SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR ENGORON** **PART** **37**

Justice

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BRAUSE 59 CO.,

Plaintiff,

- v -

BILHUBER, INC., A/K/A BILHUBER INCORPORATED, A/K/A BILHUBER & ASSOCIATES INC.,

Defendant.

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INDEX NO. 652097/2021

MOTION DATE 01/21/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons stated hereinbelow, plaintiff's motion for summary judgment is granted in part and denied, without prejudice, in part.

Background

On April 12, 1994, plaintiff Brause 59 Co. ("Brause"), as landlord, entered into a ten-year lease of the entire rentable portion of the sixth floor of 330 East 59th Street, New York ("The Premises") with defendant Bilhuber, Inc. ("Bilhuber") a/k/a Bilhuber Incorporated a/k/a Bilhuber & Associates Inc., as tenant ("The Lease"). NYSCEF Doc. No. 25.

On April 12, 2004, the parties entered into a First Amendment of Lease that, inter alia, extending the terms of The Lease for another ten years ("First Amended Lease"). NYSCEF Doc. No. 25.

On May 1, 2014, the parties entered into a Second Amendment of Lease ("Second Amended Lease") that, inter alia, extending the terms of The Lease until July 31, 2024. NYSCEF Doc. No. 25.

According to defendant, due to the ongoing global Covid-19 pandemic defendant last paid rent on May 1, 2020. NYSCEF Doc. No. 26.

In the late spring or early summer of 2020, defendant vacated The Premises. NYSCEF Doc. No. 30 ¶ 3. To date, The Premises have neither been relet nor has any further rent been paid. NYSCEF Doc. No. 21.

On March 30, 2021, Brause sued Bilhuber, asserting two causes of action: (1) breach of lease in the amount of $308,046.06; and (2) attorneys' fees to be determined. NYSCEF Doc. No. 22.

On July 7, 2021, plaintiff moved for a default judgment. NYSCEF Doc. No. 4.

On July 27, 2021, the parties stipulated for more time for defendant to answer and, on August 3, 2021, defendant filed an answer generally denying the allegations of the complaint. NYSCEF Doc. Nos. 15 and 16. On August 5, 2021, the parties filed a stipulation withdrawing plaintiff's motion for a default judgment. NYSCEF Doc. No. 17.

On August 2, 2021, defendant served a Demand for a Bill of Particulars seeking: a copy of the lease, any evidence of plaintiff attempting to re-let The Premises, an explanation of defendant's obligation to pay rent, and a schedule detailing how plaintiff estimated defendant's arrears. NYSCEF Doc. No. 34.

On August 14, 2021, plaintiff objected to defendant's demand for a Bill of Particulars. NYSCEF Doc. No. 35.

On October 31, 2021, plaintiff moved, pursuant to CPLR 3212, for summary judgment against defendant on its first cause of action, breach of contract, now in the amount of $485,003.04, and on its second cause of action, attorneys' fees, in an amount to be determined. NYSCEF Doc. No. 19.

In an affirmation in opposition dated December 14, 2021, defendant's counsel argued summary judgment was not warranted as there were still questions regarding how plaintiff calculated the arrears. NYSCEF Doc. No. 31.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden 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).

Here, plaintiff has made a prima facie showing of a breach of contract sufficient for summary judgment by submitting, inter alia: a copy of the pleadings (NYSCEF Doc. No. 22); The Lease and its amendments; an affidavit of a person with personal knowledge of the facts, in this case David Brause, who identifies himself as an employee of non-party Brause Realty Inc., plaintiff's managing agent (NYSCEF Doc. No. 21); a calculation of the arrears owed ("Arrears") (NYSCEF Doc. NO. 26); a reply memorandum clarifying some of the items listed on the Arears (NYSCEF Doc. No. 41); and, pursuant to 22 NYCRR 202.8-g, a Statement of Material Facts as to which there is no genuine issue (NYSCEF Doc. No. 38). CPLR 3212(b).

Defendant argues that the manner in which plaintiff calculated water ("Water Base…" and "Sprinkler B…"), real estate taxes ("Real Estate…"), and excess rent ("Late Charge…") in the Arrears were not sufficiently documented.

However, plaintiff correctly notes in its boldface-type-and-bullet-point-riddled reply affirmation that the monthly water and sprinkler charges for The Premises were raised from $50 to $100 in 2004 pursuant to paragraph 1(b)(ii) of the First Amended Lease ("the water and sprinkler charges pursuant to, respectively, Articles 29 and 30 of the Lease, shall each be $100.00 per month"). NYSCEF Doc. No. 25 at 20.

Further, plaintiff allows in footnote three (!) of its reply affirmation that "without conceding" the validity of plaintiff's objections Brause "hereby waives its demand for recovery of said 'Late Charge…' and 'Excess Ren[t?]…" items [of the Arrears], which, when added together, amount to the sum of $3,248.78." NYSCEF Doc. No. 40.

Which only leaves the inevitable: real estate taxes.

In signing The Lease, defendant agreed to Article 43, which states that, if the taxes on The Premises are above a certain Base Tax rate set on June 30, 1995, then "Tenant shall pay for such Tax Year an amount ("Tax Payment") equal to Tenant's Share [12.5 percent] of such excess."

Article 43 of The Lease was replaced in the First Amended Lease which, inter alia, added Business Improvement District ("BID") payments to the mix, and which allows that "The Tax Payment and BID Payment shall be payable by Tenant within 30 days after receipt of a demand from Owner, which demand *shall be accompanied by Owner's computation of the Tax Payment and BID Payment* (a copy of the relevant tax bills shall be sent by Owner to Tenant promptly on request)" (emphasis added).

Plaintiff asserts that the Arrears statement submitted, as a business record, is sufficient evidence of unpaid real estate taxes owed.

The Lease and its amendments define "taxes" as not just real estate taxes, but also "vault charges, assessments, and special assessments … and any expenses incurred by Owner in contesting the same" and, further, the First Amended Lease adds "BID Charges" to the mix. Which is to say, the "taxes" plaintiff is entitled to charge defendant pursuant to the Lease are not an apples-to-apples number and must be calculated, which is why The Lease and its amendments are clear that when demanding payment Brause's "demand shall be accompanied by Owner's computation of the Tax Payment and BID Payment."

Here, plaintiff has failed to show that it accompanied a "computation of the Tax Payment and BID Payment" due when it demanded the same from defendant, as required by The Lease and its amendments. The Arrears submitted by plaintiff, despite separating out charges for water and sprinklers, does not appear to separate "Tax Payments" due from "BID Payments" due, and instead just offers a catchall "Real Estat…" charges with no explanation.

Thus, because plaintiff has not shown how it calculated the taxes and BID payments demanded, as The Lease requires and defendant requested, this Court cannot currently grant summary judgment of that portion of plaintiff's first cause of action and should sever them from the first cause of action.

Conclusion

Therefore, plaintiff Brause 59 Co.'s motion for summary judgment is granted only as to the "Rent Base…" charges on the arrears sheet submitted, and the clerk is hereby directed to enter a judgment against Bilhuber, Inc. a/k/a Bilhuber Incorporated a/k/a Bilhuber & Associates Inc. in the amount of $393,944.43 ($492,329.54 total "arrears" - $7,326.50 in legal fees - $3,248.78 in "Late Charge…" and "Excess Ren[t]…" pursuant to NYSCEF Doc. No. 40 fn. 3 - $87,809.83 in "Real Estat[e]…" charges).

The portion of plaintiff's first cause of action seeking real estate taxes and BID payments is hereby severed and plaintiff may continue to pursue those claims.

Further, plaintiff's claim for attorneys' fees is hereby held in abeyance pending resolution of the entire first cause of action.

2/4/2022
DATE

ARTHUR ENGORON, J.S.C.

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