2250 Bassford Ave. Props. LLC. v Neighborhood Assn. for Inter-Cultural Affairs, Inc.
2022 NY Slip Op 32320(U)
January 10, 2022
Supreme Court, Bronx County
Docket Number: Index No. 31066/2020E
Judge: Eddie J. McShan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-32

2250 BASSFORD AVENUE PROPERTIES LLC.,

Plaintiff,

-against-

NEIGHBORHOOD ASSOCIATION FOR INTER-CULTURAL AFFAIRS, INC.

Defendant.

DECISION AND ORDER
Index No. 31066/2020E

Present:
HON. EDDIE J. MCSHAN

The following e-filed documents, listed on NYSCEF as document numbers 16 - 38 (Motion Seq. #002) were read on this motion seeking summary judgment and an order of dismissal.

Upon the foregoing cited papers, the Decision and Order on this motion is as follows:

Plaintiff moves for an order granting summary judgment against the Defendant on its first cause of action for breach of the lease in the amount of $842,331.91, and its second cause of action seeking attorney's fees in the amount of $25,000. Plaintiff also moves for an order dismissing Defendant's twelve affirmative defenses pursuant to CPLR 3211(b). Defendant opposes Plaintiff's application. The Court determines Plaintiff's application as follows.

Background

Defendant entered into a five-year Commercial Lease ("Lease") with Plaintiff commencing on January 1, 2019 for a four-story building located at 2250 Bassford Avenue, Bronx, New York ("Premises"). Defendant is a non-profit corporation operating an emergency housing program based on contracts awarded by the City of New York Human Resources Administration ("HRA"). Defendant vacated the subject Premises on or about July 2020. The "Net lease" provision under Paragraph 3 of the Lease provides in relevant part that "[n]otwithstanding any of the terms and conditioned [sic] agreed to by the parties in this lease agreement, this agreement shall terminate upon receipt of notice from City that it is withdrawing funding for the project located at this address." Paragraph 34 of the Lease provides in relevant part that "[t]his lease shall terminate immediately upon receipt of HRA-that program is to terminate and funding is discontinued." In

addition, the final paragraph of the Lease provides in relevant part that "[t]he City of New York HRA shall have the right to terminate this lease with or without reason." Plaintiff commenced the instant action seeking damages based upon Defendant's alleged breach of the Lease.

Summary Judgment

Plaintiff argues that it never received a termination notice from HRA or the City that funds were being withdrawn for the project located in the subject Premises. Plaintiff notes that paragraph 34 provides for termination "upon receipt of HRA-that program is to terminate and funding discontinued." Plaintiff insists that City of New York did not exercise its right to terminate the lease in accordance with the notice provisions as required by the Lease. Plaintiff also insists that the Lease therefore remains enforceable, and that Defendant is liable for its damages. Plaintiff notes that Defendant vacated the premises in July 2020 although the Lease does not expire until December 2023. Plaintiff asserts that Defendant owes rent for the remaining 42 months of the Lease term at $18,000 per month totaling $756,000. Plaintiff also asserts that Defendant has failed to pay water bills in the amount of $66,519.48 (NYSCEF # 22) and sanitation tickets totaling $312.43. Plaintiff seeks an additional $19,000 for the repair costs it incurred after Defendant moved out and an award of reasonable attorney fees in the amount of $25,000 (NYSCEF # 23).

A party moving for summary judgment bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, providing sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party's evidence, most importantly, must be in admissible form (*Friends of Animals, Inc. v Assoc. Fur Mfr., Inc.*, 46 NY2d 1065 [1979]). Once the moving party establishes his prima facie showing, the burden shifts to the nonmoving party to establish, by admissible evidence, the existence of a factual issue requiring a trial to determine the dispute (*Zuckerman v City of New York*, 49 NY2d 492 [1980]). The nonmoving party cannot provide conclusory allegations of fact or law to defeat a summary judgment motion, a "drastic remedy" in this State, this court looks to find issues rather than to determine them, and to evaluate whether the alleged factual issues are genuine or lack substance (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 394, 404-5 [1957]).

Summary judgment should not be granted where there is any doubt as to the existence of a triable issue (*Moskowitz v Garlock,* 23 AD2d 943 [3d Dept 1965]).

The Court finds that Plaintiff established *prima facie* showing of entitlement to judgment as a matter of law on its breach of contract claims relating to the Commercial Lease dated March 1, 2019. It is well-settled that to prevail on a breach of contract claim, plaintiff must establish "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*see Dee v Rakower,* 112 AD3d 204 [2d Dept 2013]; *Harris v Seward Park Housing Corp.,* 79 AD3d 425 [1st Dept 2010]). It is undisputed based upon the record presented that the parties entered into a five-year net lease commencing on January 1, 2019 and terminating on December 31, 2023. The Lease required Defendant to pay monthly rent in the amount of $18,000 to Plaintiff. It is also undisputed that Defendant moved out on or about July 2020. Plaintiff provided uncontested allegations that Defendant failed to tender the monthly rent payments after July 2020, and that Defendant is responsible for the remaining 48 months of rent in accordance with their Lease.

In addition, Plaintiff presented evidence of the water bill arrears on the Premises during Defendant's tenancy. The Court notes that Plaintiff failed to present evidence of the alleged sanitation tickets. Plaintiff established that Defendant failed to surrender the Premises in "as good condition as it was in the beginning of the terms, reasonable use and wear excepted" as required by paragraph 34 of the Lease resulting in $19,000 repair costs. Based upon the Court's findings, the burden shifts to the Defendant to establish, by admissible evidence, the existence of a factual issue requiring a trial to determine the dispute (*Zuckerman v City of New York,* 49 NY2d 492 [1980]).

Defendant asserts that it notified Plaintiff in July 2020 that it was exercising the early termination provisions of their lease because HRA cancelled its program. In support, Defendant annexes email correspondence from Plaintiff on August 7, 2020 (NYSCEF # 31). Defendant argues that the Lease was dependent on its contract with HRA and that it had an "unfettered right to terminate" the Lease upon a showing that its contract with HRA was cancelled. Defendant also argues that Plaintiff's motion for summary judgment and dismissal of its affirmative defenses is

premature because there has been no exchange of discovery. Defendant insists that it does not have the necessary documents to be exchanged in discovery to support its affirmative defenses.

Defendant disputes the outstanding water arrears alleged by the Plaintiff suggesting that Plaintiff or Plaintiff's prior tenant are responsible for the arrears. Defendant suggests that Plaintiff's water bills confirm as much. Defendant indicates that it rejected Plaintiff's attempt to bill it $30,000 for three-month tenancy in April 2020, and in support annexes said correspondence (NYSCEF # 35). Defendant contends that Plaintiff never invoiced it for the purported water charges due at the Premises. Defendant also disputes being issued sanitation tickets during its tenancy and emphasizes that Plaintiff fails to annex the purported sanitation tickets to its moving papers. Defendant asserts that it left the Premises in broom clean condition denying the damages claimed by the Plaintiff. In support, Defendant annexes various photographs (NYSCEF # 33).

The Court finds that Defendant established, by admissible evidence, the existence of a triable issues of fact. Defendant does not dispute that it terminated the Lease prior to its expiration of December 31, 2023. Defendant asserts instead that it exercised its rights to terminate the parties' Lease in accordance with the early termination provisions. Defendant presented uncontested proof that it provided Plaintiff with notice of its intent to terminate the Lease after HRA cancelled their contract. Plaintiff's argument that the relevant provisions of the Lease only grants "the City of New York HRA", a non-signatory to the agreement, the right to terminate the lease is without merit and would require this Court to ignore the other early termination language within the Lease.

"It is settled that the interpretation of the provisions of a lease is governed by the same rules of construction applicable to other agreements, and in those instances where the intent of the parties is clear and unambiguous from the language employed on the face of the agreement, the interpretation of the document is a matter of law solely for the court" (*Horwitz v 1025 Fifth Ave. Inc.*, 34 AD3d 248 [1st Dept 2006]). "A lease is to be interpreted as a whole and construed to carry out the parties' intent, gathered, if possible, from the language of the lease. . . . If the language is clear and unambiguous, no resort may be had to extrinsic or parol evidence of the intentions of the parties" (*see Papa Gino's America, Inc. v Plaza at Latham Associates*, 135 AD2d 74 [3d Dept

1988]). In the instant matter, this Court's review of the parties' Lease as a whole finds that their right to terminate the lease in accordance with the plain language of Paragraph 3 was not forfeited although they further agreed that HRA also had the right to terminate the lease.

As noted above, Paragraph 3 provides "[n]otwithstanding any of the terms and conditioned [sic] agreed to by the parties in this lease agreement, this agreement shall terminate upon receipt of notice from City that it is withdrawing funding for the project located at this address." This unambiguous language clearly protected the parties' right to terminate the Lease "notwithstanding" the terms and conditions of the Lease which also granted the "City of New York HRA" the right to terminate the lease "with or without reason." This Court is not inclined to interpret the entire Lease to mean that the City of New York HRA had the exclusive right to terminate the contract. There is nothing in the Lease that granted the City of New York HRA the exclusive right to terminate the Lease as suggested by the Plaintiff. Moreover, such an interpretation would give no meaning to the relevant provisions of Paragraph 3 and Paragraph 34 of the Lease. There is no dispute on this record that HRA terminated its contract with Defendant and that Defendant provided Plaintiff with notice of the termination. The self-executing language contained in Paragraph 3 and Paragraph 34 of the Lease were not forfeited by the parties' further agreement to give a non-party a right to terminate the Lease.

The Court further finds that Defendant created material questions of fact exist as to Plaintiff's alleged damages for the outstanding water bills and purported repair costs. In addition, Defendant is clearly entitled to discovery as it relates to such claims. Accordingly, Plaintiff's application for summary judgment on its first and second causes of action is denied.

Dismissal of Affirmative Defenses

CPLR 3211(b) provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The party seeking to dismiss an affirmative defense bears the burden of showing that the affirmative defense "are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense" (*see Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912 [2d Dept 2018]). Caselaw

has determined that "the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR 32ll(a)(7), and the factual assertions of the defense will be accepted as true" (*Wells Fargo Bank, N.A.*,160 AD3d 912). Nevertheless, "where affirmative defenses 'merely plead conclusions of law without any supporting facts,' the affirmative defenses should be dismissed pursuant to CPLR 3211(b)" (*see Bank of America, N.A. v 414 Midland Ave. Associates, LLC,* 78 AD3d 746 [2d Dept 2010], quoting *Fireman's Fund Insurance Co. v Farrell,* 57 AD3d 721 [2d Dept 2008]).

Plaintiff's application to dismiss Defendant's first affirmative defense alleging a failure to state a cause of action is denied. Caselaw has determined that an "affirmative defense alleging that the plaintiff failed to state a cause of action, the principal appears to have become accepted that such a defense may be dismissed only if all the other affirmative defenses are found to be legally insufficient" (*see Raine v Allied Artists Production, Inc.,* 63 AD2d 914 [1st Dept 1978]). The Court has not dismissed all of Defendant's other affirmative defenses. Moreover, an application to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7) can be made ay anytime. "[I]nclusion of such defense in an answer is not prejudicial. It serves to give notice to the other side that the pleader may at some future time move to assert it . . . Since a defendant might not want to move under CPLR Rule 3211, preferring a later motion for summary judgment (CPLR 3212(a)), there is no reason why he should not be permitted to allege in his answer that a particular cause of action is substantively deficient, especially when it is recalled that this defect is unwaivable [sic]" (*Riland v Frederick S. Todman & Co.,* 56 AD2d 350 [1st Dept 1977]). As such, Plaintiff's application to dismiss Defendant's first affirmative defense is denied.

The Court grants Plaintiff's application to dismiss Defendant's second, third, fourth, fifth, sixth, eighth, ninth (unjust enrichment),[1] eleventh and twelfth affirmative defenses as they are plead

[1] Defendant pleads two separate "Ninth Affirmative Defense". The first "Ninth Affirmative Defense" is for unjust enrichment and the second "Ninth Affirmative Defense" is for frustration of person and impossibility.

as conclusions of law and not supported by any facts (*Bank of America, N.A.*,78 AD3d 746). Defendant's suggestion that discovery may reveal additional facts, without more, is insufficient to withstand Plaintiff's motion to dismiss (*see Bank of America, N.A.*, at 750).

The Court denies Plaintiff's application seeking to dismiss Defendant's Seventh Affirmative Defense, Ninth Affirmative Defense asserting frustration of purpose and impossibility as well as its Tenth Affirmative Defense alleging its right of terminate the Lease. The Court finds that Plaintiff failed to establish that these affirmative defenses are "without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense" (*Wells Fargo Bank,* 160 AD3d 912).

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that the Plaintiff's application seeking summary judgment on its first and second causes of action is denied in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that Plaintiff's application to dismiss Defendant's affirmative defenses is granted to the extent that Defendant's second, third, fourth, fifth, sixth, eighth, ninth (unjust enrichment), eleventh and twelfth affirmative defenses are dismissed pursuant to CPLR 3211(b) in accordance with the Court's findings hereinabove; and it is further

This shall constitute the decision and order of the Court.

Dated: January 10, 2022

Hon. Eddie J. McShan, J.S.C.