

32-42 Broadway Owner LLC v Colgate Restoration Corp.

2023 NY Slip Op 32076(U)

June 22, 2023

Supreme Court, New York County

Docket Number: Index No. 158768/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

-----X

32-42 BROADWAY OWNER LLC

Plaintiff,

- v -

COLGATE RESTORATION CORP.,

Defendant.

-----X

INDEX NO. 158768/2022

MOTION DATE 06/21/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

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

Plaintiff’s motion for summary judgment, to dismiss the affirmative defenses and to amend the pleadings to conform to the evidence is granted.

Background

Plaintiff owns a building in Manhattan and entered into a lease with defendant for five years that expired on August 31, 2021. It contends that defendant unilaterally vacated the premises in February 2021 without plaintiff’s authorization. Plaintiff asserts that it is owed \$34,423.14 and that this amount includes a credit for the amount collected from a new tenant that signed a lease in July 2021 (after defendant left the premises). It details why each of defendant’s affirmative defenses should be dismissed.

In opposition, defendant claims that it renovated the commercial space and increased the value of the premises for plaintiff. It contends that because of the COVID-19 pandemic, the parties agreed to an early termination of the lease. Defendant insists that plaintiff accepted an early surrender of possession of the premises on April 5, 2021. It maintains that the parties

emailed each other about the surrender agreement and that after it left the space, defendant did not hear anything about an outstanding balance until the filing of this complaint in October 2022.

Defendant argues that there are issues of fact that compel the Court to deny the instant motion about the alleged surrender agreement. It maintains that a surrender can be implied from the parties' course of conduct and it is not responsible for rent due through the remainder of the lease. Defendant argues that it has adequately pleaded its 15 affirmative defenses and demands that they not be dismissed.

In reply, plaintiff argues that defendant submitted no proof that the parties agreed to modify the lease to provide for an early termination that absolved plaintiff of having to pay for any additional rent. It maintains that neither of the email threads submitted by defendant in opposition raise an issue of fact about a surrender agreement. With respect to the affirmative defenses, plaintiff claims that defendant did not raise an issue of fact to preserve these defenses.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City*

of *New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The central issue on this motion is whether or not defendant raised an issue of fact concerning the existence of a surrender agreement. The Court grants the motion as defendant did not submit anything to suggest that the parties entered into a surrender agreement by which plaintiff agreed to absolve defendant of its obligation to pay the rent. The two email chains do not evince that there was a surrender agreement. The first email chain (NYSCEF Doc. No. 26) contains an email from defendant in which it notified plaintiff that it had vacated the premises as of February 6, 2021. That plaintiff's agent responded that he inspected the premises and requested that it be left in broom clean condition does not form a surrender agreement. At no point did plaintiff's agent explicitly accept a surrender.

The second email chain (NYSCEF Doc. No. 27) contains a discussion about what appears to be a potential settlement agreement. Plaintiff's agent mentions that he had the authority to waive the electrical charges but defendant responds that it is unable to pay the remaining amount and could only "try for \$15,000" (*id.*). Plaintiff then countered at \$22,500 with a payment plan, but there is no response from defendant (or a further communication from plaintiff) to show that they had reached an agreement. Certainly, there is no evidence that plaintiff agreed to waive outstanding rent owed by defendant.

The Court also emphasizes that the lease itself contains a provision that states that it “may not be altered, changed or amended except by an instrument in writing signed by the party to be charged” (NYSCEF Doc. No. 16). Under these circumstances, where defendant did not include an amendment in writing entered into by both parties, the Court finds that plaintiff is entitled to summary judgment. Defendant also did not point to any outstanding discovery that is required—plaintiff attached the lease and defendant did not adequately explain what other documents might exist to refute plaintiff’s right to recover.

The Court dismisses the affirmative defenses. Defendant groups these into three categories: equitable affirmative defenses, statutory and waivable defenses, and mitigation defenses.

The equitable affirmative defenses center on defendant’s claim that there was a surrender accepted by plaintiff. Having found that defendant did not meet its burden to show that there was a surrender agreement, the Court dismisses these affirmative defenses. To the extent that defendant claims plaintiff did not tell defendant about the “potential repercussions of vacating,” that does not raise an issue of fact. Defendant admits it signed a lease; it cannot blame plaintiff for pursuing its right to recover unpaid rent under that lease.

The second category, statutory and waivable defenses, are also dismissed as defendant did not meet its burden to preserve them. These included affirmative defenses based upon the failure to state a claim, no breach of a duty, the statute of limitations and lack of standing. Defendant did not show how any of these apply.

The final category is styled as defendant’s mitigation defenses. But plaintiff explains that it relet the premises in July 2021 and was able to collect some rent, although it offered a pro-

rated rent for the applicable time period. Defendant did not meet its burden to preserve these affirmative defenses either.

The Court observes that defendant did not challenge the specific amount sought by plaintiff and so the Court awards plaintiff \$34,423.14. In other words, defendant did not directly dispute plaintiff's calculation of unpaid rent and other charges.

The Court awards reasonable legal fees as provided for in the lease and directs plaintiff to make a separate motion for such fees on or before July 14, 2023.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment, to dismiss defendant's affirmative defenses and to conform the pleadings to the evidence is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$34,423.14 plus statutory interest from June 1, 2021 (a reasonable midpoint) along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable legal fees is severed and plaintiff shall make a separate motion for such fees on or before July 14, 2023.

6/22/2023

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: