

Trigon 52 L.L.C. v Carlisle Etcetera LLC
2022 NY Slip Op 31262(U)
March 24, 2022
Supreme Court, New York County
Docket Number: Index No. 158543/2020
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36M

Justice

-----X
TRIGON 52 L.L.C.,
Plaintiff, INDEX NO. 158543/2020
MOTION SEQ. NO. 002

- v -

CARLISLE ETCETERA LLC,
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff commenced this commercial landlord tenant action to recover unpaid rent due pursuant to a commercial lease agreement. (NYSCEF Doc. No. 1, *Summons and Complaint*). Now, plaintiff moves pursuant to CPLR 3025(c) to amend the complaint to add monthly rent due after the commencement of this action and conform to the proof; pursuant to CPLR 3212 for summary judgment on the amended complaint; and pursuant to CPLR 3212 for summary judgment dismissing defendant's affirmative defenses and counterclaim based upon expiration of the Statute of Limitations. (NYSCEF Doc. No. 32-44, *motion papers*).

Defendant opposes the motion and cross-moves for summary judgment. (NYSCEF Doc. No. 46, *Notice of Cross Motion*).

Plaintiff sets forth the following facts in its memorandum of law. (NYSCEF Doc. No. 44). On July 1, 2012, plaintiff, the owner of the commercial building located at 16 East 52nd Street, New York, New York, entered into a lease with tenant defendant Carlisle Etcetera, LLC for the entire 16th floor. The lease required defendant to pay 18% annual interest on late rent payments and to post a security deposit. In 2013, the parties entered into a lease amendment which extended the lease through June 2023 and increased defendant's security deposit to \$234,809.87. This deposit would be reduced by \$16,928.99 each year, with the first installment due to be returned on July 1, 2014 and every July 1st thereafter, until the lease expiration. Defendant ceased paying rent in July 2020 but did not surrender possession of the premises. In August, plaintiff drew \$84,644.85 against the security deposit in satisfaction of defendant's rent arrears. Defendant remained in possession but failed to tender rent for August 2020 through March 2021 or additional rent for April 2020 through March 2021. Plaintiff argues that it should be permitted to amend the complaint to include unpaid rent and additional rent from November 2020 through March 2021 arguing that leave to conform the pleadings to the proof should be freely given and that defendant cannot show lack of merit or prejudice. Plaintiff also argues that there are no questions of fact regarding payment as defendant has not paid, alleged it paid, or provided proof of payment. Finally, plaintiff avers that the first affirmative defense alleging failure to state a cause of action should be dismissed as the complaint states causes of action for

breach of contract; the second affirmative defense alluding to contributory negligence should be dismissed as said affirmative defense is not available in contract actions; the third affirmative defense of waiver and estoppel should be dismissed as the lease bars any waiver claims and an equitable defense such as estoppel is not available in actions seeking money damages only; and the portion of the fifth affirmative defense/counterclaim which alleges plaintiff's failure to return the annual security deposit tranche from July 1, 2014 to July 1, 2020 should be dismissed with respect to the July 1, 2014 tranche as it is beyond the six year statute of limitations.

Defendant, in its opposition and cross-motion for summary judgment, concedes that rent arrearages are due for August through October 2020, however argues that that insofar as plaintiff has breached its contractual obligation to return \$16,928.99 of defendant's security deposit each July, plaintiff owes defendant significantly more than defendant owes plaintiff and thus, judgment should be entered in favor of defendant. (NYSCEF Doc. No. 54). Specifically, defendant asserts that plaintiff failed to return \$16,928.99 of the security deposit that became due in July 2016, July 2017, July 2018, July 2019 and July 2020 in accordance with the amended lease agreement and is indebted to defendant in the amount of \$84,644.95, plus interest of 9% per annum totaling \$105,867.85, which is more than the \$72,575.56 sought in plaintiff's complaint thus, its cross-motion for summary judgment should be granted.

With respect to the branch of plaintiff's motion seeking to amend its complaint, defendant avows that plaintiff's proposed judgment includes \$17,550.60 in electric charges without documents showing that the charges are properly billed to defendant; \$13,894.30 for attorney's fees without submitting bills depicting how these charges were incurred; and \$13,575.49 in late fees without demonstrating how they have been calculated, and therefore motion should be denied as the record is devoid of evidence to conform the pleadings.

In reply, plaintiff argues that it seeks to recover base rent for the months of August through October 2020, which is sought in its original complaint, and November 2020 through May 2021 for a total of \$223,676.42 at \$23,781.33 per month. Plaintiff asserts that insofar as defendant has not paid its base rent from August 2020 through May 2021, plaintiff is entitled to the difference between the base rent owed and the security deposit it owes to defendant. Plaintiff avers that if the court finds any issue of material fact as to additional rent, those items can be severed for separate resolution. Plaintiff also argues that the July 2020 tranche of the security deposit was not owed to plaintiff because defendant failed to tender rent and thus, breached the agreement.

"CPLR 3025 (c) authorizes courts to permit pleadings to be amended before or after judgment to conform them to the evidence upon such terms as may be just. As with a motion pursuant to CPLR 3025 (b), the determination is committed almost entirely to the discretion of the Trial Court. The operative factor considered upon a motion to conform pleadings is prejudice to the nonmoving party" (*Gonfiantini v Zino*, 184 AD2d 368, 369 [1st Dept 1992][internal citation omitted]). In the absence of any prejudice, the motion to amend the complaint is hereby granted.

Turning next to the parties' application for summary judgment, it is well-settled that to prevail on a motion for summary judgment, the movant must make a *prima facie* showing of

entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact. (See *Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). However, “[t]his burden is a heavy one”, requiring that the “facts . . . be viewed in the light most favorable to the non-moving party.” (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). Thus, it “should only be granted where there is no doubt as to the existence of a triable issue of fact.” (*Advanced Aerofoil Tech., AG v MissionPoint Capital Partners LLC*, 170 AD3d 460, 461 [1st Dept 2019], quoting *Ellenberg Morgan Corp. v Hard Rock Café Assoc.*, 116 AD2d 266, 269-270 [1st Dept 1986]).

Here, plaintiff seeks summary judgment on its amended complaint and an order dismissing defendant’s affirmative defenses and counterclaims and defendant’s motion for summary judgment seeks judgment in the amount of unpaid tranches of the security deposit. However, defendant does not dispute that it failed to tender rent and additional rent since August 2020 and plaintiff does not dispute that it failed to return the agreed upon security deposit tranches due in 2016-2020. What remains in contention is which party is more indebted to the other.

Plaintiff seeks to recover \$9,644.45 for August 2020 and \$23,781.33 in base rent from September 2020 through May 2021¹ totaling \$223,676.42. While plaintiff seeks approximately \$57,277.86 in additional rent, it asks the court, if not inclined to grant said sums on a motion for summary judgment, to sever its claims for additional rent and direct a hearing on that portion of the relief sought. Defendant seeks to recover the five tranches of \$16,928.99 due in July of 2016-2020 which amount to \$84,644.95, plus 9% annual interest totaling \$105,867.85. Having only accounted for the rent it owed through the date the complaint was filed, defendant argues that it is entitled to a judgment as it was owed more than what plaintiff is owed. But, insofar as the application to conform the pleading to the proof is granted, a calculation of the arrears through the submission of the motion papers is greater than the unpaid tranches of the security deposit. Accordingly, plaintiff has established entitlement to summary judgment on its amended complaint.

Further, plaintiff’s application for summary judgment dismissing defendant’s affirmative defenses is likewise granted as the asserted defenses are either inapplicable or lack merit. The branch of plaintiff’s motion seeking to dismiss the portion of defendant’s counterclaim with respect to the 2014 tranche is moot, as defendant concedes that the 2014 and 2015 tranches were paid. (NYSCEF Doc. No. 54, *Memorandum of Law in Support of Cross Motion and in Opposition to Plaintiff’s Motion*). Defendant’s motion for summary judgment is granted solely to the extent that the judgment awarded to plaintiff will be offset by the tranches owed to defendant.

With respect to the amount of judgment to be entered, after a review of the documents annexed in support of plaintiff’s motion including the rent ledger, demonstrating defendant’s breach of lease by failing to tender portions of the rent and additional rent for the months preceding the July 2020 tranche, resulting in plaintiff drawing \$84,644.95 from the security deposit to cover the arrears, the court concurs with plaintiff’s argument that it was not obligated

¹ In its moving papers, plaintiff seeks base rent through March 2021, the month it was filed, and in its reply papers plaintiff seeks base rent through May 2021, the month its reply was filed.

to return July 2020 tranche of the security deposit. As such, judgment will be awarded to the plaintiff in the amount of \$155,960.46, which represents the base rent owed to plaintiff offset by the unpaid tranches owed to defendant in July 2016-2019, exclusive of additional rent and/or interest owed to either party which shall be severed and referred to a special referee. Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3025(c), for leave to amend the complaint to include base rent due May 2021, is granted; and it is further

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the sum of \$155,960.46, with interest, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion for summary judgment on defendant's affirmative defenses is granted; and it is further

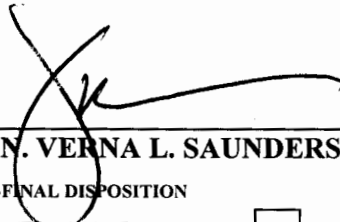
ORDERED that the issue of additional rent owed to plaintiff, as well as, an offset by the interest owed on the unpaid tranches of the security deposit is severed and referred to the Special Referee Clerk for assignment to a Special Referee to hear and determine; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this order, with notice of entry, on defendant, as well as, on the Clerk of the Court (60 Centre Street, Room 141 B), who shall enter judgment in accordance with this decision and order; and it is further

ORDERED that counsel for plaintiff shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that service upon the Clerk of the Court and the Special Referee Clerk 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).

March 24, 2022


HON. VERNA L. SAUNDERS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>	REFERENCE