Majestic Rayon Corp. v Soho Off. Suites, LLC

2023 NY Slip Op 31025(U)

March 30, 2023

Supreme Court, New York County

Docket Number: Index No. 651740/2022

Judge: Louis L. Nock

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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

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MAJESTIC RAYON CORP. and CUDGE REALTY, LLC,

Plaintiffs,

- v -

SOHO OFFICE SUITES, LLC,

Defendant.

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INDEX NO. 651740/2022

MOTION DATE 06/21/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, and 82

were read on this motion for SUMMARY JUDGMENT, etc.

LOUIS L. NOCK, J.

Upon the foregoing documents, the plaintiffs' motion is granted in part for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 39, 52, 65, 77), and the exhibits attached thereto, in which the court concurs, as summarized herein.[1] In this commercial landlord-tenant action, plaintiffs, who as a joint venture are the landlord of the rental premises ("landlord"), has established prima facie entitlement to summary judgment by submission of "the lease . . . the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease" (*Thor Gallery at South Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016]). The lease provides that defendant tenant ("tenant") shall pay the rent "without any set off or deduction whatsoever" (lease, NYSCEF Doc. No. 42, ¶ 44[b]). Further, the Third Amendment to the lease provides that tenant shall deposit

[1] Plaintiffs' first cause of action for ejectment is moot, as defendant vacated the premises subsequent to the full briefing of the motion.

with landlord a $449,895.85 letter of credit as a security deposit, which may be drawn down by landlord in the event of tenant's default under the lease, and which must then be replenished by tenant upon ten days' notice (Third Amendment, NYSCEF Doc. No. 45, ¶ 9[A]). Landlord drew down the letter of credit on December 24, 2021, following tenant's failure to pay base rent and additional rent, and required tenant to replenish the letter of credit accordingly (notice to replenish, NYSCEF Doc. No. 48). When tenant failed to replenish the letter of credit, landlord sent tenant a 15-day notice to cure the failure to replenish the letter of credit (lease, NYSCEF Doc. No. 42, ¶ 17[1]) on February 3, 2022 (notice to cure, NYSCEF Doc. No. 49). Finally, after tenant again failed to replenish the letter of credit, landlord issued a notice of termination (lease, NYSCEF Doc. No. 42, ¶ 17[1]), terminating the lease as of March 30, 2022, and requiring tenant to vacate the rental premises on or before April 4, 2022 (notice of termination, NYSCEF Doc. No. 50). Tenant remained in the premises until at least September 2022, when in its opposition papers to the instant motion it stated that it would vacate the premises by the end of the month (Olivo aff., NYSCEF Doc. No. 57, ¶ 21).[2] Landlord has thus established prima facie entitlement to summary judgment for use and occupancy for whatever length of time tenant remained in the premises following termination (*MMB Assoc. v Dayan*, 169 AD2d 422 [1st Dept 1991]), the amount of which will be determined at trial since the record does not establish the amount of said use and occupancy or the length of time tenant held over.

In opposition, tenant fails to raise a triable issue of fact. Tenant challenges the propriety of the notices landlord sent out, but each notice is accompanied by proof of mailing or courier delivery to tenant and its counsel at the addresses set forth for notice in the lease (Third Amendment, NYSCEF Doc. No. 45, ¶ 11[o]). Tenant's assertions that it made payments that are

[2] The absence of a certificate of conformity for this affidavit, apparently notarized without the state (CPLR 2309[c]), is an excusable defect (*Matapos Tech. Ltd. v Cia. Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]).

not being accounted for in landlord's rent statements are unsupported by any contemporaneous documentary evidence of such payments (*Hooke v Speedy Auto Ctr.*, 4 AD3d 110, 112 [1st Dept 2004] [granting summary judgment after opposing party "did not produce any contemporaneous documentary evidence corroborating its testimony"]). Tenant's further suggestion that the parties agreed to lower the monthly rent during the ongoing COVID-19 pandemic is barred by the lease's merger clause, as such agreement was never reduced to a writing (lease, NYSCEF Doc. No. 42, ¶ 25; *Paramount Leasehold, L.P. v 43rd St. Deli, Inc.*, 136 AD3d 563, 568 [1st Dept 2016] ["if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls"]). Finally, tenant's claim that landlord breached the lease by not providing it with access to the rental premises is belied by the building security logs showing tenant's employees accessing the building (Litt Reply aff., NYSCEF Doc. No. 65, ¶¶ 25-41; security logs, NYSCEF Doc. No. 68).

In addition, tenant's affirmative defenses must be dismissed. The first affirmative defense states that documentary evidence demonstrates that landlord did not comply with the lease's notice provisions, yet tenant fails to provide such evidence. The second (erroneously titled first) affirmative defense alleging a dispute in the amount owed fails for the reasons set forth above.

The third (erroneously titled second) affirmative defense sounds in frustration of purpose due to pandemic restrictions on operation and capacity. As the Appellate Division, First Department, has now established, these restrictions do not frustrate the purpose of the lease (*e.g. Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 537 [1st Dept 2022] [rejecting frustration of purpose defense where "New York City Executive Order No. 100 of 2020 (N.Y.C EEO 100), which, under § 17, directed adult

congregate care facilities such as the tenant's to suspend operations during the pandemic, was temporary"]; *Fives 160th, LLC v Zhao*, 204 AD3d 439, 440 [1st Dept 2022] ["Although the pandemic did make it more difficult and less profitable for defendants to run their business, they were never prevented from using the space or operating their restaurant"]; *Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480 [1st Dept 2022] ["Here, the pandemic, while continuing to be 'disruptive for many businesses,' did not render plaintiff's performance impossible, even if its ability to provide a luxury experience was rendered more difficult, because the leased premises were not destroyed"]).

The fourth (erroneously titled third) affirmative defense asserts that landlord has failed to join necessary parties (CPLR 1003) because landlord has not joined tenant's licensees, who use and occupy portions of the rental premises with landlord's consent. "Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice" (CPLR 1003). CPLR 1001 provides that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants" (CPLR 1001[a]). Tenant offers no explanation in opposition as to why the licensees are necessary parties. Indeed, as landlord states, where a landlord does not attempt to terminate a subtenancy while terminating the primary tenancy, then the subtenant is not affected by the termination (*Ocean Grille, Inc. v Pell*, 226 AD2d 603, 604-05 [2d Dept 1996]).

Finally, the fifth (erroneously titled fourth) affirmative defense states that "[p]laintiffs have raised duplicitous causes of action, namely, the Third and Fourth Causes of Action." It is unclear what tenant means by "duplicitous." Assuming arguendo that tenant means to argue that the third and fourth causes of action for use and occupancy and unjust enrichment are

duplicative, "[c]auses of action or defenses may be stated alternatively or hypothetically" (CPLR 3014). Moreover, since landlord is entitled to summary judgment on its cause of action for use and occupancy, the court need not address the alternative theory of unjust enrichment seeking the same relief, and this affirmative defense does not present an impediment to summary judgment.

Accordingly, it is hereby

ORDERED that the plaintiffs' motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiffs and against defendant on the second and third causes of action as follows:

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs and against defendant in the amount of $2,040,126.07, together with interest at the rate of 10% per annum from the date of April 1, 2022, until entry of judgment, as calculated by the Clerk, and continuing to accrue thereon until satisfaction of judgment; and it is further

ORDERED that the second cause of action is severed, and the balance of the claims are continued; and it is further

ORDERED that the defendant is found liable to plaintiff on the third cause of action and the issue of the amount of a judgment to be entered thereon shall be determined at a damages trial herein; and it is further

ORDERED that upon a review of the record and upon movants' counsel's representation that tenant has vacated the rental premises, the first cause of action for ejectment is severed and dismissed as moot (CPLR 3212[b]); and it is further

ORDERED that the action shall continue as to the third cause of action; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, on April 19, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

ENTER:

3/30/2023
DATE

LOUIS L. NOCK, J.S.C.

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