc. v Bloomberg L.P., 51 AD3d 573, 574 (1st Dep't 2008), that, absent evidence that liquidated damages are "plainly or grossly disproportionate to the probable loss," then a charge of two times the existing rent in the event of holdover was "not an unenforceable penalty."

Therefore, because Tenant cannot show that at the time of the initial lease in 2003 a 200% liquidated damage charge was clearly disproportionate to any foreseeable loss, Tenant's affirmative defense of unenforceable penalty fails.

Conclusion

Consequently, plaintiff ESRT 501 Seventh Avenue, LLC's motion, pursuant to CPLR 3212, for summary judgement against defendant Regine, LTD, is granted, as is plaintiff's motion, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss defendant's affirmative defenses and counterclaim. The Clerk is hereby directed to enter a judgement against defendants on the first cause of action

in the amount of \$792,648.55, plus interest on \$296,248.01 of that amount from June 1, 2020, plus interest on the remainder of \$496,400.54 from June 1, 2021, pursuant to CPLR 5001(b).

It is further ordered that plaintiff's request for attorney's fees is hereby severed, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and any necessary fees. Plaintiff must file such Note of Issue within 30 days from the date of this Decision and Order, and plaintiff's failure to do so timely shall result in automatic disposal of this action. Plaintiff is further directed, within 15 days of filing the Note of Issue, to contact chambers to schedule the inquest date.



11/29/2021

DATE

ARTHUR ENGORON, 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