SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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1156 APF LLC,

Plaintiff,

- v -

HOTEL RESERVATION SERVICE, INC.,

Defendant.

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INDEX NO. 651044/2022

MOTION DATE 07/08/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, plaintiff's motion for summary judgment is denied for the reasons set forth in the opposition papers (NYSCEF Doc. Nos. 32-36), in which the court concurs, as summarized herein.

Background

Central to this commercial-landlord tenant dispute is whether defendant, the tenant herein, properly exercised its limited right of early termination of the lease. The lease provides, in relevant part, that:

> A. Provided that each and every one of the terms and conditions set forth below are fully satisfied, each of Landlord and Tenant shall have the option (the "Early Termination Option") to terminate this Lease, effective as of a date which is after the sixty second (62nd) full calendar month after the Commencement date (the "Early Termination Date"):
>
> 1. The terminating party (the "Terminating Party") shall give the other party a written notice of its irrevocable election to exercise the Early Termination Option, which notice shall be given not later than six (6) full calendar months prior to the Early Termination Date which is designated in the notice, which Early Termination Date so designated shall be the last day of a calendar month;

2. If Tenant is the Terminating Party:

a. Tenant may only exercise the Early Termination Option if Tenant shall have paid sixty (60) months of Fixed Rent hereunder by the date due, after the expiration of any applicable notice or cure period; and

b. Tenant shall not be in default under any of the terms, covenants and conditions of this Lease to be observed and performed after the expiration of applicable notice and grace periods either on the date that Tenant exercises the Early Termination Option or on the Early Termination Date.

c. Tenant shall pay to Landlord concurrently with Tenant's exercise of the Early Termination Option, a cash lease termination fee (the "Fee") in an amount equal to the sum of the unamortized amount (as amortized on a straight-line basis over the term of this Lease) as of the Early Termination Date of the sum of the following costs relating to this Lease: (i) the Fixed Rent Allowance, (ii) any fee, commission or other compensation paid by Landlord to any broker or finder and any attorney in connection with this Lease and the preparation thereof, and (iii) the cost of Landlord's Work not paid for or reimbursed by Tenant.

* * *

C. Tenant's right to the Early Termination Option shall automatically terminate and become null and void upon the earlier to occur of: (i) the termination of Tenant's right to possession of the Demised Premises; or (ii) the failure of Tenant to timely or properly exercise the Early Termination Option.

(Lease, NYSCEF Doc. No. 19, Art. 72.)

At the beginning of the COVID-19 pandemic, defendant suffered a "substantial decrease in business" (Benakis aff., NYSCEF Doc. No. 36, ¶¶ 3-4). The parties then attempted to renegotiate the lease, during which time plaintiff's managing member, Kenneth S. Aschendorf, allegedly informed defendant's Interim Managing Director, Alexandra Benakis, that defendant did not need to pay rent while the parties were attempting to renegotiate the lease (*id.*, ¶¶ 5-7). Aschendorf, for his part, denies that he made this representation (Aschendorf affirmation, NYSCEF Doc. No. 38, ¶ 3). When negotiations were unsuccessful, defendant gave notice of its

intention to terminate the lease pursuant to Article 72 (July Termination Notice, NYSCEF Doc. No. 25). Defendant declared its intention to terminate the lease as of August 19, 2021, six months prior to the end of the 62nd month of the lease term and asked for the information necessary to calculate the Early Termination Fee (*id.*). Rather than provide said information, plaintiff instead purported to reject defendant's notice, on the grounds that defendant had not yet paid 60 months rent, that defendant had defaulted by not paying rent while the parties were attempting to renegotiate the lease, and that defendant had not paid the Early Termination Fee at the same time as they sent the notice. (rejection letter, NYSCEF Doc. No. 26).

Attempting to remedy any potential flaws in its notice, defendant paid its estimate of the Early Termination Fee, as well as rent due through the 60th month in advance, shortly before the date upon which defendant would exercise the Early Termination option (August Termination Notice, NYSCEF Doc. No. 27). Plaintiff, however, again rejected the notice, claiming that the advance payment through the 60th month of rent did not satisfy the terms of the Early Termination provision (second rejection letter, NYSCEF Doc. No. 28). Moreover, plaintiff asserted that, because defendant's first termination notice was improper, defendant had waived the right to exercise the Early Termination provision (*id.*)

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 New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the

opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, 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]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

The parties offer competing interpretations of the requirements of the Early Termination provision. Plaintiff argues that defendant may only exercise the Early Termination option after 60 months of rent have come due and been paid, that defendant must not have missed any payments, and that the notice and the exercise of the option are in fact one and the same act, requiring payment of the Early Termination fee in conjunction with the notice rather than at a later time. Defendant, in opposition, argues that the Early Termination provision is at least susceptible of the interpretation that the notice specifies a future date for exercising the Early Termination Option, and that therefore it fulfilled the requirements of the provision by paying rent through the 60th month, as well as its estimated Early Termination fee subsequent to sending plaintiff the notice.

It is axiomatic that where the parties set down the unambiguous terms of their agreement in writing, the court has no power to vary that writing (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). The agreement should be read as a whole, and

no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). When doing so, a court should not read the contract in a way that renders any provision or clause meaningless (*Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]). Instead "[t]he court construe[s] the plain and ordinary meaning of the unambiguous terms and conditions of the agreement" (*Edelman v Chubb Indem. Ins. Co.*, 41 AD3d 327, 327 [1st Dept 2007]). "A contract is ambiguous if it is susceptible to more than one reasonable interpretation" (*Discovision Assoc. v Fuji Photo Film Co., Ltd.*, 71 AD3d 488, 489 [1st Dept 2010] [internal quotation marks and citations omitted]).

The Early Termination provision does not unambiguously set forth the timing of its various components. The court finds it noteworthy that the Early Termination fee is based in part on information that is solely within plaintiff's possession, specifically the amount of any broker's commission, attorney referral, or other fee paid in conjunction with preparing the Lease itself and the initial rental of the premises (Lease, NYSCEF Doc. No. 19, § 72[A][2][c][ii]). Defendant would have to, if plaintiff did not provide such information initially, send a notice to plaintiff of its intention to exercise the Early Termination Option as of a given date with enough lead time to obtain the necessary information from plaintiff to properly pay the Early Termination fee. Thus, the notice of defendant's intent to exercise the option comes prior to, and separately from, the actual exercise of the option.

Similarly, the provision regarding fixed rent specifies that defendant must have paid "sixty (60) months of Fixed Rent hereunder *by the due date*" (*id.*, § 72[A][2][a] [emphasis added]). While plaintiff interprets this to mean that the Early Termination Option only becomes available after defendant pays rent for 60 months, the language is at least susceptible to the interpretation that defendant may, as it did herein, pay the amount of rent equal to 60 months of

rent prior to the date it becomes due. The provision could have explicitly required that defendant had already paid sixty months of rent prior to exercising the option, but it does not. "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co.*, 1 NY3d at 475). "When the language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment" (*DiLorenzo v Estate Motors, Inc.*, 22 AD3d 630, 631 [2d Dept 2005]).

Plaintiff further argues that, regardless of the interpretation of the prior provisions, defendant was barred from exercising the Early Termination Option because, at the time defendant sent notice of its intent to do so, it was in default of the rent payments that had accrued while the parties were renegotiating the lease. This issue may not be summarily resolved for two reasons. First, the lease provides that defendant is only in default of the rent where it has not been paid on time, and defendant continues not to pay "for a period of ten (10) days after the due date and remain uncured for a period of three (3) business days following any written notice ("Rent Default Notice") to tenant that payment is past due" (Lease, NYSCEF Doc. No. 19, § 49[A][a]). Notice is waived only if, within the previous calendar year, plaintiff has already sent a Rent Default Notice (*id.*). Moreover, defendant raises an issue of fact with respect to plaintiff's alleged instruction not to pay rent while negotiations were ongoing (Benakis aff., NYSCEF Doc. No. 36, ¶¶ 5-7). While plaintiff correctly asserts that the lease has "no oral modification" and "no waiver" clauses (Lease, NYSCEF Doc. No. 19, § 25), where a party induces another party to act based on an oral modification, and such party acts in a way not referable to the written agreement between the parties, the inducing party may be estopped from relying on a no oral modification clause (*Barber v Deutsche Bank Sec., Inc.*, 103 AD3d 512, 513 [1st Dept 2013]

["Moreover, defendants could be equitably stopped to rely upon that clause by their alleged inducement of plaintiff's significant and substantial reliance on the alleged oral promise"] [internal quotation marks and citations omitted]). Defendant asserts that it stopped paying rent for several months because plaintiff instructed it not to in view of potentially renegotiating the lease. Plaintiff's denial that it made such a representation does not resolve the issue, as it is not the court's task to resolve contested issues of fact on a motion for summary judgment (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] ["issue-finding, rather than issue-determination, is the key to the procedure"] [internal quotation marks and citations omitted]).

Finally, plaintiff argues that defendant's counterclaims for declaratory judgment, breach of contract, and breach of the implied covenant of good faith and fair dealing should be dismissed. Issues of fact, as set forth above, preclude such dismissal at this time. Moreover, the allegation that plaintiff denied information to defendant regarding the amount of the Early Termination Fee, while not prohibited by the contract, could be interpretated at this stage to be an act meant to deprive defendant of the benefits of its bargain, namely the Early Termination Option. Such conduct is separate from and not duplicative of the claim for breach of contract (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] ["neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"]).

Accordingly, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York on April 26, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

3/20/2023
DATE

LOUIS L. NOCK, J.S.C.

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