Padia v Toha
2022 NY Slip Op 31297(U)
April 15, 2022
Supreme Court, New York County
Docket Number: Index No. 655517/2018
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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HARSH PADIA

Plaintiff,

- v -

MARTIN TOHA,

Defendant.

INDEX NO. 655517/2018

MOTION DATE 10/01/2021

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199

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

I. INTRODUCTION

In this action seeking, *inter alia*, to recover damages for breach of a lease agreement for a penthouse unit in a Manhattan condominium building, the plaintiff landlord moves pursuant to CPLR 3212 for summary judgment on the complaint in the principal sum of $688,670.00. The defendant opposes the motion. The motion is granted in part.

II. BACKGROUND

In support of his motion, the plaintiff submits, *inter alia*, the summons and complaint; the lease agreement and rider between the parties dated August 1, 2017 (the lease); a letter from the plaintiff's attorney to the defendant dated July 2, 2018; a notice of lease termination from the defendant's attorney to the plaintiff dated July 27, 2018; the transcript of the deposition of the

defendant; and the affidavits of the plaintiff and nonparty Andrew Azoulay (Azoulay), the real estate agent who brokered the lease on the plaintiff's behalf.

The plaintiff's submissions establish that on August 1, 2017, the parties entered into a written lease agreement for a term commencing on September 1, 2017, and terminating on February 28, 2019. Pursuant to the lease, the defendant agreed to pay to the plaintiff $75,000.00 per month for his use of a penthouse apartment on the seventh, eighth, and ninth floors of the premises located at 471 Washington Street, a condominium building in the Tribeca neighborhood of Manhattan (the premises). Section 16(B) of the lease provided that if the defendant were to abandon the premises before the end of the lease term without the consent of the plaintiff, the lease would continue and the defendant would remain responsible for monthly rental payments through the end of the lease. However, Section 2 of the rider attached to the lease provided that the defendant had "the right to terminate the lease after the first consecutive 12 months, on or after August 30, 2018, on condition that [the defendant] provide notice to vacate lease 60 days prior to termination." Section 26(B) of the lease required any notice from the defendant to the plaintiff to be provided in writing and delivered or sent by registered or certified mail to the address listed on the first page of the lease or another address of which the plaintiff or agent of the plaintiff had given written notice. The address listed on the first page of the lease was that of the premises itself.

The defendant took possession and paid monthly rent pursuant to the lease between September 1, 2017, and May 31, 2018. After May 31, 2018, the defendant ceased paying rent and vacated the premises as of June 21, 2018. On July 2, 2018, the plaintiff sent the defendant a letter advising that the defendant could not terminate the lease until on or after August 30, 2018. The plaintiff did not terminate the lease, however. The plaintiff further stated his position that

notice of termination could not be provided until August 30, 2018, and that rent would be required through October 31, 2018, at minimum. On July 27, 2018, the defendant mailed the plaintiff a notice of lease termination, effective as of September 30, 2018 (the second termination notice). The defendant's notice indicates that the defendant had sent prior written notice of termination on May 3, 2018, prior to vacating the premises (the first termination notice), and that the defendant did not waive his right to seek enforcement of the May 3, 2018, notice. On November 6, 2018, the plaintiff commenced this action, seeking all rent accrued and accruing through February 28, 2019.

In opposition to the plaintiff's motion, the defendant submits, *inter alia*, listing information for the subject premises; the deposition transcript of Azoulay; email exchanges between Azoulay and the plaintiff, Azoulay and the premises' managing agent, Azoulay and the defendant and his wife, and Azoulay and the defendant's assistant; text messages between Azoulay and the defendant's broker; the deposition transcript of the plaintiff; the first termination notice; and the affidavit of the defendant. The defendant's submissions confirm the existence of the lease between the parties and the defendant's vacatur of the premises in June 2018. The defendant's submissions further demonstrate, however, that on May 3, 2018, the defendant sent the first termination notice, an email from the defendant to Azoulay, which announced his intention to vacate the premises in 30 to 45 days and purported to terminate the lease as of the end of June. The defendant sent the first termination notice via email at the direction of Azoulay, provided via text message. The defendant states that Azoulay was the plaintiff's real estate agent and that he negotiated exclusively with Azoulay during lease negotiations. Further, the defendant, his wife, and his assistant engaged in significant communications with Azoulay over the course of the lease with respect to rent payments, issues

the defendant was having at the premises, reimbursement for repairs made to the premises, and the defendant's interest in terminating the lease. The defendant states, and the plaintiff does not dispute, that the defendant surrendered his $75,000.00 security deposit when he vacated the premises.

III. LEGAL STANDARD

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). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers." Vega v Restani Constr. Corp., supra, at 503.

IV. DISCUSSION

The plaintiff avers that he is entitled to recover $688,670.00 under a theory of breach of contract as and for monthly rental payments from June 1, 2018, through February 28, 2019, as

well as various alleged physical damages to the premises. To successfully prosecute a cause of action to recover damages for breach of contract, the plaintiff is required to establish (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009).

The plaintiff offers no proof of any of the physical damage he claims and fails to prove a *prima facie* case in that regard. Additionally, given the plaintiff's admitted acceptance of the defendant's $75,000.00 security deposit, surrendered upon vacatur, the plaintiff is not entitled to recover the same sum for the month of June 2018. However, the plaintiff does establish that he is entitled to recover $150,000.00 for the months of July 2018 and August 2018. Even assuming the validity of the defendant's termination notices, nothing in the lease agreement or rider permitted the defendant to terminate the lease without the plaintiff's consent prior to August 30, 2018, and there is no indication that the lease was ever modified. The defendant presents no argument to the contrary.

While there can be no dispute as to the existence of the lease, the defendant's abandonment of the premises in June 2018, and the defendant's obligation to pay rent for the months of July 2018 and August 2018, the parties' submissions raise, at minimum, issues of fact as to whether and when the defendant properly terminated the lease. As to the first termination notice, while such notice was not delivered to the premises address as provided in the lease, the lease permitted notice to be served at "another address of which [the plaintiff] *or Agent* has given [the defendant] written notice" (emphasis added). The defendant avers that Azoulay, whom the defendant understood to be the plaintiff's agent, expressly advised that the first termination notice could be sent via email. Notwithstanding the plaintiff's insistence that Azoulay was not

his agent and was uninvolved in any activities related to the performance of the lease on the plaintiff's behalf, the defendant's submissions would permit a rational factfinder to determine that the plaintiff's acts and omissions created an apparent agency relationship, (see Hallock v State of New York, 64 NY2d 224 [1984]; Federal Ins. Co. v Diamond Kamavakis & Co., 144 AD2d 42 [1989]). Specifically, the plaintiff communicated with Azoulay regularly about the premises and other matters, relied on Azoulay as his agent during the lease negotiations, instructed Azoulay to communicate with the defendant regarding rental payments to be made to the plaintiff, and permitted Azoulay to pay staff and have repairs performed on his behalf. Moreover, neither the plaintiff nor Azoulay ever advised the defendant that he should not communicate with Azoulay as the plaintiff's agent. Indeed, the plaintiff did not provide any means of communicating with him directly other than to make Azoulay available. Thus, there is a triable issue as to whether the lease was properly terminated by the first termination notice as of the earliest possible termination date, August 31, 2018.

As to the second termination notice, the plaintiff does not submit any proof that such notice was not properly served on him in accordance with the lease terms. Instead, the plaintiff argues that such notice was ineffective because the defendant was already in default on his rental payments at the time it was sent and because it purported to terminate the lease prior to October 31, 2018.

The rider to the lease, which was executed contemporaneously with the lease and is a part thereof, provides that "[i]n the event of any conflict in the terms of the lease and the terms of this Rider, the terms of the Rider shall control." As summarized above, the rider expressly permits the defendant to terminate the lease after the first consecutive 12 months, "on or after August 30, 2018, on condition that [the defendant] provide notice to vacate lease 60 days prior to

termination." This provision directly conflicts with Section 16(B) of the lease, which categorically prohibits the defendant from terminating the lease early absent the consent of the plaintiff. Therefore, the rider controls. Contrary to the plaintiff's contentions, the rider does not condition the ability to terminate the lease on the absence of the defendant's prior default or contain any requirement beyond the specified notice period. Likewise, the plaintiff's proposed interpretation of the lease's early termination provision as prohibiting termination until October 31, 2018, is without any basis in the text. The plain language of the subject provision permits *termination* "on or after August 30, 2018." Nothing prevents the defendant from serving the requisite *notice* of termination prior to that date. Thus, even if the first termination notice was ineffective, the plaintiff's submissions do not establish that the plaintiff may recover rent after September 30, 2018.

In light of the foregoing, the plaintiff is entitled to judgment on his first cause of action only to the extent he seeks rental payments for the months of July 2018 and August 2018. The plaintiff may submit supplemental documentation in support of his request for contractual attorney's fees authorized by Section 20 of the lease within 60 days of this Decision and Order. The plaintiff's motion is denied insofar as it seeks any further relief under the first cause of action.

While the plaintiff states in his initial moving papers that he seeks relief on his second cause of action, sounding in unjust enrichment, and that he further seeks dismissal of the defendant's counterclaims and affirmative defenses, he does not present arguments on any of the foregoing. Moreover, the plaintiff states in his reply that he no longer seeks dismissal of the defendant's counterclaims and affirmative defenses. Accordingly, to the extent the plaintiff

seeks in his notice of motion relief on the second cause of action and to dismiss the defendant's counterclaims and affirmative defenses, his motion is denied.

V. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment on the complaint is granted to the extent that the plaintiff is awarded the sum of $150,000.00, with statutory interest from August 31, 2018, on so much of the first cause of action as seeks to recover rent under the subject lease for the months of July 2018 and August 2018, 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 defendant in the sum of $150,000.00, with statutory interest from August 31, 2018; and it is further

ORDERED that the plaintiff may submit supplemental documentation in support of any claimed attorney's fees authorized by Section 20 of the subject lease within 60 days of this Decision and Order, by filing the same on e-courts and e-mailing a copy to the Part 42 Clerk at SFC-Part42-Clerk@nycourts.gov, and failure to adhere to the foregoing deadline shall result in any such damages being waived.

This constitutes the Decision and Order of the court.

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

DATED: April 15, 2022