Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IAS Part 2
Justice



BRIARWOOD PLAZA, INC., Index No. 706442/15

Plaintiff, Motion Date: 6/30/21

-against- Motion Seq. No. 7

BAYSIDE DANCE STUDIO, INC. a/k/a SOUTH SHORE PLAZA DANCE STUDIO, INC. a/k/a SOUTH SHORE DANCE STUDIOS, INC. d/b/a ARTHUR MURRAY DANCE STUDIOS SAFWAT GERGES,

Defendants.

x

The following papers numbered EF112 to EF150 read on this motion by plaintiff for summary judgement, pursuant to Rule 3212(b) CPLR, upon the First, Second and Third Causes of Action in the Plaintiff's Amended Complaint; and to dismiss Defendants' Affirmative Defenses, pursuant to Rule 3211(b) CPLR.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits..... | EF112-134 |
| Answering Affidavits - Exhibits . . . . . | EF135-149 |
| Reply Affidavits . . . . . | EF150 |

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff in this action seeks, inter alia, unpaid rent from out-of-possession tenant Bayside Dance Studio Inc., a/k/a South Shore Plaza Dance Studio, Inc., a/k/a South Shore Dance Studios, Inc., d/b/a Arthur Murray Dance Studios (herein, "Bayside"), and the

guarantor thereof Safwat Gerges (collectively, "Defendants"). The term of the Lease Agreement was from July 23, 2012 through December 30, 2015, however Bayside vacated the demised premises on or about February 28, 2013. At some point during the latter part of 2011, plaintiff began the demolition of the building adjacent to the Premises, which plaintiff had purchased and, began the construction of a new office building. This construction/demolition project also included the repair and the renovation of the existing multi-level parking garage which was located immediately behind the Premises. The dance studio included a rear wall of large windows, two (2) wooden dance floors, several instruction rooms and a reception area. In furtherance of this demolition and construction project, plaintiff, by its officers, agents, servants and employees, caused the windows in the dance studio to be boarded up with 4"x 8" panels of plywood, without any prior notice to Bayside, in or about 2011. The dance studio business, which defendant operated out of the premises was located in the basement/lower level area of the Premises. As a result of this action, the dance studio was deprived of any natural light from the exterior of the demised premises into the dance studio for well over a one (1) year period of time and was allegedly caused to suffer with the "appearance" of the "boarded" windows during that period of time.

The demolition/construction work included the sanding of stucco siding/walls, cement walls/supports and other friable substances from the exterior of the building on the Premises. Defendants submit that this demolition/construction project caused and resulted in Briarwood, by its officers, agents, servants and employees, releasing, propelling and projecting a large amount of dust particles, dirt particles and other substance particles into the air about the dance studio; about the two (2) hallways leading to the dance studio on the lower level of the Premises, about the areas of the parking garage and, about the areas at or near the entrances to the lower level of the Premises. Beginning in the latter part of 2011 and continuing through February 28, 2013, a customer intending to enter the dance studio for dance instruction was unable to park his/her automobile, safely, in the parking garage behind the Premises; was unable to walk to the Premises from the parking garage without walking on or over substantial amounts of particles of dust, of dirt and of other substances on the sidewalk(s) and, on and about, the entryways leading into the lower level of the Premises. Defendants submit that customers were unable to enter the Premises and to walk down either hallway leading to the dance studio without walking on and over plastic on the floor filled with dust particles, dirt particles and other substance particles; were unable to walk in these hallways without seeing and avoiding step ladders, workers, tools and hanging wires; were unable to enter the dance studio without observing a sign, which was taped on the front door of the dance studio, which warned the customer(s) of the dangerous water seepage/leakage condition on the floors of the dance studio; were unable to enter into the dance studio without seeing, experiencing and breathing the air filled with dust particles, dirt particles and other substance particles; were unable to enter into the dance studio without smelling and experiencing the awful odors from the mold in the dance studio; and were unable to enter the

dance studio without observing the water accumulation on the two (2) wooden dance floors and about the other areas located in the dance studio. Bayside, by its officers, agents, servants and employees, regularly met with, complained to and requested that all of these conditions be rectified, by Briarwood, its officers, agents, servants and employees commencing in the latter part of 2011 and continuing throughout 2012, until February 28, 2013. The presence of the dust particles, the dirt particles and the other substance particles continued to emanate into the air, on a daily basis, for well over one (1) year after the construction/demolition project was commenced in and about the lower level of the Premises, in and about the hallways in the lower level of the Premises, in and about the parking garage on the Premises, in and about the areas at or near the entrances into the lower level of the Premises and, in and about the dance studio. Defendants submit that the emanation and the projection of these particles of dust, of dirt and of other substances all over the Premises caused many of the customers and employees of Bayside to become ill; to experience eye redness and eye irritation; to experience throat and mouth irritation; to experience difficulty in breathing; caused many of the employees of Bayside to refuse to work in the dance studio business; and caused Bayside to close the dance studio business. Defendants further submit that Briarwood, by its officers, agents, servants and employees, consistently refused to take any steps in order to rectify any of these conditions. Vincent Riso, the managing member of Briarwood, testified that, prior to the demolition of the start of the demolition project, Briarwood did not notify any of the tenants of the building about the upcoming construction; and that the demolition/construction commenced in about November, 2011 and ended around February, 2014. Defendants submit that plaintiff advised defendants' employees that there was nothing that plaintiff could or would do in order to rectify any of these conditions, until the demolition/construction project was completed, which occurred in 2014.

By the instant motion, plaintiff-landlord seeks summary judgment upon the First Cause of Action in the Amended Verified Complaint (Breach of the Lease Agreement), based upon Bayside's alleged failure to pay monthly rent payments and the monthly additional rent payments, to the Plaintiff, during the period of time from July 24, 2012 through October 31, 2014. The Plaintiff also seeks an order of this Court granting summary judgment upon the Third Cause of Action in the Amended Verified Complaint (Breach of Guaranty), based upon the alleged breach of the Guaranty by the Defendant, Safwat Gerges. The Plaintiff also summary judgment in its favor on its claim set forth in the Second Cause of Action in the Amended Verified Complaint for legal fees pursuant to the Lease Agreement. Finally, plaintiff seeks to dismiss the five (5) Affirmative Defenses raised by the Defendants in their Verified Answer. The motion is opposed by defendants.

Discussion

It is well settled that summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact *(see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b] ). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers *(see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] ). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b] ). When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues *(see Sillman v Twentieth Century–Fox Film Corp.*, 3 NY2d 395, 404 [1957] ). The court must view the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Rotunda Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978] ).

A tenant is constructively evicted when "although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the [tenant] of the beneficial use and enjoyment of the premises." (74 N.Y. Jur 2d, Landlord and Tenant § 294 [2013] ). When a landlord brings an action for unpaid rent, a tenant may assert constructive eviction as a defense (*see Minjak Co. v Randolph*, 140 AD2d 245 [1st Dept 1988] ), and must establish that "the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises," and that the tenant actually abandoned possession of all or part of the property (*Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 83 [1970]; 74 N.Y. Jur 2d, Landlord and Tenant § 294). Defendants' specific allegations as to how they were constructively evicted appear to have merit. Defendants have asserted breach of contract and constructive eviction in defense to the claim for rent. Defendants submit that plaintiff interfered with Bayside's use and enjoyment of the demised premises as a ballroom dance studio by reason of plaintiff's actions and the plaintiff's inactions in permitting and allowing the boarding of the windows, the water leakage, the water seepage, the development of mold and the resultant "horrendous" odors, and the presence of dirt, dust and other substance particles in and about the Premises, resulted in the demised premises becoming unfit for use as a ballroom dance studio and caused Bayside to have to close the dance studio business. These

conditions prevented Bayside from carrying on and operating the ballroom dance studio business which had commenced in November, 1999; interrupted the daily operation of this ballroom dance studio business; resulted in the loss of the dance studio's customers and employees; and, substantially and materially deprived Bayside of the beneficial use and the enjoyment of the demised premises. By reason thereof, defendants submit that plaintiff breached the covenant of quiet enjoyment by causing Bayside to be constructively evicted from the premises (*see, e.g., Lanin v Thurcon Properties, Ltd.*, 197 A.D.2d 423, 424 [1st Dept 1993]) (flooding resulting from landlord's action or inaction constituted breach of covenant of quiet enjoyment); *Minjak Co. v Randolph* , 140 AD2d 245 [1st Dept 1988] (water damage and sandblasting constituted a breach of the covenant of quiet enjoyment); *Nostrand Gardens Coop. v Howard*, 221 AD2d 637-38 [2d Dept 1995] (excessive noise deprived tenants of quiet enjoyment); *Koretz v 363 East 7 Street Corp.*, 178 AD3d 445, 447 [1st Dept 2019] (breach of covenant of quiet enjoyment based upon dust, debris, noise, and vermin due to the defendant's construction activities); *West Broadway Glass Co. v L T.M. Bar Inc.*, 171 Misc. 2d 321, 322 [App. Term, 1st Dept 1996] (constructive eviction based upon water problems which disrupted the tenant's business). Defendants submit that, as a result, Bayside was forced to vacate the demised premises and to surrender the Lease to the demised premises to the plaintiff .

It is well settled that a commercial tenant may be relieved of its obligation to pay the full amount of rent due where it has been actually or constructively evicted from either the whole or a part of the leasehold (*Barash v Pennsylvania Term. RealEstate Corp.*, 26 NY2d 77, 82-83 [1970]; *Johnann v Cabrera*, 246 AD2d 578, 578-79 [2d Dept 1998]; *Union City Union Suit Co. Ltd. v Miller*, 162 AD2d 101, 105 [1st Dept 1990]). Defendants submit that the conditions created by plaintiff's actions warranted the abandonment of the Premises by defendants and relieved defendants from the obligation to pay rent (*see Johnson v Cabrera*, 246 AD2d 578, 579 [2d Dept 1998] (loss of heat and water substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises, a constructive eviction arose which suspended the tenant's obligation to pay rent). Defendants submit that plaintiff was cognizant of the boarded windows; the water leakage; the water seepage; the mold condition and the odors; the damage caused to the dance floors, and the dust, dirt and other particles in and about the Premises. At a minimum, an issue of fact exists as to whether plaintiff substantially and materially deprived defendants of the beneficial use and enjoyment of the dance studio, so as to raise a claim for constructive eviction (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]).

In moving for summary judgment on count three of the Amended Complaint, plaintiff argues that Safwat Gerges breached the"good guy" provision of the limited guaranty by failing to (a) deliver possession of the premises on February 28, 2013; ("Possession Date"), (b) surrender the Premises in the condition required by the Lease Agreement, (c) pay all

outstanding rent by the Possession Date, and (d) provide six months' notice of the actual date of surrender. In opposition to this contention, Gerges submitted evidence that the Guaranty executed by Gerges on November 1, 2009 ("Reaffirmation of Guaranty"), provided that "the notice to be delivered pursuant thereto shall be reduced from "six" months to "four"months; and that on August 22, 2012, Gerges executed a written notice to the Plaintiff, on behalf of Bayside and on behalf of himself, which advised the Plaintiff that possession of the demised premises would be delivered to the Plaintiff on February 28, 2013. Gerges avers that plaintiff was given written notice, oral notice and had personal knowledge of all of these conditions and their interference with Bayside's use and enjoyment of the demised premises on multiple occasions. Gerges further submitted information indicating that on September 5, 2012, he mailed this letter by certified mail to the Plaintiff. Since plaintiff has not denied receipt of the same and assuming, *arguendo*, that the Plaintiff received this Notice on September 10, 2012, then Gerges and Bayside had provided the Plaintiff with the required four (4) months prior notice. The affidavit of Gerges and the Good Guy Guaranty, which was executed by Gerges on November 1, 2009, simultaneously with the execution of the First Amendment of the Lease Agreement, indicate that defendants may have provided the required notice to the Plaintiff. As an issue of fact is raised, the branch of the motion which is for summary judgment in favor of plaintiff on its claims against Safwat Gerges for breach of the "good guy" provision of the limited guaranty, is denied.

The branch of the motion which seeks attorneys' fees from defendant is also denied. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *see Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, 379 [2010]; *LG Funding, LLC v Johnson & Son Locksmith, Inc.*, 170 AD3d 1153, 1154 [2d Dept 2019]). " '[O]nly a prevailing party is entitled to recover an attorney's fee' and[,] '[t]o be considered a prevailing party, a party must be successful with respect to the central relief sought' " (*Village of Hempstead v Taliercio*, 8 AD3d 476, 476 [2d Dept 2004], quoting *Fatsis v 360 Clinton Ave. Tenants Corp.*, 272 AD2d 571, 571 [2d Dept 2000]; *see O'Donnell v JEF Golf Corp.*, 173 AD3d 1528, 1532 [3d Dept 2019]). "Such a determination requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" (*Blinds to Go (U.S.), Inc. v Times Plaza Dev., L.P.*, 191 AD3d 939 [2d Dept 2021], quoting *DKR Mtge. Asset Trust 1 v Rivera*, 130 AD3d 774, 776 [Dept date] [alterations and internal quotation marks omitted]). Here, the record raises but does not resolve several triable issues, including whether defendant was constructively evicted by plaintiff. In view of the unresolved factual issues, plaintiff-landlord's' entitlement to attorneys' fees as the prevailing party in this litigation is premature (*see 14 Morningside Ave. HDFC v Smalls*, 48 Misc 3d 128(A) [1st Dept App Term 2015]).

CPLR 3211(b) provides that a party may move to dismiss one or more defenses on the ground that a defense "is not stated or has no merit." "When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law' " (*Bank of N.Y. v Penalver*, 125 AD3d 796, 797 [2d Dept 2015], quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]). " 'In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference' " (*Gonzalez v Wingate at Beacon*, 137 AD3d 747, 747 [2d Dept 2016], quoting *Bank of N.Y. v Penalver*, 125 AD3d at 797; *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]). " '[I]f there is any doubt as to the availability of a defense, it should not be dismissed' " (*Chestnut Realty Corp. v Kaminski*, 95 AD3d 1254, 1255 [2d Dept 2012], quoting *Fireman's Fund Ins. Co. v Farrell*, 57 A.D.3d at 723).

The branches of the motion which are to dismiss defendant's first and second affirmative defenses based on lack of jurisdiction are granted (*see generally*, *Jaramillo v Asconcio*, 151 AD3d 947, 949 [2d Dept 2017]). Under the circumstances of this case, by their appearance and voluntary participation in the action, defendants submitted to the jurisdiction of the court and waived any defense of lack of personal jurisdiction within the applicable statute of limitations (see CPLR 320[b]; *Murray Hill Invs. v Adas Yereim, Inc.*, 205 AD2d 512, 513 [2d Dept 1994]; *Rubino v New York*, 145 AD2d 285, 288 [1st Dept 1989]; *see also LTown Ltd. Partnership v Sire Plan*, 108 AD2d 435, 438 [2d Dept 1985]; *cf. Colbert v International Sec. Bur.*, 79 AD2d 448 [2d Dept 1981]).

The branch of the motion which is to dismiss defendant's third affirmative defense, to wit, that South Shore Dance Studio, Inc. assigned the Lease Agreement to Bayside Dance Studio, Inc., is granted without opposition.

The branch of the motion which is to dismiss defendant's fourth affirmative defense, to wit, that the demised premises was delivered in compliance with the aforesaid terms and the aforesaid conditions of the Guaranty, on February 28, 2013, thereby terminating any further liability of the defendant Gerges, is denied (*see generally*, *Bank of N.Y. v Penalver*, *supra*).

The branch of the motion which is to dismiss the fifth affirmative defense, to wit, constructive eviction, is denied. It is clear from the submissions that defendants' Affirmative Defense of constructive eviction is not merely conclusory, but raises triable issues of fact herein. Furthermore, given defendants' specific allegations that plaintiff failed to provide defendant with services required by the lease, they have established that this defense has merit. (*see Lincoln Plaza Tenants Corp. v MDS Props. Dev. Corp.*, 169 AD2d 509 [1st Dept

1991] [tenant's counterclaims based on landlord's obligations to provide utility services and hookups should not have been dismissed in light of factual disputes]; *Union City Union Suit Co., Ltd. v Miller*, 162 AD2d 101 [1st Dept 1990], *lv denied* 77 NY2d 804 [1991] [tenant entitled to damages based on landlord's failure to provide essential services as required by lease]; *Ciraolo v Miller*, 138 AD2d 443 [2d Dept 1988] [tenant entitled to compensatory damages for landlord's failure to provide services] ).

Conclusion

The branch of the motion which is for summary judgment upon the First Cause of Action in the Amended Verified Complaint by reason of the alleged breach of the Lease, by the Defendants, is denied.

The branch of the motion which is for summary judgment in plaintiff's favor on its claim that Safwat Gerges breached the "good guy" guaranty, is denied.

The branch of the motion which seeks attorneys' fees from defendant is denied.

The branches of the motion which are to dismiss defendants' first, second and third affirmative defenses, are granted.

The branch of the motion which is to dismiss defendants' fourth affirmative defense, is denied.

The branch of the motion which is to dismiss the fifth affirmative defense, to wit, constructive eviction, is denied.

Dated: November 3, 2021

J.S.C.

FILED
11/3/2021
COUNTY CLERK
QUEENS COUNTY