SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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558 SEVENTH AVE CORP., TWO LIONS CAPITAL LLC, and 200 WEST 40, LLC, as tenants in common,

Plaintiffs,

- v -

TIMES SQ PHOTO, INC., and RAYMOND SAKA,

Defendants.

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INDEX NO. 653090/2020

MOTION DATE 08/25/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for RESTORE.

In this action to recover unpaid rent and attorney's fees, the court, by a decision and order dated January 11, 2021, denied the motion of the plaintiff property owners for summary judgment against the defendants, Times Sq Photo, Inc. (the tenant) and Raymond Saka (the guarantor), under a lease agreement between the tenant and the plaintiffs, denied the defendants' cross motion to dismiss the complaint as against the guarantor for improper service, and dismissed the complaint without prejudice to seek relief in the proper forum (SEQ 001).

By an order dated May 20, 2021, the Appellate Division, First Department, reversed the court's denial of summary judgment on liability as against the tenant and *sua sponte* dismissal of the complaint, reinstated the complaint, and granted the plaintiffs' motion as to liability on the first cause of action for unpaid rent against the tenant. The First Department preserved the defendants' arguments with respect to the plaintiffs' treatment of a security deposit and the application of Administrative Code of City of NY § 22-1005 to bar recovery from the guarantor for certain periods, holding that the same could be raised at trial.

The plaintiffs now move to restore the matter to the court's calendar. The plaintiffs further move pursuant to CPLR 3025(c) to amend the pleadings to conform to the evidence, pursuant to CPLR 3212 for summary judgment against the guarantor in the sum of $1,906,894.20, and pursuant to CPLR 3211 and CPLR 3212 to dismiss the defendants' affirmative defenses. Finally, the plaintiffs seek to set the matter down for a hearing on damages and attorney's fees. The defendants oppose the motion and cross move to file an amended answer asserting counterclaims against the plaintiffs and for further disclosure pursuant to CPLR 3212(d). The plaintiffs oppose the cross motion.

The branch of the plaintiffs' motion seeking to restore the matter to the court's calendar is granted insofar as restoration is compelled by the First Department's May 20, 2021, order.

As to the plaintiffs' application to amend the complaint, the plaintiffs purport to proceed under CPLR 3025(c). However, the proper vehicle for the relief sought is CPLR 3025(b) where, as here, "limited discovery, if any, ha[s] taken place and no evidentiary hearing or trial ha[s] occurred." Janssen v Incorporated Village of Rockville Centre, 59 AD3d 15, 24 (2nd Dept. 2008). The court thus deems the application made pursuant to subsection (b) of the statute. In that regard, it is well settled that leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015).

The plaintiffs meet their burden and establish that amendment of the complaint is appropriate to reflect additional unpaid rent that has accrued since the inception of this action and a demand for accelerated rent pursuant to Paragraph 18 of the lease, which the plaintiffs' agent, Morwin Schmookler, contends in an affidavit was triggered when the tenant unilaterally abandoned the subject premises in February 2021. The defendants do not demonstrate any surprise or prejudice in allowing the amendment. The court notes, however, that the plaintiffs fail to attach a proposed amended complaint to their moving papers, as required by statute. See CPLR 3025(b). While this typically warrants denial of a motion pursuant to CPLR 3025(b), the court may providently overlook such defect where the proposed amendment is adequately described in the moving papers. See Dogwood Residential, LLC v Stable 49, Limited, 159 AD3d 490, 492 (1st Dept. 2018); Putrelo Const. Co. v Town of Marcy, 137 AD3d 1591, 1592 (4th Dept. 2016). Here, Schmookler's affidavit clearly describes the proposed amendments the plaintiffs seek, which are limited to adding factual allegations as to the tenant's unilateral abandonment of the premises and the applicability of Paragraph 18, and updating the figures sought as damages. Compare WVH Housing Development Fund Corporation v Brooklyn Insulation and Soundproofing, Inc., 193 AD3d 523, 524 (1st Dept. 2021) (motion to amend properly denied because it was "unclear from the moving papers submitted what specific amendments were intended"). Thus, leave to amend is granted.

The plaintiffs previously moved for summary judgment against the guarantor (SEQ 001). The court, in its January 11, 2021, decision and order, denied such relief on the jurisdictional grounds described above. The First Department did not address the plaintiffs' entitlement to judgment against the guarantor because the plaintiffs did not seek such award in their appellate brief. The plaintiffs now move again for summary judgment on their amended claims in the increased sum of $1,906,894.20 against the guarantor.

It is well-settled that a party may move for summary judgment only after issue has been joined. CPLR 3212(a); see City of Rochester v Chiarella, 65 NY2d 92, 101 (1985); SHG Resources, LLC v SYTR Real Estate Holdings LLC, 201 AD3d 610, 611 (1st Dept. 2022);

Valentine Transit, Inc. v Kernizan, 191 AD2d 159, 160 (1st Dept. 1993). Thus, "a summary judgment motion brought prior to service of an answer should [ordinarily] be dismissed as premature." Stephanie R. Cooper, P.C. v Robert, 78 AD3d 572, 572-73 (1st Dept. 2010) (citing Republic Natl. Bank of N.Y. v Luis Winston, Inc., 107 AD2d 581, 582 [1st Dept. 1985]). Where, as here, leave to file an amended complaint has been granted, the amended complaint supersedes the original complaint and becomes the only complaint in the case. See Plaza PH2001 LLC v Plaza Residential Owner LP, 98 AD3d 89, 99 (1st Dept. 2012); Halmar Distributors, Inc. v Approved Mfg. Corp., 49 AD2d 841, 841 (1st Dept. 1975). Consequently, "an amended complaint should ordinarily be followed by an answer" prior to entry of summary judgment. Stephanie R. Cooper, P.C. v Robert, supra at 573; see, e.g., Hoppenfeld v Hoppenfeld, 220 AD2d 302, 303 (1st Dept. 1995); Seidler v Knopf, 186 AD3d 886, 888 (2nd Dept. 2020); R& G Brenner Income Tax Consultants v Gilmartin, 166 AD3d 685, 688 (2nd Dept. 2018). The court may permit exception to this rule, (see CPLR 3025[d]), in its discretion where, *inter alia*, "(1) no new factual allegations were asserted in the amended complaint; (2) changes in the amended complaint had no bearing on the counterclaims asserted in the original answer; and (3) plaintiff had notice of the counterclaims being asserted." Bahar v Sanieoff, 210 AD3d 459, 460 (1st Dept. 2022); see Stephanie R. Cooper, P.C. v Robert, supra at 573.

Here, the proposed amended complaint, which has yet been filed, does not merely update the plaintiff's damages figures. It also adds new factual allegations related to the tenant's purported unilateral abandonment of the premises, which the plaintiffs contend triggered a rent acceleration clause that would increases the defendants' damages exposure more than tenfold, from $214,305.00 to $2,196,844.20. The defendants' opposition indicates that the defendants intend to raise defenses to this new claim not previously available to them, including alleging that the accelerated rent constitutes an unenforceable penalty. Moreover, on the instant summary judgment application, the plaintiffs exclusively seek to recover damages provided for in the rent acceleration clause against the guarantor. In other words, the plaintiffs seek an award premised on the allegations made in their amended pleading. Under these circumstances, the court determines that an answer to the allegations in the amended complaint is required before summary judgment may issue. The branch of the plaintiffs' motion seeking summary judgment is therefore denied as premature.

The court further notes that, even if it were to consider the merits of the plaintiffs' summary judgment application, the plaintiffs do not claim any sum that would be beyond the protections of Administrative Code of City of NY § 22-1005 (the guaranty law). The guaranty law provides that lease guarantors, under certain circumstances, will not be held liable for unpaid rent owed between March 7, 2020, and June 30, 2021. "The period for determining whether [the guaranty law] applies 'is the time of the "event causing [guarantors] to become liable."'" 274 Madison Company, LLC v Vieira, 205 AD3d 403, 404 (1st Dept. 2022) (quoting 3rd & 60th Assoc. Sub LLC v Third Ave. M & I, LLC, 199 AD3d 601, 602 [1st Dept. 2021] [quoting Administrative Code of City of NY § 22-1005]). The First Department has confirmed that where, as here, the parties acknowledge the guaranty law is applicable and the guarantor "became liable for tenant's accelerated rent during the statutory period," the guarantor is protected. 274 Madison Company, LLC v Vieira, supra at 404-05. Since, by the plaintiffs' own account, the

subject rent acceleration clause was triggered in February 2021, the guarantor cannot be held liable for the rent owed through the remainder of the lease period. See id.

The branch of the plaintiffs' application seeking to dismiss the defendants' affirmative defenses, to the extent not already resolved by the First Department's May 20, 2021, order granting summary judgment against the tenant on the first cause of action, is denied as academic in light of the amended complaint, which will require a new answer to be filed. CPLR 3025(d).

Finally, the branches of the plaintiffs' application seeking an award of contractual attorney's fees and to set the matter of fees and damages due to the plaintiffs down for a hearing are denied as premature, in light of the amended complaint and denial of the plaintiffs' motion for summary judgment against the guarantor.

The defendants' cross motion to amend their answer is academic since the defendants are required to file a new answer in response to the amended complaint. CPLR 3025(d); Bahar v Sanieoff, supra at 460; R& G Brenner Income Tax Consultants v Gilmartin, supra at 688. However, the defendants may not include in their answer any affirmative defenses previously disposed of by the First Department when it granted summary judgment on the plaintiffs' first cause of action. "Once a court has granted or denied a summary judgment motion based on the facts adduced before it, the matter is *res judicata*…; new life may not be breathed into it through permissive repleading, even upon a showing of merit." Buckley & Co., Inc. v City of New York, 121 AD2d 933, 935 (1st Dept. 1986); see Baker v 16 Sutton Place Apartment Corp., 2 AD3d 119, 120 (1st Dept. 2003). This prohibition includes the third, fourth, and fifth defenses premised on COVID-19, and the first affirmative defense of unclean hands, which the First Department expressly rejected. As the First Department stated, the defendants may use the plaintiffs' application of the security deposit only as an argument for a reduction in damages at trial. While the First Department did not have occasion to directly address the defendants' remaining affirmative defenses, the court notes that, in granting summary judgment to the plaintiffs on the first cause of action, the First Department implicitly determined that the defendants raised no material issue as to any affirmative defense insofar as asserted on behalf of the tenant. Thus, the defendants are precluded from reviving, or introducing new, affirmative defenses on behalf of the tenant as to the first cause of action for unpaid rent.

The branch of the defendants' cross motion seeking further disclosure is granted to the extent that the court directs the parties to appear for a compliance conference. The court notes that the parties previously appeared for a preliminary conference on October 1, 2020, at which time a Note of Issue deadline was set for February 19, 2021. However, the court's dismissal of the action removed it from the discovery calendar. The parties are thus entitled to seek an extension of the Note of Issue deadline from the court at the compliance conference.

Accordingly, it is

ORDERED that the plaintiffs' motion is granted to the extent that (1) this matter is restored to the court's active calendar, and (2) the branch of the motion which is pursuant to CPLR 3025(c) is deemed made pursuant to CPLR 3025(b), and is granted, and the motion is otherwise denied, without prejudice, as premature and/or academic; and it is further

ORDERED that the defendants' cross motion is granted to the extent that a compliance conference is scheduled, as described below, and the motion is otherwise denied, without prejudice, as academic; and it is further

ORDERED that the plaintiffs shall file an amended complaint, including only those amendments specified in the moving papers and permitted by the court herein, on or before February 6, 2023; and it is further

ORDERED that the defendants shall file an answer to the amended complaint within 20 days of the plaintiffs' filing the amended complaint; and it is further

ORDERED that the parties shall proceed with discovery, to the extent they have not already done so, and appear for a compliance conference before the court on March 9, 2023, at 12:30 p.m., to be conducted via Microsoft Teams; and it is further

ORDERED that defense counsel is cautioned against sending any further intemperate or unprofessional communication to chambers, chambers staff, or any court personnel.

This constitutes the Decision and Order of the court.

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

1/18/2023
DATE

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