SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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EIGHTH AVENUE SKY, LLC

Plaintiff,

- v -

DEEPAK BALLANEY,

Defendant.

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INDEX NO. 654477/2022

MOTION DATE 04/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 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, 34

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment is denied and the cross-motion by defendant is also denied.

Background

Plaintiff brings this commercial lease case to recover based upon a guaranty signed by defendant. It claims that the tenant failed to pay rent, real estate taxes, late charges, bank fees and legal fees. Plaintiff admits that it started a separate proceeding in Civil Court against the tenant in November 2022. It maintains that over $1.3 million is due.

In opposition and in support of his cross-motion for summary judgment, defendant points to an amendment to the lease dated January 11, 2022. He claims that this amendment abated the obligation to pay rent while natural gas services were unavailable. Defendant claims that the failure to obtain natural gas services was solely plaintiff's fault. He observes that the tenant planned to turn the space into a restaurant (it was previously a store) and so a natural gas line had to be set up. Defendant blames the landlord for not properly drilling an entry point.

He attaches an affidavit from his engineer, who claims that the gas sleeve was improperly installed by plaintiff. Allegedly, the sleeve was not installed to the proper depth and so ConEd cannot complete the gas installation.

In reply and in opposition to the cross-motion, plaintiff asserts that the gas line issue was well known to the parties when the amendment to the lease was executed. It also argues that under the terms of that amendment, a reduced amount of rent was due but it was not, as defendant contends, reduced to zero. Plaintiff maintains that defendant is improperly picking and choosing the portions of the amendment to the lease.

In reply to his cross-motion, defendant argues that this case should be dismissed because there is a prior action pending (the landlord-tenant case). Defendant argues that no gas was provided to the tenant for three years solely due to the landlord's failure to correct its mistake regarding the gas sleeve. He insists he made numerous requests to the landlord to fix the defective gas sleeve and the landlord refused each time. Defendant claims he suggested that the restaurant use electric stoves but that request was also denied.

Discussion

As an initial matter, the Court declines to dismiss this case on the ground that there is a prior action pending. That contention is without merit because the Civil Court action is not based on the guaranty (although defendant is named as a respondent in that action). Plaintiff is entitled to seek recovery against the guarantor under the terms of the guaranty, separate and apart from its obligation to seek recovery against the tenant (NYSCEF Doc. No. 12, ¶ 6 [the guaranty]). The entire point of the guaranty is to permit the landlord to seek recovery as against the guarantor regardless of its efforts to seek damages from the tenant (although, of course, it cannot obtain a double recovery).

The key part of the Court's analysis concerns the first amendment to the lease which provides, in part, that:

> "For that certain period (herein referred to as "Abatement Period No. 3") beginning as of the date immediately following the last day of Abatement Period No. 2 and ending as of the day (herein referred to as the "Abatement Period No. 3 End Date") immediately preceding the date which shall be the two (2) year anniversary of the Effective Date, the Minimum Fixed Rent ***shall be abated such that Tenant shall be obligated to pay monthly installments of Minimum Fixed Rent in the amount of Thirty Thousand Dollars ($30,000.00)***; provided, however, if (A) Tenant has, at all times, timely and diligently taken any and all action necessary to obtain delivery of natural gas service to the Building and the Demised Premises by Consolidated Edison Company of New York, Inc. (herein referred to as the "Utility Provider") and has otherwise completed all necessary work to qualify for natural gas service to be furnished to the Building and the Demised Premises, including, but not limited to, the performance of all required installations, alterations, and buildouts in compliance with Requirements, obtaining approvals required for the furnishing of natural gas service to the Building and the Demised Premises, and has performed all of its obligations with respect thereto, including, without limitation, its obligations set forth in Paragraph 10, but as of the Abatement Period No. 3 End Date, the delivery of natural gas service to the Building by the Utility Provider has not been established and has been prevented solely as a result of (1) the existence of one or more violations of record based on conditions existing solely within that certain space within the Building that is leased for the operation of a hotel, or (2) any deliberate and wrongful action on the part of Landlord or, if Landlord shall be obligated under the Lease to take any action, Landlord's failure to take such action, provided Tenant has given Notice of such failure to Landlord and Landlord has failed to take such action within a reasonable period thereafter, and in either case, through no fault on the part of Tenant, which cause of prevention has been confirmed, in writing, by the Utility Provider (as applicable, herein collectively referred to as the "Gas Service Delay Conditions") . . . then the Abatement Period No. 3 End Date shall be extended until to the later to occur of (y) the Abatement Period No. 3 End Date, as initially fixed hereinabove, extended by one (1) day for each day that delivery of natural gas service to the Demised Premises by the Utility Provider has not been established and has been prevented solely as a result of one or more of the Gas Service Delay Conditions" (NYSCEF Doc. No. 11, ¶ 2[iii] [emphasis added]).

The Court observes that plaintiff is correct that this abatement provision simply reduces the minimum rent to be paid to $30,000, an amount significantly less than that prescribed in the

lease. It does not reduce the amount to be paid to zero as defendant seems to suggest. However, the Court's analysis does not end there. The lease itself provides that:

> "Landlord shall have no liability to Tenant or any other person for any loss, damage or expense in any manner whatsoever which may be sustained, incurred or suffered nor shall Tenant's obligations under this Lease be excused, abated, reduced or otherwise affected, by reason of any change, inadequacy, deficiency, failure or defect in the supply or character of electric energy, gas, steam, water or any other utilities deemed necessary or desirable by Tenant, or furnished to the Demised Premises, or if the quantity or character of any or all of the same shall be unsuitable for Tenant's requirements or unavailable, temporarily or permanently, for any reason other ***than the willful misconduct of Landlord or its employees***" (NYSCEF Doc. No. ¶ 7.3 [emphasis added]).

The Court finds that the instant motion is premature because there are issues of fact about the "willful misconduct" of plaintiff relating to the gas line. Defendant claims that the tenant wanted to turn the space into a restaurant and that required that a gas line be installed. He maintains plaintiff's improper installation and refusal to remedy the issue (the depth of the gas sleeve) constitutes willful misconduct. At this stage of the case (there has not yet been any discovery), the Court cannot determine as a matter of law that these actions are not willful misconduct. Discovery may reveal that plaintiff bears no fault under this provision but the assertions contained in this motion raise doubts about plaintiff's conduct with respect to the gas sleeve that requires the parties to engage in discovery.

The Court emphasizes that there is no basis to grant defendant's cross-motion for summary judgment on the gas sleeve issue either. The phrase willful misconduct is, obviously, a fact intensive standard that prevents the Court from making such a determination before any discovery has taken place.

Accordingly, it is hereby

ORDERED that both plaintiff's motion and defendant's cross-motion are denied.

Conference: August 1, 2023 at 10:30 a.m. By July 25, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute regarding discovery or 3) letters explaining why no agreement about discovery could be reached. Based on these submissions, the Court will assess whether an in-person appearance is necessary. The failure to upload anything by July 25, 2023 will result in an adjournment of the conference.

5/2/2023
DATE

ARLENE P. BLUTH, J.S.C.

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