Endicott Commercial LLC v Doeblin
2022 NY Slip Op 33837(U)
November 9, 2022
Supreme Court, New York County
Docket Number: Index No. 650393/2020
Judge: Louis L. Nock
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. LOUIS L. NOCK** **PART** **38M**

Justice

----------X

ENDICOTT COMMERCIAL LLC,

Plaintiff,

- v -

CHRISTOPHER DOEBLIN,

Defendant.

----------X

INDEX NO. 650393/2020

MOTION DATE 06/17/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (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, and 34 were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is hereby ordered that the plaintiff's motion for summary judgment (Mot. Seq. No. 001) is decided in accordance with the following memorandum.

BACKGROUND

Endicott Commercial LLC ("Plaintiff") asserts two causes of action against Christopher Doeblin ("Defendant") for breach of a commercial lease. Plaintiff now moves for summary judgment on the complaint and dismissal of all of Defendant's affirmative defenses.

Plaintiff is the landlord of a commercial unit at the 101 West 81st Street Condominium in Manhattan (Complaint, NYSCEF Doc. No. 1 ¶ 1). On May 9, 2014, non-party Book Culture Inc. leased the premises from plaintiff and later assigned the lease on November 7, 2014, to non-party Book Culture on Columbus LLC ("BCC") (Doc. No. 1 ¶ 4-5). Defendant is the guarantor on the original lease and also executed the lease assignment acknowledging that the guaranty remains in effect (Doc. No. 1 ¶ 7).

Plaintiff claims that Defendant defaulted on the lease which expires on July 31, 2026 (Doc. No. 1 ¶ 8). Defendant states that between 2015-2020, BCC fell behind on rent obligations at least four times, but each time BCC would arrange for payment (Defendant Affidavit, NYSCEF Doc. No. 31 ¶ 4-8). Defendant states he spoke with Plaintiff's managing agent, Walker Malloy of Walker Malloy & Co., in arranging a delayed payment (Doc. No. 31 ¶ 3). In the present circumstance, Defendant received notice around November 2019 that BCC was behind on its rent payments (Doc. No. 31 ¶ 9).

After receiving notice from the City Marshall that Plaintiff commenced eviction proceedings on December 17, 2019, Defendant alleges that he talked to Robert Cohen, Chief Operating Officer of Walker Malloy & Co., about arranging another payment plan on that same day (Doc. No. 31 ¶ 10). Defendant alleges that he was reassured by Cohen that Plaintiff would not pursue eviction proceedings and that Defendant promised that all rent would be paid (Doc. No. 31 ¶ 13). BCC was evicted on January 7, 2020 (Doc. No. 31 ¶ 14). At the time of the eviction, BCC failed to pay an account balance of $138,443.02 (Doc. No. 1 ¶ 9). A new tenant, The Strand, was operating out of the premises by February 14, 2020 (Defendant Memorandum of Law, NYSCEF Doc. No. 29 at 3). Plaintiff seeks $138,443.02 in rent and additional rent due through January 2020 and no less than $10,000 in legal fees and costs incurred in connection with the eviction (Doc. No. 1 ¶ 9).

STANDARD OF REVIEW

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a

trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

DISCUSSION

Plaintiff moves for summary judgment on the basis that BCC breached the lease due to nonpayment. First at issue is whether there was a valid oral contract modification to the lease rendering plaintiff's cancellation of the lease inequitable. The lease contains a provision stating, "any executory agreement hereafter made shall be ineffective to change, modify discharge or effect an abandonment … unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought" (Lease, NYSCEF Doc. No. 12 ¶ 20). "A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent" (General Obligations Law § 15-301 [1]). The record is devoid of any such signed written agreement.

The Defendant argues that on at least four prior occasions he was permitted to pay overdue rent after talking with individuals at Walker Malloy & Co; hence, there is a valid oral contract modification. "While there may be circumstances where partial performance of an oral modification may avoid the requirement of a writing, the partial performance must be unequivocally referable to the claimed modification" (*Joseph P. Day Realty Corp. v Jeffrey Lawrence Assocs., Inc.*, 270 AD2d 140, 141 [1st Dept 2000]). Here, there is no evidence of partial performance. In Defendant's affidavit he states that he spoke with representatives of

Walker Malloy & Co. about the late payments and a need to make a payment plan (Doc. No. 31 ¶ 8-10). Defendant alleges that after receiving eviction notices he talked to Cohen of Walker Malloy & Co. who told him that Plaintiff would not initiate eviction proceedings (Doc. No. 31 ¶ 11, 13). Outside of stating that "such arrangements were entered into at least four (4) times" before, the Defendant does not provide any details of the alleged oral modification such as the payment plan or state that there was partial performance of an oral modification that would avoid the requirement of a writing. Even though there was a past history of granting repayment plans, the lease has a no-waiver clause that states, "the failure of Landlord to seek redress for violation … shall not prevent a subsequent act which would have originally constituted a violation from having all the force and effect of an original violation" (Doc. No. 12 ¶ 12). Without a cognizable oral modification, in addition to the no-waiver clause, the court rejects Defendant's argument that it did not breach the lease by nonpayment.

Defendant also takes issue with Walker Malloy & Co. being the managing agent as well as rental broker for Plaintiff. Defendant alleges that Plaintiff paid a self-dealing brokerage fee to Walker Malloy & Co. in order to deplete Defendant's security deposit through application of that deposit toward payment of Walker Malloy's brokerage fee for reletting the premises (Doc. No. 29 at 9). The court disagrees with Defendant's characterization of the relationship between Plaintiff and Walker Malloy & Co. as self-dealing based solely on the fact that Walker Malloy & Co. serves dually as Plaintiff's managing agent and rental broker. Plaintiff has demonstrated that "the security deposit properly is credited under par. 78(c) of the Guaranty towards the monthly post-eviction deficiencies owed under Article 18 ('Article 18') of Tenant's Lease" (Memorandum of Law in Reply, NYSCEF Doc. No. 33 at 5). As asserted by the Plaintiff, the post-eviction deficiencies resulted from Defendant repeatedly defaulting in paying rent, and thus,

incurring fees by the need to find a replacement tenant. Defendant does not deny defaulting. Paragraphs 78 and 79 of the lease, which Defendant signed, state that guarantor is liable in the event of a default including expenses such as nonpayment of rent and reletting expenses (Doc. No. 12 ¶ 78-79).

Nevertheless, Defendant takes issue with Plaintiff's calculation of its damages. First, Defendant argues that the brokerage fee is exorbitant as more than 25% of the new tenant's annual rent (Doc. No. 29 at 5). But Defendant incorrectly calculates this percentage, as the broker's fee is derived from the total term—not annually—which results in the fee being only 1.83% (Doc. No. 33 at 5). Next, Defendant takes issue with the fact that Plaintiff credited its $97,000 security deposit toward the $125,546 in reletting expenses, including the brokerage commission of $121,000, instead of applying it to any monies owed by BCC prior to eviction (Doc. No. 29 at 9). Defendant argues that the brokerage commission is self-dealing and theorizes that it was created to deplete Defendant's security deposit, and therefore, is not a *bona fide* payment for which the deposit can be credited toward (Doc. No. 29 at 9). The court finds these arguments superfluous in light of Plaintiff's modest, and correct, calculation of the broker's fee.

In sum, the court finds that Plaintiff has satisfied its burden to make out a *prima facie* case in support of its motion for summary judgment.

Defendant asserts twelve affirmative defenses. The third affirmative defense, "Plaintiff's claims are barred in whole or in part by applicable statutes of limitations"; fifth affirmative defense, "The Complaint is barred in whole or in part by the doctrine of laches"; and seventh affirmative defense, "Plaintiff's failure to perform its obligations under any agreement(s) it may have had with Defendant has discharged Defendant from any obligations he may have had under

any agreement(s) at issue in this matter," are conclusory and do not contain "sufficiently particular" facts intended to be proved as required by CPLR § 3013 (Doc. No. 4 at 3). Additionally, Defendant's opposition papers are silent in regard to these defenses, and "by his silence in his opposition brief, defendant concedes" that these defenses should be dismissed (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017]). The court grants summary judgment dismissing the third, fifth, and seventh affirmative defenses.

The first and second affirmative defenses are failure to state a cause of action and failure to state a claim upon which relief can be granted (Answer, NYSCEF Doc. No. 4 at 3). In assessing whether Plaintiff has stated a cause of action, the court "determines only whether the alleged facts fit within any cognizable legal theory" (*Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021]). The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Markov v Katt*, 176 AD3d 401, 401 [1st Dept 2019]). Here, Plaintiff has pled that there was a lease between Plaintiff and BCC for which Defendant was a guarantor, and nonpayment of monies due under the lease and guaranty (Doc. No. 1). Plaintiff alleges that as a result of BCC's nonpayment, Plaintiff evicted BCC and now seeks damages as a result of unpaid rent and reletting expenses (Doc. No. 1). Plaintiff has pled sufficient facts that fit within a cognizable legal theory including resulting damages; therefore, the court grants summary judgment dismissing the first and second affirmative defenses.

The fourth affirmative defense states, "the Complaint is barred in whole or in part by the doctrines of waiver, estoppel, discharge, release, and/or ratification" (Doc. No. 4 at 3). The twelfth affirmative defense states, "Some or all of Plaintiff's claims are barred by the consent of Plaintiff, whether express or implied, to Defendant's actions" (Doc. No. 4 at 4). In its opposition

papers, Defendant mentions these two affirmative defenses together, but the Defendant only addresses the asserted defense of waiver. The Defendant is silent as to the defenses of estoppel, discharge, release, ratification, and/or consent; therefore, they are dismissed as Defendant concedes by his silence that the defenses should be waived (*see*, *Steffan v Wilensky*, *supra*). As for waiver, Defendant argues that there was a waiver because of Plaintiff's "repeated allowance of grace periods for the delayed payment of rent" (Doc. No. 29 at 8). However, there is a no-waiver clause in the lease stating "failure of Landlord to seek regress for a violation … shall not prevent a subsequent act which would have originally constituted a violation from having all the force and effect of an original violation" (Doc. No. 12 ¶ 24). Defendant argues that the "no-waiver clause itself may be waived by certain conduct of the parties, which may be developed during discovery" (Doc. No. 29 at 9). However, "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion" (*Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016]). Discovery requests under CPLR 3212(f) in response to a summary judgment motion require Defendant to demonstrate that "facts essential to justify opposition to the motion may lie within [the moving party's] exclusive knowledge or control" (*Barreto v City of N.Y.*, 194 AD3d 563, 564 [1st Dept 2021]). In the present matter, Defendant states that he is "entitled to that discovery to further develop the (bare) record," speculating that discovery will help develop his asserted waiver defense without alleging any specific discovery which is needed that lies within the Plaintiff's exclusive knowledge (Doc. No. 29 at 9). Defendant provides an affidavit in which it only asserts that the Defendant had a conversation with Walker Malloy & Co. and defendant promised to repay the sums owed. The record is devoid of any payment plan or details about how the repayment was to proceed. Without further elucidation by the Defendant

regarding the details of the asserted oral arrangement to continue the landlord/tenant relationship on modified terms – which ought to be in Defendant's own knowledge – Defendant has not met his burden in opposition to plaintiff's *prima facie* showing in support of summary judgment (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] ["the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form **sufficient** to establish the existence of material issues of fact which require a trial of the action"] [emphasis added]). Thus, the court grants summary judgment dismissing the fourth affirmative defense.

Defendant argues that the sixth affirmative defense, "Any damages which Plaintiff claims to have sustained were caused in whole or in part by reason of Plaintiff's conduct, negligence and/or omissions, and he has failed to mitigate same," and the eighth affirmative defense, "Plaintiff has suffered no damages or has suffered damages that are inconsequential or de minimus" should not be dismissed (Doc. No. 4 at 3-4). Defendant alleges that "the 'brokerage commission' was not a bona fide payment, and once it is shown to be the product of self-dealing, Plaintiff will have no or de minimus damages" after the security deposit of $97,000 is applied to only the unpaid rent (Doc. No. 29 at 9). The court does not accept the argument that defendant is not liable for reletting-related brokerage expenses – as a form of self-dealing – because the lease states:

> Tenant shall also pay Landlord as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants…. In computing such liquidated damages there shall be added to the said deficiency such expenses as Landlord may incur in connection with re-letting, such as legal expenses, attorneys' fees, brokerage, advertising and for keeping the demised premises in good order or for preparing the same for re-letting.

(Doc. No. 12 ¶ 18.) The court also finds that Plaintiff has sufficiently argued its alleged damages as previously discussed along with submitting BCC's ledger demonstrating amounts due under

the lease (*see*, Doc. No. 15). The court grants summary judgment dismissing the sixth and eighth affirmative defenses.

The ninth affirmative defense states, "Plaintiff's claims are barred in whole or in part by the doctrine of unclean hands" (Doc. No 4 at 4). "Doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages" (*Manshion Joho Ctr. Co. v Manshion Joho Ctr., Inc.*, 24 AD3d 189 [1st Dept 2005]). The present action only seeks damages. Since the doctrine of unclean hands is an equitable defense, the court grants summary judgment dismissing the ninth affirmative defense.

The tenth affirmative defense states, "Plaintiff's wrongful conduct obviated any obligations that Defendant may have had under any agreement(s) at issue in this matter absent such wrongful conduct." Defendant argues that discovery will reveal that Plaintiff intentionally depleted Defendant's deposit by paying Walker Malloy a $121,000 brokerage commission (Doc. No. 29 at 10). Defendant also argues that Plaintiff breached an orally modified contract in evicting BCC (Doc. No 29 at 3). As previously discussed, having a managing company that is also a rental broker is not inherently wrongful, and the court does not find evidence of a valid contract modification. Accordingly, the court grants summary judgment dismissing the tenth affirmative defense.

The eleventh affirmative defense states, "Some or all of Plaintiff's claims are barred by the doctrines of equitable and/or promissory estoppel" (Doc. No. 4 at 4). First, equitable estoppel "is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought" (*Nassau Trust Co. v Montrose Concrete*

Prods. Corp., 56 NY2d 175, 184, *rearg denied* 57 NY2d 674 [1982]). Second, promissory estoppel requires that the Defendant allege "(1) an oral promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance" (*New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]). Defendant alleges that he "spoke with Walker Malloy representatives … concerning these letters [late payment notifications], and the need to make a payment arrangement" (Doc. No. 31 ¶ 10). Defendant also states that "such arrangements were entered into at least four (4) times during the lease period" (Doc. No. 31 ¶ 8). After receiving eviction notices, Defendant states he spoke to Cohen of Walker Malloy & Co. who alleged told Defendant that Plaintiff would not initiate eviction proceedings and Defendant assured that rent would be paid (Doc. No. 31 ¶ 13). The record is devoid of any evidence demonstrating the details of the promise, including how the overdue rent should be paid. Defendant does not detail any specific "words or conduct" by Plaintiff regarding this point that would amount to a misrepresentation, as required for application of the doctrine of equitable estoppel (*see, Rashbaum v Tax Appeals Tribunal*, 229 AD2d 723 [3d Dept 1996]). Instead, Defendant relies on past arrangements to repay overdue rent. For the same reasons, the promise as pleaded is not "sufficiently clear and unambiguous" as required by the elements of promissory estoppel (*New York City Health & Hosps. Corp., supra*). Therefore, the court grants summary judgment dismissing the equitable and promissory estoppel affirmative defenses.

Finally, the lease provides:

> Guarantor will not set up or claim any defense, counterclaim, set-off or other objection of any kind to the suit, action or proceeding at law, in equity, or otherwise, or to any demand or claim that may be instituted or made under and by virtue of the Guaranty.

(Doc. No. 12 ¶ 78[c].)

For all the foregoing reasons, the court grants Plaintiff's motion for summary judgment on the complaint and dismissal of Defendant's affirmative defenses.

According, it is hereby

ORDERED that Plaintiff's motion for summary judgment on its two causes of action in the complaint is granted; and it is further

ORDERED that Plaintiff's motion for summary judgment dismissing Defendant's affirmative defenses is granted; and it is, therefore,

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff, Endicott Commercial LLC, having an address c/o Smith & Krantz, LLP, 122 East 42nd Street, Suite 1518, New York, New York 10168, against defendant, Christopher Doeblin, having an address at 535 West 11th Street, Apt 3H, New York, New York 10025, in the principal sum of $138,443.02, with interest accrued thereon at the statutory rate from January 7, 2020,[1] and continuing to so accrue until the date of satisfaction of judgment, together with costs and disbursements as taxed by the Clerk pursuant to a Bill of Costs to be filed by plaintiff, and that the plaintiff have execution therefor; and it is further

ORDERED that plaintiff is entitled to its reasonable attorneys' fees incurred in this action as set forth in the Lease (NYSCEF Doc. No. 12 Art. 18), in an amount to be heard and determined by this court at a hearing on Thursday, December 15, 2022, at 3:00 p.m., at the Courthouse, 111 Centre Street, Room 1166, New York, New York.

[1] Plaintiff suggests an accrual start date of January 7, 2020, the date of eviction, in its complaint. The court finds this date to be consistent with CPLR 5001(b) as a reasonable intermediate date for the accrual of interest within the context of this case.

This constitutes the decision and order of the court.

11/9/2022
DATE

LOUIS L. NOCK, J.S.C.

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