

1140 LLC v Meis Studio Inc.

2023 NY Slip Op 33739(U)

October 13, 2023

Supreme Court, New York County

Docket Number: Index No. 652982/2021

Judge: Verna L. Saunders

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received from any such new tenant less the costs incurred to obtain a new tenant. According to plaintiff, it will also credit tenant and assignee for application of their security deposit in the amount of \$80,266.00 against the post-surrender date amounts due (NYSCEF Doc. No. 27, *memo of law*, pg 9). Thus, as its first cause of action, plaintiff seeks judgment in its favor and against tenant and assignee, jointly and severally, for pre-surrender date rent and additional rent in the amount of \$197,223.18, and \$695,097.67 in rent and additional rent for the remainder of the lease term. Plaintiff asserts that, pursuant to the guaranty, guarantor unconditionally guaranteed tenant's obligations under the lease and as such, guarantor is liable for \$197,223.18 in unpaid rent and additional rent through the surrender date (second cause of action). Plaintiff furnishes a rent ledger and an affidavit of John M. DiFiore, agent for plaintiff herein, ("DiFiore") explaining how the amount sought was calculated (NYSCEF Doc. Nos. 22, 26, *DiFiore affidavit, rent ledger*). Lastly, plaintiff contends that it is entitled to attorney's fees as against defendants, jointly and severally (third cause of action).

Defendants oppose the motion and cross-move for summary judgment in their favor and against plaintiff. Defendants contend that DiFiore's affidavit does not provide any evidentiary foundation for plaintiff's computation of the tenant's allegedly unpaid rent amounts guaranteed by guarantor. They assert that the computation in DiFiore's affidavit relied on the computation in the rent ledger but does not claim that the rent ledger was developed and maintained in the regular course of business. Specifically, defendants assert that plaintiff charges them \$10,765.50 for tax escalations and \$9,000.00 for un-billed retroactive electricity charges, without submitting supporting evidence for each (NYSCEF Doc. No. 37, *defs opposition*, pg 5). Defendants likewise posit that their rent payment obligations ceased once plaintiff accepted surrender of the premises, and that to the extent plaintiff undertook any actions inconsistent with the notion that the landlord-tenant relationship had ended, defendants should be given opportunity to conduct discovery. Furthermore, according to defendants, while Article 18 of the lease provides for liquidated damages in the amount of the balance of the rent for the term less rents received net of the costs of reletting, liquidated damages are only payable in monthly installments (*id.*, at pg 8). Lastly, guarantor claims that he made a \$188,000.00 settlement offer to plaintiff but was rejected, and plaintiff subsequently served its motion for summary judgment seeking \$197,223.18 against him. However, according to guarantor, the amended complaint overstates the amount of the guarantor's liability by \$14,743.03 for pre-and post-surrender interest charges, and therefore, plaintiff's recovery from guarantor cannot exceed \$186,844.31. Therefore, plaintiff is liable to guarantor for his post-offer expenses for defending its damages claim in an amount to be determined by the Court pursuant to CPLR 3220 (*id.*, at pg 9-10).

In reply, plaintiff contends that defendants do not dispute that they breached the lease by failing to pay rent and additional charges. Plaintiff maintains that the rent ledger and DiFiore's affidavit establish the \$197,223.18 in unpaid rent and additional rent (including interest) sought. Contrary to defendants' contention, plaintiff asserts that guarantor is liable for all of tenant and assignee's payment obligations (including accrued interest) under the lease until the surrender date. Plaintiff also argues that to the extent tenant and assignee dispute their obligations to pay the balance of the rent post-surrender of the premises, such a position is at odds with Article 18 of the lease which entitles plaintiff to liquidated damages in the event tenant vacates the premises before the lease expires, as is the case here. Regarding guarantor's alleged offer to settle damages for \$188,000.00 pursuant to CPLR 3220, plaintiff avers that an offer under CPLR 3220

is not an offer to settle a claim, but rather an offer to fix damages in a specific amount if a defendant's defenses fail at trial. Thus, according to plaintiff, even had it accepted the offer, plaintiff still would have had to prove its case. Lastly, plaintiff sets forth that guarantor is liable for tenant and assignees interest, costs and attorneys' fees, all of which are payable as "additional rent" to the extent they accrued prior to the surrender date, and that under the guaranty, guarantor is liable for costs and attorneys' fees incurred to enforce the guaranty, whether accruing before or after the surrender date.

Although defendants filed a sur-reply (NYSCEF Doc. No. 42), defendants are not entitled to a sur-reply as of right and, therefore, it shall not be considered in the court's determination of this motion (see *Allied World Assur. Co. (U.S.) Inc. v Greater N.Y. Mut. Ins. Co.*, 2023 NY Slip Op 31698(U) **3 [Sup Ct, NY County 2023]).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact (see *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

A landlord seeking summary judgment against a tenant for breach of rental obligations satisfies its *prima facie* evidentiary burden by proving the existence of a lease, landlord's performance under the lease, tenant's nonpayment of rent, the total debt due, and a description of the how the amounts due were calculated (see *Thor Gallery At S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016]). A landlord seeking summary judgment against a guarantor satisfies its *prima facie* evidentiary burden by proving the existence of a guaranty agreement with an absolute and unconditional guaranty, a debt owed by tenant to landlord, and guarantor's failure to pay under the agreement (see *L. Raphael NYC CI Corp. v Solow Bldg. Co., L.L.C.*, 206 AD3d 590, 592-593 [1st Dept 2022]).

Here, upon review of the record, which includes the lease, guaranty, amendment, rent ledger, and DiFiore's affidavit, this court finds that plaintiff has not established its *prima facie* entitlement to summary judgment against defendants. Although plaintiff furnishes the affidavit of its agent, DiFiore, who claims to have personal knowledge of the fact set forth therein, affiant has not provided any evidentiary foundation for plaintiff's computation of the tenant's allegedly unpaid obligations guaranteed by guarantor. "A proper foundation for admission of a business record may be laid by a witness familiar with the practices and procedures of the particular business" (*People v Nashal*, 130 AD3d 480, 481 [1st Dept 2015]). Here, DiFiore's affidavit relies on the rent ledger (NYSCEF Doc. No. 22), but does not claim to have prepared it, or that it was prepared under his supervision, or that it was prepared in the regular course of plaintiff or the agent's business. Nor does he lay a foundation for admissibility by specifying that he was familiar with the record keeping practices or procedures of plaintiff's or any other party that may have created the rent ledger. The affidavit submitted in support of the motion has no probative value, and the rent ledger submitted with the motion cannot be admitted as a business record

since the affiant does not lay a sufficient foundation for their admissibility (see *Muslar v Hall*, 214 AD3d 77, 81 [1st Dept 2023], citing *O'Connor v Restani Constr. Corp.*, 137 AD3d 672, 673 [1st Dept 2016]). Therefore, plaintiff's motion for summary judgment is denied.

Turning next to defendants cross-motion for summary judgment, defendants have not established their *prima facie* entitlement to summary judgment against plaintiff. Given the issues of fact as to the ledger and the amount outstanding, that branch of the cross-motion seeking guarantor's post-offer costs and expenses including attorney fees from plaintiff is denied. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

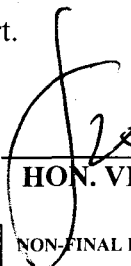
ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED defendants' cross-motion is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiff.

This constitutes the decision and order of this court.

October 13, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: