

**Premier 1122 Madison Realty, LLC v
Halston N.Y., LLC**

2022 NY Slip Op 31829(U)

June 10, 2022

Supreme Court, New York County

Docket Number: Index No. 150073/2019

Judge: Lyle E. Frank

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

PREMIER 1122 MADISON REALTY, LLC, PREMIER 1122
MADISON AVE., LLC, DORON 1122 MADISON LLC, THOR
1122 MADISON AVENUE LLC

Plaintiff,

- v -

HALSTON NEW YORK, LLC, HALSTON OPERATING
COMPANY, LLC, BEN MALKA,

Defendant.

-----X

INDEX NO. 150073/2019
MOTION DATE 02/16/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 76, 77, 78, 79, 80, 81

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, pursuant to CPLR § 3212; to deem its first and third causes of action in its amended complaint amended to conform to the evidence, pursuant to CPLR § 3025(c); and to dismiss defendants’ affirmative defenses, pursuant to CPLR § 3013. Defendants opposes the instant motion. Based on the reasons set forth below, plaintiff’s motion is denied.

Background

Plaintiff’s predecessor, Premier 1112 Madison, LLC, and defendant Halston New York, LLC, entered into a lease agreement in November 2012 for the entire building located at 1122 Madison Avenue, New York, New York. The lease term was expected to begin on January 1, 2013 and end on December 31, 2022, or in the alternative if the lease did not commence on January 1, 2013, then ten years from the date of commencement. Defendant, Ben Malka, entered into a Guaranty of Lease with plaintiff’s predecessor in November 2012.

On or about January 26, 2015, tenant and guarantor sent plaintiffs' predecessor a letter signed by tenant and guarantor surrendering the premises on February 1, 2015. Plaintiffs were deeded the building by plaintiffs' predecessor in or about April 2015. Plaintiffs acquired the right to the rent arrears accruing under the lease and guaranty as part of the transaction with plaintiffs' predecessor. *See* NYSCEF Doc. 30. Plaintiffs' predecessor terminated the Lease as of March 10, 2015 by serving Tenant with a Notice of Termination, dated February 27, 2015, because Tenant deserted the Building and allowed it to become vacant for ten (10) consecutive days. (Jacobi Affidavit, ¶ 18, Exhibit 8).

Plaintiffs were the owners and landlords of the building as tenants in common beginning in or about April 2015 until in or about May 2019, when they sold the building.

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.

Discussion

Preliminarily, the portion of plaintiffs' motion that seeks dismissal of defendants' counterclaims is granted without opposition. Defendants' fail to substantively oppose plaintiffs'

arguments or contend that that guaranty clause that precludes the guarantor from raising any defenses or counterclaims is invalid.

Plaintiffs' primary contention is that the letter dated January 26, 2015, does not release either the tenant or the guarantor from its obligations under the lease or the guaranty. Plaintiffs contend that the letter improperly gave plaintiffs' predecessor notice for the first time that guarantor wanted to escape his liability 5 months after February 1, 2015. (Jacobi Affidavit, ¶ 9, Exhibit 4).

Plaintiff contends that tenant and the guarantor's rent obligations continued to accrue through May 31, 2019. A rent ledger made and kept by Plaintiffs in the ordinary course of business shows that Tenant and Guarantor had not paid \$166,020.68 in accrued Rent as of January 26, 2015, \$111,079.08 as of February 1, 2015, and \$706,906.09 as of January 2, 2016. (Jacobi Affidavit, ¶¶ 10 – 11, 16, Ex. 5). Further, plaintiff avers that in total, as shown in the rent ledger, the amount of unpaid fixed rent due under the Lease and Guaranty under Article 2.02(a) of the Lease is \$3,503,030.04. (Jacobi Affidavit, ¶ 25, Exhibits 1, 3, 5).

In opposition, defendants argue that the January 26, 2015 letter was proper pursuant to the tenant's exercise of its Early Termination Option Good Guy Clause. To the contrary, the plain language of the Good Guy Clause required Guarantor to give Landlord five (5) months' notice to exercise its terms and the letter indicated Guarantor's exercise of the Good Guy Clause to limit his liability in accordance with that clause. *See* NYSCEF Doc. No. 26.

Defendants contend that the guaranty also provides at paragraph 3 that Guarantor shall be released from his obligations under the Guaranty in the event that certain enumerated conditions occurred (the "Good Guy Clause"). (NYSCEF Doc. No. 26). Specifically, guarantor would be released from his obligations under the guaranty if the following conditions occurred (the

“Surrender Conditions”): (a) guarantor gave Landlord five (5) months’ notice to exercise the terms of the Good Guy Clause; (b) the Lease was in full force and effect and Tenant shall have made payment of all fixed rent and additional rent as of the Surrender Date; (c) Tenant had delivered keys to the premises to Landlord; and (d) Tenant vacated and surrendered the premises and delivered the premises to Landlord vacant and free of all subleases. *See* NYSCEF Doc. No 26.

As to alleged damages, defendants argue that plaintiffs’ submissions are replete with various amounts of alleged rent due and late fees, as well as discrepancies in the amended verified complaint and the affidavit in support of the underlying motion. Specifically, defendants contend that there is a conflict with the numbers provided in discovery in an excel spreadsheet by the plaintiffs with the numbers sought in this motion, and that plaintiffs never terminated the lease, a condition precedent to any damages, and Plaintiffs never sent written demand for late rent charges as required by Articles 2.05, 26, 27, 28, and 33.01 of the Lease. *See* NYSCEF Doc. No. 24.

In sum defendants argue that the surrender conditions occurred, or that there is a genuine issue of material fact regarding if all rent was paid on or by the surrender date or in the alternative that it is inequitable to find that the Good Guy Clause does not apply.

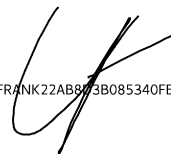
The Court agrees with defendants’ and finds that there are questions of fact that preclude a finding of summary judgment in plaintiffs’ favor. As a preliminary matter there is a question as to what effect, if any, should be given to the January 26, 2015 letter. Notably, there have been no depositions in this action thus it is unclear by the record before this Court what the parties understood the January 26, 2015 letter to mean and if it altered the conduct of either side.

Moreover, as outlined in defendants' papers, there are various inconsistencies with the alleged amount due and owing, accordingly the plaintiff's motion that seeks to amend the complaint to conform to the evidence is denied. Accordingly, it is hereby

ADJUDGED that plaintiffs' motion for summary judgment is denied; and it is further

ADJUDGED that the portion of plaintiff's motion that seeks amended complaint amended to conform to the evidence is denied; and it is further

ORDERED that the portion of plaintiffs' motion that seeks dismissal of defendants' affirmative defenses is granted without opposition.

20220610130027LFRANK22AB873B085340FEA8C00B4D31A4341D


6/10/2022
DATE

LYLE e. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE