

35th St. Assoc. v 7 & Up Clothing Store, Inc.

2022 NY Slip Op 32377(U)

July 14, 2022

Supreme Court, New York County

Docket Number: Index No. 652839/2021

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

35TH STREET ASSOCIATES,

Plaintiff,

- v -

7 & UP CLOTHING STORE, INC.,
ISAAC SASSON and RAMIN GIDANIAN

Defendant.

-----X

INDEX NO. 652839/2021

MOTION DATE 2-1-22

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover, inter alia, unpaid rent and additional rent allegedly due under a commercial lease and guaranty agreements, the plaintiff landlord, owner of property at 237 West 35th Street in Manhattan, moves pursuant to CPLR 3212 for summary as against defendant 7 & Up Clothing Store, Inc., the tenant of Store #4, and defendants Isaac Sasson and Ramin Gidanian, guarantors on the lease and pursuant to CPLR 3211(b) for dismissal of their affirmative defenses. The defendants oppose the motion. The motion is granted in part.

On a motion for summary judgment, the moving party must make a prima facie showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

In support of its motion, the plaintiff submits, inter alia, a complaint verified by David Eshaghian, managing partner of the plaintiff, an affidavit of Michael Kaufman of the Kaufman

Organization, managing agent for the building, the subject lease and lease extensions, which expired on October 31, 2019, the subject guaranty agreements, a default notice dated April 14, 2021, a rent ledger, an attorney's affirmation and attorney billing records. This proof establishes that the defendant tenant commenced possession of the premises in May of 2009 and remained in possession after October 2019 as a month-to-month holdover tenant on the same terms and paid rent and additional rent for November 2019. The defendants defaulted in their obligations beginning on December 1, 2019, paying only \$11,000.00 of the \$15,000.00 monthly rent, and paid nothing from January 1, 2020, through October 1, 2021, when the instant motion was filed, for a total outstanding balance as of that date of \$334,000.00.

By this proof, the plaintiff has met its burden on the first and fourth causes of action of the complaint alleging breach of contract by establishing (1) the existence of a contract, (2) the plaintiffs' performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). It is well settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff'd 88 NY2d 716 (1996). Furthermore, "where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446–47 (1st Dept. 2012) (quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 [1st Dept. 1991]). The terms of the subject guaranty agreements are clear, unambiguous, absolute, and unconditional and the defendants have not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiffs in regard to the agreements.

In opposition, the defendants submit an affidavit of defendant Ramin Gidanian, an officer of defendant 7 & Up Clothing Store, Inc., an attorney's affirmation and an NYPD "Incident Information Slip" indicating a reported burglary at the subject premises on June 1, 2020. Gidanian does not deny that the defendants failed to pay any amount since December 2019 or that the store is open and operating. He asserts that the store was closed starting in March 2020 due to the COVID-19 pandemic and remained closed for several months thereafter, that the premises were burglarized and damaged in June 2020 during a protest and that the store

re-opened at some point thereafter doing a reduced amount of business. Neither the Gidianian affidavit nor the police report raise an issue requiring a trial. Notably, the submissions do not include an affidavit from defendant Isaac Sasson or any other person with first-hand knowledge of the facts. Since counsel claims no personal knowledge of the underlying facts, the affirmation of the defendants' counsel is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010).

Nor is there merit to the defendants' argument that the motion is premature due to outstanding discovery. They "fail[] to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421 423 (1st Dept. 2015). It is well settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Alcaron v Ucan White Plains Housing Dev. Fund Corp., 100 AD3d 431 (1st Dept. 2012); Kent v 534 East 11th Street, *supra*; Flores v City of New York, 66 AD3d 599 (1st Dept. 2009).

The plaintiff's motion is granted as to the second and fifth causes of action, alleging continuing damages, only to the extent it seeks damages incurred through October 2021 and is otherwise denied as entitlement to that relief is not established on the papers submitted.

In regard to the third and sixth causes of action, which seek contractual attorney's fees pursuant to Article 19 of the lease, the plaintiff has established, through an attorney's affirmation and billing records, entitlement to fees in the sum of \$15,065.00.

In moving to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the burden of showing that the defense is without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541 (1st Dept. 2011). The court should not dismiss a defense where there remain questions of fact requiring a trial. *Id.* The plaintiffs have met their burden, and no questions of fact are raised as to the affirmative defenses. The defendants'

purported affirmative defenses are without merit, are not stated with clarity or are improperly asserted in a conclusory manner without any detail or factual allegations. See Commissioners of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Manufacturers Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). Thus, all affirmative defenses are dismissed.

Generally, interest is computed "from the earliest ascertainable date the cause of action existed". CPLR 5001(b). In a breach of contract action, interest "accrues from the time of an actionable breach." Kellman v Mosley, 60 AD3d at 457 (1st Dept. 2009); see generally Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256 (1998); Love v State of New York, 78 NY2d 540 (1991). The plaintiff is entitled to interest from December 1, 2019.

The parties are encouraged to explore settlement.

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiffs' motion is granted to the extent it seeks summary judgment as set forth herein and granted to the extent it seeks dismissal of the defendants' affirmative defenses, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sum of \$334,000.00, plus costs and statutory interest from December 1, 2019, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiffs and against the defendants, jointly and severally, in the additional sum of \$15,065.00, as attorney's fees.

This constitutes the Decision and Order of the court.

7/14/2021

DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER