ESRT 501 Seventh Ave., L.L.C. v Soraya Couture Inc.
2022 NY Slip Op 31723(U)
May 26, 2022
Supreme Court, New York County
Docket Number: Index No. 653689/2021
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS — **Justice** — **PART** 57TR

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ESRT 501 SEVENTH AVENUE, L.L.C.,

Plaintiff,

- v -

SORAYA COUTURE INC.,SOROYA SHAOULIAN

Defendant.

---X

INDEX NO. 653689/2021

MOTION DATE 05/26/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

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

BACKGROUND

Plaintiff commenced this action seeking rent alleged due from defendants the tenant and guarantor for the premises known as Suites 103, B103 and M103 at 501 Seventh Avenue, New York, New York (Subject Premises).

Defendants vacated and surrendered possession of the Subject Premises prior to the end of the lease term and during the height of the pandemic in August 2020. Plaintiff sues for amounts alleged due under the lease and guaranty.

PENDING MOTION

On February 25, 2022, plaintiff moved for dismissal of defendants' affirmative defenses and summary judgment on its claims for unpaid rent and additional rent.

On May 26, 2022, the motion was marked submitted and the court reserved decision.

For the reasons stated below, plaintiff's motion for summary judgment is denied and the motion to dismiss affirmative defenses is granted in part.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980).

Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

This Court denies this motion because it violates the Uniform Rules governing summary judgment applications. Effective February 1, 2021, every motion for summary judgment in this

State, except in lieu of a complaint pursuant to CPLR 3213, must annex a "separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried" (22 NYCRR [Uniform Rules of Supreme and County Court] § 202.8-g[a]; *see also* Siegel, NY Prac § 281 [2021 supp]). Such numbered paragraphs must specifically cite to evidence separately submitted in support of the motion (*see* Uniform Rule 202.8-g[d]). Plaintiff offers no Statement of Material Facts at all — in direct violation of the Rule. Plaintiff's papers also appear to offer no explanation for why plaintiff did not and could not comply with this Rule, or any recognition that this Rule exists.

Additionally, there are questions of fact raised by the opposition papers as to the calculation of amounts due, whether some charges were improperly back billed, as well as defendants' claims of constructive eviction and harassment.

As to the motion to dismiss defenses, defendants have consented to the dismissal of the second affirmative defense asserting lack of personal jurisdiction and the third affirmative defense asserting statute of limitations.

The motion to dismiss the first affirmative defense of failure to state a cause of action is denied. A defense for failure to state a cause of action may be asserted in an answer and is a non-prejudicial notice to an opposing party that the pleader may at some future time move to assert it. *Riland v. Frederic S. Todman & Co.*, 56 A.D.2d 350 [1st Dept, 1977]. As such, courts have generally held that a defense for failure to state a cause of action without specification of any factual allegations in support of the defense may be subject to dismissal only where all of the defendant's other affirmative defenses are stricken (*see, e.g., Raine v. Allied Artists Prods.*, 63 A.D.2d 914, 915 [1st Dept, 1978]; *Bernstein v. Freudman*, 136 A.D.2d 490, 492-93 [1st Dept, 1988]) .

Defendants' fourth affirmative defense alleges that plaintiff's claims are barred by documentary evidence from maintaining this action, defendant's fifth affirmative defense alleges that plaintiff's claims are barred by the doctrine of estoppel, plaintiff's sixth affirmative defense alleges that plaintiff's claims are barred by the statute of frauds. Defendants also assert defense based on laches and waiver.

In support of each of the foregoing affirmative defenses, defendants allege that a prior dispute with respect to use of a portion of the Subject Premises and certain storage premises were resolved by the Third Amendment to the Lease, pursuant to which Defendant Soraya agreed to pay, and Plaintiff agreed to accept, the sum of $28,802,90 in settlement of the alleged arrears, and that Defendant Soraya paid said sum to Plaintiff, but Plaintiff thereafter retroactively billed $41,242.96 to Defendant Soraya. In addition, Defendants allege that Plaintiff improperly billed Defendants for late fees that were not due pursuant to the Lease and/or applicable law.

However, the court does not find that the facts as alleged by defendants would support the defenses of estoppel, waiver, laches or statute of frauds. As such the fifth affirmative defense for estoppel, the sixth affirmative defense that the claims are barred by the statute of frauds, the ninth affirmative defense of waiver, and the tenth affirmative defense of laches are also dismissed.

Similarly, none of the facts alleged by defendants in their opposition papers support the asserted defenses of frustration of purpose, impossibility or unjust enrichment. As such these defenses are also dismissed.

The thirteenth affirmative defense pertaining to failure to mitigate damages is dismissed as there is no duty to mitigate damages in this case. *See, e.g., Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 133 (1995) (holding that "[o]nce the lease is

executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages.").

Defendant's defenses related to constructive or actual eviction and harassment are not subject to dismissal at this time given the facts alleged.

Actual or constructive eviction exists where a landlord wrongfully deprives the tenant of the beneficial enjoyment or actual possession of the Premises (*see, e.g., Barash v. Pennsylvania Term. Real Estate Corp*., 26 N.Y.2d 77, 82-83 [1970]). A commercial tenant may be relieved of its obligation to pay the full amount of rent due where it has been actually or constructively evicted from either the whole or a part of the leasehold (*Id*).

Whether a constructive eviction has occurred is generally a question of fact for the trier of fact (*W. Broadway Glass Co. v. I.T.M. Bar*, 171 Misc.2d 321 [App.Term, 1st Dept., 1996), *citing Melbourne Leasing Co. v. Jack LaLanne Fitness Ctrs*., 211 A.D.2d 765 [2nd Dept., 1995]). A constructive eviction exists where persistent and severe water problems that continue to recur prevent a tenant from operating its business (id). (*See also, H.K.D. Seafood v. 25 N. Moore Assocs*., 271 A.D. 351 [1st Dept., 2000] (*tenants constructive evicted where they were deprived of refrigerated space at the premises*).

Even if a tenant is unable to establish constructive eviction, the tenant may be able to establish a breach of the lease which would give rise to damages potentially calculated by the difference between the value of the leased premises and the value resulting from the breach (see, e.g., *West Broadway Glass Co. v. LT.M. Bar, Inc*., 245 A.D.2d at 232 [App. Term, 1st Dept., 1996]).

New York City Administrative Code §22-902(a) prohibits a landlord from engaging in commercial tenant harassment, and defines same as "any act or omission by or on behalf of landlord that (i) would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property..." New York City Administrative Code §22-902(a) further provides that commercial tenant harassment includes, but is not limited to, "causing repeated interruptions or discontinuances of one or more essential services"; "causing an interruption or discontinuance of an essential service for an extended period of time"; "causing an interruption or discontinuance of an essential service where such interruption or discontinuance substantially interferes with a commercial tenant's business" and/or "engaging in any other repeated or enduring acts or omissions that substantially interfere with the operation of a commercial tenant's business".

The opposition papers submitted by defendants set forth sufficient factual assertions to warrant denial of the defense of partial or actual eviction and harassment at this stage of the litigation.

The affirmative defense seeking attorneys' fees is dismissed. The claim for legal fees must be dismissed because an affirmative defense cannot seek affirmative relief. *P.J.P. Mech. v. Commerce*, 65 A.D.3d 195, 199-200 (1st Dept. 2009). Additionally, "attorneys' fees and disbursements are 'incidents of litigations' and a prevailing party may not collect such fees from the 'loser unless an award is authorized by agreement between the parties or by statute or court rule.'" *Petty v. Law Office of Robert P. Santoriella, P.C.*, No. 155468/2015, 2020 N.Y. Slip Op. 33908 (Sup. Ct. NY Co., Nov. 25, 2020); *Green v. Fischbein Olivieri*, 119 A.D.2d 345 (1st Dept. 1986). Here, there is no agreement between the parties that would entitle defendants to fees, nor

any statute or court rule that would allow them to collect attorneys' fees in the event the court determines they are the prevailing party.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the following defenses are dismissed as un supported by any alleged facts in the pleadings or motion papers: Second Affirmative Defense of Lack of Personal Jurisdiction; Third Affirmative Defense of Statute of Limitations; Fifth Affirmative Defense of Estoppel; Sixth Affirmative Defense based on Statute of Frauds; Ninth Affirmative Defense of Waiver; Tenth Affirmative Defense of Laches; Eleventh Affirmative Defenses of Frustration of Purpose; Twelfth Affirmative Defense of Impossibility of Performance; Thirteenth Affirmative Defense of failure to mitigate damages; Fourteenth Affirmative Defense of unjust enrichment and Nineteenth "Affirmative Defense" related to attorneys fees; and it is further

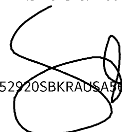
ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the 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);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that the parties shall appear for a virtual preliminary conference on June 22, 2022 at 2:30 PM; and it is further

ORDERED that this constitutes the decision and order of this court.



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5/26/2022		SABRINA KRAUS, J.S.C.	
DATE			

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