

Kato Intl. LLC v Gerard Fox Law, P.C.

2023 NY Slip Op 30125(U)

January 5, 2023

Supreme Court, New York County

Docket Number: Index No. 652468/2018

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

KATO INTERNATIONAL LLC,
Plaintiff,

- v -

GERARD FOX LAW, P.C., and GERARD P FOX,
Defendants.

INDEX NO. 652468/2018

MOTION DATE 07/11/2022,
07/11/2022

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 008) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 223, 224, 225, 226, 227

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

This is an action for, inter alia, money damages arising from the breach of a commercial lease between the plaintiff-landlord, Kato International, LLC (the plaintiff), and the defendant-tenant, Gerard Fox Law, P.C. (the tenant), and of a personal guaranty of the lease by the defendant Gerard P. Fox (the guarantor, and together with the tenant, the defendants). By a decision and order dated May 26, 2020, the court granted the plaintiff's motion pursuant to CPLR 3212 for summary judgment on the issue of liability on the complaint, with the issue of damages and attorney's fees due to the plaintiff to be determined at trial. On June 17, 2021, the Appellate Division, First Department, affirmed. The plaintiff now moves pursuant to CPLR 3212 for summary judgment against the defendants, jointly and severally, in the total sum of \$8,908,416.74 (SEQ 007). The defendants oppose and separately move pursuant to CPLR 3212 to dismiss the plaintiff's damages claims in their entirety (SEQ 008). The plaintiff opposes the defendants' motion. For the following reasons, the plaintiff's motion is granted and the defendants' motion is denied.

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 such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez v Prospect Hosp., *supra*; Zuckerman v City of New York, *supra*.

While no party has raised the issue, the court notes that the plaintiff's application constitutes its second successive motion for summary judgment. Successive summary judgment motions are generally disfavored, absent a showing of newly discovered evidence or other sufficient justification. See Amill v Lawrence Ruben Co., Inc., 117 AD3d 433 (1st Dept. 2014). Sufficient justification exists where the successive motion is substantively valid and enhances judicial efficiency. See MTGLQ Investors, LP v Collado, 183 AD3d 414 (1st Dept. 2020); Landmark Capital Investments, Inc. v Li-Shan Wang, 94 AD3d 418, 419 (1st Dept. 2012). The plaintiff's first motion for summary judgment was made pre-discovery and sought judgment on the issue of liability and damages through the date of the tenant's vacatur. The plaintiff did not submit proof of damages after the tenant's vacatur, as it requested that such damages, along with attorney's fees, be determined at a hearing. Following the court's disposition of the first motion, which reserved the issue of damages for trial, the parties completed discovery on damages. Additionally, on February 4, 2022, the plaintiff stipulated to the waiver of its claim for additional rent, as defined by the lease, excepting interest, late charges, and attorney's fees. The plaintiff's stipulation eliminated from this action an element of damages as to which the defendants raised a triable issue of fact, as noted in the court's May 26, 2020, decision and order. In light of the foregoing, and mindful of the defendants' failure to claim any prejudice arising from consideration of the instant summary judgment motion, the court finds that sufficient justification for the motion is demonstrated.

In support of its motion, the plaintiff submits, *inter alia*, the affidavit of its asset manager, Robert Bakst (Bakst); the subject commercial lease with amendment and guaranty agreement; the notice of default the plaintiff sent to the tenant; the tenant's notice of surrender; and a spreadsheet breaking down the total arrears sought pursuant to the lease and guaranty. Contrary to the defendants' assertions, Bakst, whose previous affidavit was considered by the court in determining the plaintiff's initial summary judgment motion, is a person with knowledge sufficient to provide credible information as to the defendants' rent obligations under the lease and guaranty and the plaintiff's business activities and records, including with respect to the subject premises.

The lease and accompanying amendment, dated as of October 2015, provide for the payment of base rent, among other things, by the tenant in exchange for its occupation of certain premises located on the 26th floor of the building known as 12 East 49th Street in Manhattan (the premises). The tenant was obligated to pay base rent on a monthly basis, and, upon early termination of the lease due to the tenant's default, was liable for all rental arrears outstanding as of the date of vacatur. After vacatur, the lease dictated that the tenant would remain obligated to the plaintiff, on a monthly basis, for any deficiency between the rent for the remainder of the lease term, set to expire in June 2027, and the net amount of rents collected after re-letting, minus the plaintiff's reletting expenses, including attorney's fees, alteration costs, and brokerage commissions. The plaintiff could also elect, at any time, to recover from the tenant on demand, in lieu of any further deficiency payments, a sum equal to the amount by which the rents for the period constituting the unexpired portion of the lease exceeds the then fair market rental value of the premises for the same period, both discounted to present value at a rate of 6% per annum, less the aggregate amount of deficiencies previously collected by the plaintiff for the same period. The lease further provided, in relevant part, that the tenant would be subject to (1) late charges of \$0.05 on each dollar of rent that remained unpaid 15 days after it became due and (2) interest charges in the amount of prime plus 4% on rent that remained unpaid five days after it became due.

The tenant vacated and surrendered the premises as of May 7, 2018. At that time, it is undisputed that the tenant owed \$441,000.00 in base rent under the lease and amendment. Through May 2022, when the plaintiff filed the instant motion, \$5,230,875.00 in additional base rent accrued. During such period, the plaintiff re-let the premises to three separate tenants and collected \$2,095,894.35 in rent from such tenants. Nonetheless, Bakst explains in his affidavit that the plaintiff incurred additional expenses—namely, build-out costs for the new tenants, improvements to common areas, brokerage commissions, attorney's fees, and moving costs—totaling \$2,853,125.50, such that the tenant is not entitled to any reduction in the amount owed under the lease. Moreover, Bakst states that the fair market value of the premises after May 2022 through the remainder of the lease term, based on the highest rent the plaintiff was able to achieve for re-letting the premises, is \$3,375,77.60, or \$2,522,577.60, discounted to the present value. This is \$2,773,614.60 less than the rent due under the lease for the same period, discounted to its present value, which is \$5,296,192.30. Finally, \$792,333.09 in interest and \$283,593.75 in late charges under the lease has accrued on the unpaid base rent owed by the tenant through May 2022.

Upon the foregoing, the plaintiff demonstrates entitlement to the sum of \$8,908,416.74, representing base rent, accelerated base rent, interest, and late charges, authorized by the lease from February 2018 through the conclusion of the

lease term, less the tenant's letter of credit in the sum of \$613,000.00. Bakst avers in his affidavit that the plaintiff waives its demand for attorney's fees.

The defendants fail to raise any triable issue in opposition to the plaintiff's showing. First, in defiance of the court's conclusions in its May 26, 2020, decision and order, and the Appellate Division, First Department's June 17, 2021, affirmance of such decision and order, the defendants continue to dispute that they are subject to any liability at all under the lease and guaranty. To be sure, in both their opposition and in their motion to dismiss the plaintiff's damages claims, the defendants almost exclusively repeat arguments made in opposition to the plaintiff's initial motion for summary judgment (SEQ 001) and arguments made in support of the defendants' motion to renew their opposition to the plaintiff's initial summary judgment motion (SEQ 006), the latter of which was denied by a decision and order dated September 27, 2022.

The issue of liability has been foreclosed since May 26, 2020. The defendants' hope for appellate relief from the court's May 26, 2020, order ended when they were denied leave to appeal to the Court of Appeals, on November 23, 2021. While the defendants have recently adopted a new strategy to challenge the court's decision, the court explained in its September 27, 2022, decision and order that the hiring of a purported expert to espouse legal arguments that could have been (and, to an extent, already were) made years prior is not a basis for renewal pursuant to CPLR 2221(e). Thus, the court's May 2020 decision and order remains law of the case. The defendants' challenge to such law in (1) opposition to a motion for summary judgment on the issue of damages and (2) a motion for summary judgment dismissing the plaintiff's claim for damages is procedurally improper. It is also without any merit, for the reasons explained by this court in prior orders.

The court has considered the defendants' remaining arguments in opposition to the plaintiff's motion and in support of their own motion and likewise finds them to be without merit. The defendants do not dispute that they have paid no rent due under the lease since January 2018. Instead, they assert that the plaintiff's calculations are inaccurate because the defendants subjectively disagree with the amounts the plaintiff provides for the fair market value of the premises through the remainder of the lease, the cost the plaintiff incurred in re-letting the premises, and the interest penalty on unpaid rent. Notwithstanding that the parties have completed discovery and the Note of Issue was filed March 28, 2022, the defendants present no evidence that the plaintiff's calculations are inaccurate. Nor do they present any alternative to the plaintiff's method of calculating future fair market value, any cogent reason why Bakst's sworn testimony on issues such as re-letting costs should be ignored, or any specific challenge to the prime interest rates the plaintiff used to calculate interest owed on unpaid rent. Rather,

the defendants limit themselves to labeling the figures claimed by the plaintiff as “preposterous,” “unfathomable,” and “outrageously inflated,” without any substantive basis for objection. Inasmuch as the defendants’ arguments rest upon speculation and conclusory allegations, they do not raise a triable issue sufficient to defeat the plaintiff’s prima facie showing of entitlement to summary judgment on the issue of damages. See Schloss v Steinberg, 100 AD3d 476 (1st Dept. 2012). For these reasons, the plaintiff’s motion is granted and the defendant’s motion is denied.

Finally, the defendants’ counterclaims, but sounding in breach of lease, breach of implied duty of good faith and fair dealing, and fraudulent inducement, are severed and shall continue. Because the counterclaims are thinly pleaded the proof presented to the court, including release and waiver language in the subject lease and guaranty, the viability of the counterclaims is doubtful. However, the plaintiff has made no application to dismiss them at this juncture.

Accordingly, it is

ORDERED that the plaintiff’s motion pursuant to CPLR 3212 for an award of summary judgment against the defendants (MOT SEQ 007), jointly and severally, in the total sum of \$8,908,416.74, is granted; and it is further


ORDERED that the Clerk shall enter judgment in favor of the plaintiff, Kato International, LLC, and against the defendants, Gerard Fox Law, P.C., and Gerard P. Fox, jointly and severally, in the sum of \$8,908,416.74, with interest from the date of judgment; and it is further

ORDERED that the defendants’ motion pursuant to CPLR 3212 for summary judgment dismissing the plaintiff’s claims for damages (MOT SEQ 008) is denied; and it is further

ORDERED that the defendants’ counterclaims are severed and shall continue.

This constitutes the Decision and Order of the court.

1/5/2023
DATE


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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
SEQ 007	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
SEQ 008	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
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