

500 Eighth Ave. LLC v Resource Training Ctr. Inc.

2022 NY Slip Op 30801(U)

March 10, 2022

Supreme Court, New York County

Docket Number: Index No. 160028/2016

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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500 EIGHTH AVENUE LIMITED LIABILITY COMPANY,
Plaintiff,

- v -

RESOURCE TRAINING CENTER INC.,DONNA MAE
DEPOLA

Defendant.

-----X

INDEX NO. 160028/2016
MOTION DATE 11/29/2021
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

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

This action arises out of the alleged breach of commercial lease agreement. Plaintiff now moves for summary judgment on the grounds that defendant materially breached the lease agreement and the total amount of rent agreed upon is now due and owing. Defendant opposes the instant motion and cross-moves to amend its answer to add an affirmative defense and for summary judgment on the grounds that plaintiff's acceptance of its final rent payment satisfies the debt, accord and satisfaction. Based on the reasons set forth below, defendant's cross-motion is denied in its entirety and plaintiff's motion is granted.

Undisputed Facts

The parties entered into a commercial lease agreement, dated October 26, 2011. The lease term was 9 years and 6 months, from July 1, 2012, to December 31, 2021. Defendant vacated the premises on August 1, 2016 and has made no rental payments since that date.

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Defendant's Cross-Motion

Preliminarily, the portion of defendant's motion that seeks to amend its answer to add the affirmative defense is denied. While it is well established that pursuant, to CPLR 3025 (b), leave to amend the pleadings is freely granted absent prejudice, it is also well established that leave should not be granted if the amendment is lacking in merit. *See Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015].

Here, defendant seeks to add the affirmative defense of accord and satisfaction, contrary to the terms of the lease. The lease states, in relevant part, that no partial payment will be accepted as a settlement of unpaid rent "nor shall any endorsement or statement of any check or any letter accompanying any check or payment as rent be deemed as an accord and satisfaction" *see* NYSCEF Doc. 68, ¶ 25. The First Department has held that such defense should be dismissed when it is precluded by the language in the lease (*225 E. 64th St., LLC v Janet H. Prystowsky, M.D. P.C.*, 96 AD3d 536, 538 [1st Dept 2012]). Thus, permitting amendment to include accord and satisfaction as an affirmative defense would be futile.

As to the portion of defendant's cross-motion that seeks summary judgment, that relief is denied. The Court finds that defendant has failed to establish its *prima facie* entitlement to judgment as a matter of law. Defendant puts forth several arguments in support of its motion. Specifically, defendant argues the lease was terminated prior to the initiation of this action by accord and satisfaction, the liquidated damages clause contained in the lease is unenforceable as a penalty, that defendant surrendered the premises to the landlord thereby terminating the lease and that acceptance of the keys by the landlord is effectively a surrender of the premises under the lease.

In support of its argument that accord and satisfaction applies, defendant alleges that it paid plaintiff the sum of \$24,753.79 with the full understanding that this was the final payment to be made for rent and additional rent. Further, defendant contends that this understanding was memorialized in a letter to the plaintiff dated August 2, 2018. *See* NYSCEF Doc. 70. Defendant contends that plaintiff accepted and deposited the check which was marked "Final Rent Payment & Tax", thus satisfying its obligations pursuant to the lease, and releasing it from any additional liability. While defendant submits an abundance of caselaw that illustrates when accord and satisfaction applies and the proper means for preservation of rights in those instances, defendant fails to reconcile the terms of the lease with its purported satisfaction of the debt.

As to the argument that the liquidated damages are a penalty, defendant has failed to meet its burden on this issue. "The burden is on the party seeking to avoid liquidated damages . . . to show that the stated liquidated damages are, in fact, a penalty" (*172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528, 536 [2014] internal citations omitted). Defendant has failed to show that the liquidates damages are anything more than the actual damages incurred by plaintiff due to defendant's alleged breach of the lease.

The Court has reviewed defendant's remaining contentions and finds them in contravention of the lease and thus unavailing.

Plaintiff's Motion for Summary Judgment

Plaintiff's main argument, in support of its motion, is the unambiguous language of the lease. Specifically, plaintiff relies on paragraph 25 of the lease. NYSCEF Doc. 68.

In opposition, defendant takes exception with Mr. Torre's affidavit and avers that it is insufficient to establish a *prima facie* entitlement to judgment. Defendant also contends that the doctrines of frustration of purpose or impossibility, as a result of the COVID restrictions require a reduction of the rent due. Additionally, defendant contends that plaintiff's failure to annex the lease to its motion papers is fatal. The Court disagrees.

The Court finds that plaintiff's failure to attach the lease to its underlying motion papers is a technical but not fatal error, because the terms of the lease are not in dispute and defendant annexed the lease to its cross-motion, the Court may rely on the entire record before it. Moreover, defendant takes issue with Mr. Torre's affidavit while simultaneously attempting to impute plaintiff with alleged notice of termination through its communication with Mr. Torre.

With respect to defendant's argument of frustration of purpose and the doctrine of impossibility, that the COVID-19 pandemic would terminate the lease or reduce the amount owed pursuant to the lease, is conclusory and not based on any factual support.

The Court finds that the unambiguous and undisputed language of the lease and the undisputed fact that defendant vacated the premises and ceased paying rent is sufficient to establish plaintiff's *prima facie* entitlement to judgment as a matter of law. Defendant has failed to raise a triable issue of fact. Accordingly, it is hereby

ORDERED that defendant's cross-motion is denied in its entirety; and it is further

ORDERED that plaintiff’s motion for summary judgment is granted; and it is further

ORDERED that a trial of the issues regarding damages shall be had before this court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

3/10/2022

DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: