

525 Delaware LLC v VolumeCocomo Apparel, Inc.
2022 NY Slip Op 30459(U)
February 4, 2022
Supreme Court, New York County
Docket Number: Index No. 651467/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

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525 DELAWARE LLC,

Plaintiff,

- v -

VOLUMECOCOMO APPAREL, INC. and HYOSIK CHANG

Defendants.

-----X

INDEX NO. 651467/2021

MOTION DATE 12/01/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

The plaintiff landlord in this breach of contract action seeks to recover unpaid rent, additional rent and attorney's fees under a commercial lease agreement and a guaranty. The defendants answered and asserted five affirmative defenses. The plaintiff now moves for (1) summary judgment on the first, second, fourth, and fifth causes of action, for rent and additional rent, in the sum of \$386,334.40; (2) summary judgment on the issue of liability as to the third and sixth causes of action, for attorney's fees; (3) summary judgment dismissing the affirmative defenses and (4) severance of the second and fifth causes of action, for sums accruing after October 31, 2021, through the expiration date of the lease. No opposition is submitted. The motion is granted in part.

DISCUSSION

It is well-settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in

the light most favorable to the non-moving party.” Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of its motion, the plaintiff submits, *inter alia*, the pleadings, the subject lease and lease extension agreements, the subject guaranty, a rent ledger, property tax statements and calculations, electric bills, and the affidavit of Steven Marvin, Executive Managing Director of Olmstead Properties, Inc., the registered managing agent of the plaintiff.

A. Rent and Additional Rent

The plaintiff’s proof establishes, *prima facie*, its entitlement to relief on the first, second, fourth, and fifth causes of action to the extent they seek unpaid rent and additional rent through March 31, 2021, and unpaid rent and additional rent accruing after March 31, 2021, until April 30, 2024, the expiration date of the lease, respectively, in the total sum of \$386,334.40. The plaintiff’s claim of entitlement to \$386,334.40 is supported by the record and represents the amount of rental arrears the defendants owe through October 31, 2021, less the “legal fee charges” also listed in the rent ledger the plaintiff submits.

Specifically, the plaintiff’s proof with respect to the lease and lease extension agreements demonstrates (1) the existence of a contract, (2) the plaintiff’s performance under the contract, (3) the defendants’ breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). It is well-settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff’d 88 NY2d 716 (1996). Further, the plaintiff’s proof with respect to the guaranty demonstrates that the guaranty “is clear and unambiguous on its face and, by its language, absolute and unconditional, [and thus that] the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement.” Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446–47 (1st Dept. 2012) (quoting National Westminster Bank USA v Sardi’s Inc., 174 AD2d 470, 471 [1st Dept. 1991]). Having failed to oppose the motion, the defendants have not made any showing of any fraud, duress, or other

wrongful conduct by the plaintiff in regard to the guaranty. Accordingly, the branch of the plaintiff's motion seeking an award of summary judgment in the sum of \$386,334.40 on the first, second, fourth, and fifth causes of action is granted and the branch of the motion seeking summary judgment on the issue of liability on the third and sixth causes of action is granted to the extent stated above.

B. Attorney's Fees

The plaintiff further establishes its entitlement to judgment on the issue of liability on the third and sixth causes of action seeking attorneys' fees pursuant to Article 19 of the lease and the first paragraph of the guaranty. However, the plaintiff is entitled to judgment only to the extent of fees incurred in recovering rent and additional rent due and owing through October 31, 2021. Having failed to oppose the plaintiff's motion, the defendants have not raised any material issue of fact sufficient to require a trial. The plaintiff has not submitted proof of any fees incurred. Therefore, the plaintiff may submit supplemental documentation in regard to the third and sixth causes of action seeking attorney's fees within 30 days of the date of this order.

C. Affirmative Defenses

The branch of the plaintiff's motion seeking to strike the defendants' affirmative defenses is likewise granted. In the answer, the defendants assert as affirmative defenses "failure to state a claim", "failure to mitigate damages", "impossibility or Impracticability of performance", "frustration of purpose" and "failure of consideration." Pursuant to CPLR 3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011). For the reasons stated in its moving papers, the plaintiff meets this burden.

Furthermore, the affirmative defenses are improperly asserted in a conclusory manner without detail or factual allegations. See Commissioners of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Manufactures Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). CPLR 3013 expressly requires that all "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

D. Future Rent

Finally, the branch of the plaintiff's motion seeking to sever and continue so much of its second and fifth causes of action that seek unpaid rent accruing after October 31, 2021, through the future date of April 30, 2024, is denied. As a general matter, "no action can be brought for future rent in the absence of an acceleration clause." Beaumont Offset Corp. v Zito, 256 AD2d 372, 373 (2nd Dept. 1998); see also Islip U-Slip LLC v Gander Mtn. Co., 2 F Supp 3d 296, 303 (NDNY 2014) ("New York law states that absent an acceleration clause in a lease, the breach of a lease does not entitle a landlord to make a claim for all future rents under the lease.") There is no acceleration clause here. The subject lease contains a liquidated damages clause requiring the tenants to pay "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 this lease." Further, "[a]ny such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in the lease..." The first page of the lease indicates that the "rent day" is the first day of each month. Thus, the lease requires the plaintiff to wait until future rents accrue on the first of each month to recover them. That is, the parties' lease provides, at best, that the plaintiff is entitled to future rents but only as they accrue, on the first of each month. For these reasons, the plaintiff cannot continue to maintain an action on the remainder of the second and fifth causes of action insofar as they seek future rent beyond that which has accrued as of the filing of the notice of motion. Therefore, the remainder of the second and fifth causes of action are dismissed.

CONCLUSION

Accordingly, upon the foregoing papers and for the reasons stated herein, it is

ORDERED that the plaintiff's motion is granted, without opposition, to the extent that (1) the plaintiff is awarded summary judgment on the first, second, fourth, and fifth causes of action, in the sum of \$386,334.40, only, as and for rent and additional rent through October 31, 2021; (2) the plaintiff is awarded summary judgment on the issue of liability on the third and sixth causes of action only to the extent of attorneys' fees incurred in connection with the plaintiff's recovery of rent and additional rent through October 31, 2021; and (3) the defendants' affirmative defenses are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants, jointly and severally, on the first, second, fourth, and fifth causes of action in the sum of \$386,334.40, plus statutory interest from October 31, 2021, and it is further

ORDERED that the remainder of the plaintiff's second and fifth causes of action, to the extent they seek future rent and additional rent that may become due under the subject lease after October 31, 2021, are dismissed, and it is further,

ORDERED the plaintiff may submit supplemental documentation in support of its claims for attorney's fees under the third and sixth causes of action, to the extent incurred in connection with the recovery of rent and additional rent under the subject lease through October 31, 2021, within 30 days of the date of this order by filing the same on e-courts and notifying the Part 42 Clerk at SFC-Part42-Clerk@nycourts.gov of any such filing.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

02/04/2022
DATE

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