555 Hous. Group, LLC v Bushwick Economic Dev. Corp.
2022 NY Slip Op 31576(U)
May 2, 2022
Supreme Court, New York County
Docket Number: Index No. 650787/2021
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **18**

Justice

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555 HOUSING GROUP, LLC

Plaintiff,

- v -

BUSHWICK ECONOMIC DEVELOPMENT CORP.,

Defendant.

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INDEX NO. 650787/2021

MOTION DATE 05/24/2021, 05/24/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 38

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Upon the foregoing documents, defendant moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7), and plaintiff moves for pre-joinder summary judgment pursuant to CPLR 3211 (c).

In determining a motion to dismiss, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

The branch of the motion to dismiss the first cause of action sounding in breach of contract is denied. To allege a breach of lease, plaintiff must allege "(i) the existence of a valid, binding lease, (ii) landlord's performance thereunder, (iii) tenant's failure to pay rent (or

other breach), and (iv) damages suffered by landlord as a result of the breach" (A/R Retail LLC v Hugo Boss Retail, Inc., 149 Misc 3d 627, 637 [Sup Ct, NY County 2021]; see Markov v Katt, 176 AD3d 401, 402 [1st Dept 2019]). Here, the complaint adequately states the elements of the claim. Although defendant argues that the amount of claimed damages should be reduced by the amount of a security deposit, the Court finds that it would be inappropriate to dismiss the claim solely because defendant contests the amount of such damages.

The branches of defendant's motion to dismiss the second, third, and fourth causes of action are granted. Specifically, the second and third claims asserting quantum meruit and unjust enrichment, respectively, should be dismissed as duplicative and otherwise not available to replace a conventional claim for breach of contract (see Corsello v Verizon New York, Inc., 18 NY3d 777, 790-91 [2012]; Centennial El. Indus., Inc. v The New York City Dept. of Citywide Adminstrative Services, 2018 NY Slip Op 31055[U], *18-19 [Sup Ct, New York County 2018] ["where a valid and enforceable written contract governing the subject matter exists, plaintiff is precluded from recovery on a quasi-contract claim"], citing, e.g., Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987]). Additionally, the claim for attorneys' fees is precluded as it is not authorized in the parties' sublease agreement, nor does the plaintiff cite to any other agreement, statute, or court rule (see Gotham Partners, L.P. v High Riv. Ltd. Partnership, 76 AD3d 203, 204 [1st Dept 2010]). In any event, the second, third, and fourth causes of action appear to have been unopposed by plaintiff in opposition to defendant's motion to dismiss.

CPLR 3211 (c) states "Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment." Here, the Court finds it

appropriate to treat plaintiff's motion as one for summary judgment notwithstanding the lack of an express notification by the Court of the same. Plaintiff made a separate motion directly in response to defendant's motion to dismiss, specifically noticing the motion as one for pre-joinder summary judgment pursuant to CPLR 3211 (c). Clearly, the parties are aware of the relief sought in that plaintiff deliberately "charted a summary judgment course" (Richard A. Hellander, M.D., P.C. v Metlife Auto & Home Ins. Co., 48 Misc 3d 59, 61 [App Term, 2d Dept 2015]). The motion permitted defendant to make an appropriate record and provided ample opportunity for it "to submit all of [its] evidence relevant to a determination" on the first cause of action for rent and additional rent (see Nonnon v City of New York, 9 NY3d 825, 827 [2007]). Given that the plaintiff contests only the amount of the liability for the breach of contract claim, the Court finds this matter is one of those ripe for conversion. "After all, if the record is complete (or could be made so upon the conversion), the action can be put to rest expeditiously, sparing the parties needless expense, providing finality to them sooner rather than later, and allowing the court to concentrate its efforts on other matters" (John R. Higgitt, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, C3211:42). Accordingly, the Court will entertain the motion as one for summary judgment.

Plaintiff produced sufficient evidence demonstrating the existence of a sublease, defendant's breach thereof in failing to pay rent and additional rent for the months of April, May, and June of 2020, and resultant damages. In accordance with the lease, plaintiff claims that defendant is responsible for fixed rent in the amount of $470,308.38 and defendant fails to present an issue of fact in this regard. In its motion to dismiss, defendant claims only that the amount of rent should be decreased by the amount of a security deposit (see NYSCEF Doc No. 16 at ¶ 4). In opposition, plaintiff claims that the security deposit was never paid and is therefore

not entitled to any offset (see NYSCEF Doc No 28, Blanco affidavit at ¶ 19). Defendant does not dispute this contention in its reply papers, by, e.g., submitting a party affidavit to dispute the issue. Rather, defendant solely states that such assertion is barred by the parole evidence rule. The Court finds that argument unavailing as the sublease agreement does not infer that defendant had paid the deposit already — rather the language merely states that defendant "agrees to pay" a security deposit (see NYSCEF Doc No 30, parties' sublease at ¶ 8). Accordingly, as there is no issue of fact based upon the evidence submitted, the Court finds that defendant is not entitled to an offset on the purported security deposit as it was not paid.

Plaintiff also seeks the amounts of unpaid fines from violations, expeditor charges in connection with remedying the violations, and unpaid utility charges as additional rent. Plaintiff relies on paragraph 6 of the sublease, which states that defendant is "responsible for all utilities" except water sewer charges, and paragraph 7, which states that defendant "will be liable for all expenses associated with any violations that are issued after the commencement of this sublease resulting from the acts of [defendant], its agents, officers, representatives and/or clients" (see NYSCEF Doc No 30). In opposition to this branch of the motion, defendant claims that the evidence in support of the claim for additional rent is not in admissible form. The Court may take judicial notice of the violations, which appear to be publicly available, and, perhaps more importantly, the Court finds that plaintiff's party affidavits adequately demonstrated proof of payment of the same, thereby evidencing damages for which defendant is liable to plaintiff under the parties' sublease agreement. Additionally, the Con Ed bills were received and paid in the ordinary course of plaintiff's business and sufficiently constitutes admissible evidence as to that element of damages. As there are no disputes as to the substance or content of the evidence, nor

any claims that such elements of damages are not recoverable under the parties' sublease, the Court grants judgment in favor of plaintiff on those items as well.

Accordingly, it is hereby ORDERED that defendant's motion to dismiss (motion sequence no. 1) is granted to the extent of dismissing the second, third, and fourth causes of action and the motion otherwise denied; and it is further

ORDERED that plaintiff's motion for summary judgment per CPLR 3211 (c) (motion sequence no. 2) is granted; and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of $ 609,284.88, with interest at the statutory rate from April 1, 2020, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the Court.

5/2/2022
DATE

ALEXANDER M. TISCH, J.S.C.

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