SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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WORLD GOLD TRUST SERVICES LLC

Plaintiff,

- v -

CLINTON GROUP, INC.,

Defendant.

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INDEX NO. 652026/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for SUMMARY JUDGMENT.

The motion by plaintiff for summary judgment on damages on its breach of contract claim is denied (liability has already been granted).

Background

Plaintiff is a tenant on the ninth floor of a building located in Manhattan. It claims that defendant is a subtenant and it entered into a sublease with defendant dated August 31, 2015 pursuant to which defendant leased the entire premises from September 1, 2015 until December 30, 2021. Plaintiff claims that defendant began to fall behind on rent in November 2018 and stopped paying altogether in June 2019. Plaintiff admits that it terminated the sublease due to defendant's default but that this does not absolve defendant of its obligation to make rent payments until the end of the sublease.

When plaintiff terminated the sublease, it elected to accelerate future rent payments and seek a lump sum payment in lieu of all other damages on February 28, 2020 (NYSCEF Doc. No.

80, exh C). Plaintiff sought nearly $1.4 million as part of this letter and calculated the fair market rental value of the space at $50 per square foot.

The fair market value of the space is key in this dispute. As part of the complicated formula, the agreement provides that defendant is given a credit in the amount of the fair market value. The lower the fair market value, the less the credit and the more defendant owes. Conversely, the higher the fair market value, the greater the credit and the less defendant owes.

Previously, the Court awarded plaintiff summary judgment on its breach of contract claim with respect to liability only (NYSCEF Doc. No. 48 at 6). Specifically, the Court found that:

> "[D]efendant is correct that plaintiff has not established as a matter of law that it is entitled to the liquidated damages amount it demands. The lease provides a cumbersome and complicated formula for calculating the liquidated damages (NYSCEF Doc. No. 2, ¶ 19.4). It involves computation of the "discounted present value, at a discount rate of six percent (6%) of the Annual Fixed Rent, Additional rent, and other charges which would have been payable by Tenant under this Lease for the remainder of the Lease Term if Tenant had fulfilled all of its obligations hereunder, over and above (ii) the discounted present value, at a discount rate of six percent (6%) of the Annual Fixed Rent, Additional Rent, and other charges that would be received by Landlord (after deducting all reasonably estimated costs of reletting, including, without limitation, brokerage fees, advertising, required tenant improvements and concessions and attorney's fees)" (*id*.).
>
> The dispute appears to be plaintiff's calculation of the liquidated damages based on what it claims to be a fair market value of $50 per square foot (NYSCEF Doc. No. 4 [Notice of Election to Assess Liquidated Damages]). As defendant correctly points out, the Court cannot conclude as a matter of law that this is amount is the fair market value or that plaintiff is entitled to the entire amount it seeks. Plaintiff must prove the basis for its calculation" (*id*. at 5-6).

Now, plaintiff insists that it has proven that the damages it seeks are justifiable under the formula for liquidated damages. It purports to elect its remedies and seeks damages under the first cause of action while voluntarily discontinuing its second cause of action for unjust enrichment. Plaintiff points out that under the sublease, defendant was required to pay certain

fixed rental payments and maintain a letter of credit as security for performance under the sublease. It insists that defendant did not maintain the letter of credit and was late in paying the fixed rental payments. Plaintiff contends it chose to accelerate the amount due by electing to seek liquidated damages under the terms of the sublease.

Plaintiff explains how it calculates the fair market value for the subject space. First, it calculated the fixed rent owed for the remaining term on the sublease. Second, plaintiff assumed that based on a price of $50 per square foot, it would receive $910,416.67 in fixed and additional rent from a hypothetical tenant during the 20 months remaining on the lease. It emphasizes it subtracted $101,937.50 for the costs of subletting, yielding a total of $808,479.17. Plaintiff also discounted the amount to present value at six percent.

In opposition, defendant contends that plaintiff failed to meet its burden to establish, as a matter of law, what the fair market value is for the commercial space at issue. It points out that plaintiff reached agreements with other parties during the relevant time frame for higher prices and questions how the lowest amount in evidence (the $50 per square foot suggested by plaintiff) is the appropriate amount.

Defendant takes issue with plaintiff's purported expert, Ms. McNeil, and insists she was merely a broker rather than an expert witness. It argues that the method used to calculate the fair market value is not the one that she insisted she normally uses or finds reliable.

Defendant also argues that plaintiff's assertion that its offset uses a 20-month re-let period is belied by the fact that it actually used a 19-month period for its calculations and defendant maintains that a 22-month period should have been used. It asserts that the period should begin from the date of the Notice of Election for using the liquidated damages provision which was February 28, 2020. Defendant objects to the over $86,250 in commissions sought as

part of the costs for subletting and argues that plaintiff's broker contemplated between about $45,000 and $68,000 in commission fees.

In reply, plaintiff argues that it met its prima facie burden in its moving papers with the affidavits of its principal executive officer and its real estate broker, both of which establish that the $50 per square foot value is the fair market rental in February 2020. It insists that defendant did not raise any material issues of fact. Plaintiff maintains it was allowed to use a shorter time frame to calculate the offset (20 months) as part of a "practical interpretation" of the lease and that it incorporated a rent concession and some time for the space to be re-let. Plaintiff points out it took much longer for it to be re-let.

Discussion

"A party moving for summary judgment must demonstrate that the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in the moving party's favor. Thus, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833, 988 NYS2d 86 [2014] [internal quotations and citations omitted]).

The central issue in this motion is the calculation of the fair market value of the commercial space. That amount is critical because, under the terms of the sublease, it is used to

offset the amount owed to plaintiff when the plaintiff elects to seek liquidated damages as it did here. The Court find that there are many issues of fact that compel the Court to deny the motion.

The very nature of determining the fair market value by plaintiff's purported expert shows that her conclusion is not amenable to judgment as a matter of law. Ms. McNeil testified that "There's a lot of things that go into deciding which [space] is closest" (NYSCEF Doc. No. 120 at 92) when discussing how to evaluate comparable spaces to calculate the fair market value. She added that some people calculate a fair market value by finding an average of comparable spaces while she "usually chop[s] off the bottom one and chop[s] off the top one and go[es] someplace in the middle (*id*. at 93).

But upon further questioning, Ms. McNeil admitted that the comparable spaces ranged from $40 to $69 per square foot and the remaining numbers in the middle were units for $50, $53, $55, and $68 (*id*. at 94). And despite her discussion of how she picks a rental value, she admitted that $50 was selected (*id*.). Ms. McNeil explained that "It's more of a feel. It's hard to explain, but there's not any one firm formula to do this. It's more of a feel of what you think you can get in the market at that time" (*id*. at 94-95).

Simply put, this Court is unable to find that $50 is absolutely, without question, the fair market value for the space during the relevant time period. Plaintiff's own witness testimony suggests that her calculation was flexible and based on a "feeling." While the Court recognizes that the term fair market value inherently requires an estimate, the Court does not believe it is appropriate to credit plaintiff's preferred calculation on this record. It is clearly a question for a fact finder rather than the Court on a motion for summary judgment. It may be that the fact finder agrees with Ms. McNeil's justifications but this Court is unable to find that the selection of $50 per square foot was correct as a matter of law when it did not comport with her own stated

formula. Somewhere in the middle of $50 and $68 is $59 per square foot. Instead, Ms. McNeil chose the lowest available price. That it was originally listed at $55 per square foot (and later lowered) is of no moment because plaintiff sought $50 in the February 28, 2020 letter and seeks $50 now.

Moreover, defendant submitted documents showing that other (higher) prices were offered to potential subleasees to take over the space in 2020, including $63 per square foot (NYSCEF Doc. No. 111), and $58 (NYSCEF Doc. No. 114). Strangely, plaintiff argues in reply that the asking price of $58 per square foot in July 2020 is close to what plaintiff is now seeking in damages. Of course, there is a significant difference between seeking $50 per square foot and $58 per square foot in a space that is 11,544 square feet. That these deals did not materialize and result in a new sublease is not the point; instead, they provide a data point for a fact finder to calculate the fair market value.

Also of note is that these higher values were offered after COVID-19 had decimated the commercial real estate market whereas the time period at issue here is February 2020 (the date when plaintiff sent the letter to defendant). To be clear, the Court makes no finding about whether (or how much) COVID-19 should be factored into the calculation of the fair market value. That is to be determined by the fact finder, who will have to assess whether it was reasonable to find a new subtenant before the shutdowns associated with the pandemic.

Summary

The Court has no doubt that Ms. McNeil is an experienced and knowledgeable broker. However, the record on this motion prevents the Court from granting it. The parties decided to enter into an agreement with a complicated liquidated damages formula. That formula does not specify a precise process for calculating the fair market value of the commercial space at issue.

Accordingly, it necessarily invites a range of opinions about the best way to reach such a conclusion and so this Court denies the motion.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff is denied.

6/24/2022
DATE

ARLENE BLUTH, J.S.C.

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