ESRT One Grand Cent. Place, L.L.C. v Peoples Foreign Exch., Corp.

2023 NY Slip Op 33967(U)

November 6, 2023

Supreme Court, New York County

Docket Number: Index No. 654007/2021

Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ESRT ONE GRAND CENTRAL PLACE, L.L.C.

Plaintiff,

- v -

PEOPLES FOREIGN EXHANGE, CORPORATION,

Defendant.

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INDEX NO. 654007/2021

MOTION DATE 10/27/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 118, 119

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff's motion for summary judgment and to dismiss defendant's counterclaims is granted.

Background

In this landlord-tenant dispute, plaintiff (the landlord) seeks to recover damages arising from defendant's alleged failure to timely vacate the premises and to pay fixed and additional rent. Plaintiff alleges that the lease expired on May 31, 2021 and that defendant did not vacate the premises by this deadline. In fact, according to plaintiff, defendant did not vacate until July 7, 2021. Plaintiff also claims that defendant failed to pay rent from May 2020 through May 31, 2021 and seeks to recover that unpaid rent and unpaid rent that accrued during the alleged holdover period (from June 1, 2021 through July 7, 2021).

Plaintiff contends that it is entitled to summary judgment on its causes of action for breach of the lease, account stated and for legal fees. It also maintains that all of defendant's affirmative defenses should be dismissed.

Defendant claims in opposition that it actually settled the instant rent dispute with plaintiff for $4,800. It argues that the settlement agreement vitiates any attempt by plaintiff to sue for the full amount due under the lease. Defendant observes that discovery has not yet begun and the instant motion is therefore premature.

It explains that in an agreement dated January 10, 2022, both parties agreed to settle this case. Defendant maintains that plaintiff's sole remedy under this agreement is to seek payment under the settlement for $4,800 and points out that the agreement does not contain a default provision (i.e., plaintiff did not retain its right to seek the full amount in the event that defendant did not make the settlement payment).

Defendant also contends that there are disputed facts about defendant's vacatur; specifically, it claims that plaintiff appropriated a counter and a safe. It insists that plaintiff accepted the safe and the counter as full or partial satisfaction of the unpaid rent. Defendant takes issue with the amount that plaintiff seeks. Specifically, it claims that the demand for holdover fees should be rejected because the settlement agreement stipulated that defendant vacated the premises on May 31, 2021 (which means that holdover fees for June and July 2021 should not be recoverable).

In the alternative, defendant insists that defendant remained at the premises after the expiration of the lease in reliance upon promises made by plaintiff about a temporary agreement and that the liquidated damages provision in the lease is unenforceable.

In reply, plaintiff points out that the settlement agreement specifically stated that it would not be effective until plaintiff received the settlement payment and that there is no dispute that never happened.

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, 955 NYS2d 589 [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 Settlement Agreement

Although defendant submitted a signed settlement agreement in opposition, this document does not compel the Court to deny the motion. This agreement, NYSCEF Doc. No. 110, contains a release clause that conditioned release by plaintiff "[s]ubject to its receipt of this Settlement Agreement executed by Peoples Forex and the Settlement Payment." Put another way, plaintiff only agreed to discontinue its claims against defendant if defendant both signed that agreement *and paid the settlement amount* of $4,800.

Defendant presented no proof of that payment and so plaintiff was entitled to pursue this case. Moreover, nothing in this agreement specifies an alternative process if defendant defaults (i.e., something that would restrict plaintiff's remedies if defendant defaulted). Without a specific limitation, the Court is unable to conclude that plaintiff is barred from seeking the full amount of unpaid rent and attorneys' fees as allowed in the lease.

Typically, landlord-tenant cases that reach a settlement might include language that states that if the settlement sum is not timely paid, the landlord could seek the full amount or the landlord could enter judgment for some specific amount. This settlement does not contain this sort of language. Instead, it states that the tenant is released when the tenant pays the settlement amount, which necessarily implies that if the tenant fails to pay, then it is not released and the landlord is not barred from pursuing the full amount due.

Plaintiff's Claims and Defendant's Affirmative Defenses/Counterclaims

The Court observes that there is no dispute that defendant failed to pay the rent. Accordingly, plaintiff has met its prima facie burden to recover unpaid rent under both its breach of lease and account stated claims. Defendant does not deny that signed the lease, that it stopped paying rent in May 2020 and that it received regular bills to pay the rent.

The question for this Court is whether any of defendant's 15 affirmative defenses constitute a valid defense to compel the Court to deny plaintiff's motion and whether defendant has stated cognizable counterclaims on this record.

Whereas the settlement agreement provides that plaintiff releases defendant upon receipt of the signed agreement and the settlement funds, it also provides that the defendant releases plaintiff *only* upon receipt of the signed agreement. Specifically, the broad release states:

> "Upon its receipt of this Settlement Agreement executed by ESRT, Peoples Forex, on behalf of itself, and on behalf of its past, present and future principals and owners, parent companies, subsidiaries, affiliates, divisions, partners, real or alleged alter egos, and its respective agents, members, managers, partners, employees, officers, directors, principals, owners, shareholders, successors, and their heirs, legal representatives, successors and assigns, and all other persons and entities claiming by or through Peoples Forex, *releases and discharges ESRT . . .* from all actions, causes of action, claims, losses, costs, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, obligations, covenants, contracts, guarantees, leases, controversies, agreements, promises, variances, trespasses, obligations, liabilities, damages, judgments, extents, executions, petitions, judgments, claims and demands of any kind whatsoever, in law, admiralty or equity, known or unknown, asserted or unasserted, continent or non-contingent, arising out of, in connection with, or relating to the Lease, the Premises and/or the claims asserted or which could have been asserted in the Action or the Complaint" (*id*. ¶ 6 [emphasis added]).

This means that defendant is estopped from pursuing any of its all counterclaims or affirmative defenses. Nevertheless, the Court will also address the affirmative defenses and counterclaims separately.

The first affirmative defense for failure to state a cause of action is clearly without merit as plaintiff has established that it was the landlord and its tenant, defendant, failed to pay the rent. The second affirmative defense for unclean hands, the third affirmative defense for failure of plaintiff to mitigate its damages, the fourth affirmative defense based on plaintiff's alleged breach of the lease, the fifth affirmative defense of laches, the sixth affirmative defense of a

setoff, the seventh affirmative defense of unjust enrichment and the tenth affirmative defense of accord and satisfaction are all without merit.

Defendant entered into a lease and plaintiff is entitled to attempt to recover for unpaid rent. Defendant did not sufficiently explain how plaintiff has unclean hands or how plaintiff failed to mitigate its damages (especially when plaintiff found a temporary tenant) or how the defense of laches should apply to this commercial lease. Nor did it meet its burden to show that a setoff or unjust enrichment constitute cognizable affirmative defenses. Moreover, it is unclear how accord and satisfaction applies here, given that the settlement sum was never paid.

The thirteenth affirmative defense focuses on the fact that the lease contains a liquidated damages clause. Defendant insists this provision, article 12 of the lease (NYSCEF Doc. No. 85, § 12) is unconscionable. The Court disagrees as it only charges three times the amount of rent as a holdover charge (*see Fed. Realty Ltd. Partnership v Choices Women's Med. Ctr., Inc.*, 289 AD2d 439, 440, 735 NYS2d 159 [2d Dept 2001] [upholding a liquidated damages provision regarding holdover rent that was three times the aggregate fixed and additional rent]).

The eighth affirmative defense—that plaintiff waived or released its claims—is inapplicable as the defendant never paid the settlement amount.

The ninth affirmative defense cites impossibility, frustration of purpose and force majeure as a reason why defendant did not pay the rent. Defendant bizarrely claims that the COVID-19 pandemic frustrated the purpose of the lease despite the fact that the First Department has clearly held that frustration of purpose and impossibility are not cognizable affirmative defenses to a breach of lease claim (*558 Seventh Ave. Corp. v Times Square Photo Inc.*, 194 AD3d 561, 149 NYS3d 55 [1st Dept 2021]).

The eleventh and twelfth affirmative defenses deal with plaintiff's purported refusal to return the security deposit as does defendant's first counterclaim. These affirmative defenses and this counterclaim are dismissed as Article 32 of the lease states that the "Landlord may use any part of the security to satisfy any default of Tenant and any expenses arising from such default" (NYSCEF Doc. No. 85, § 32[A]). And plaintiff attached a rent ledger (NYSCEF Doc. No. 89) which shows that the security deposit was applied to the defendant's debt on September 2, 2020. These two affirmative defenses and the first counterclaim are therefore dismissed.

The fourteenth affirmative defense contends that plaintiff is barred, in part, because of amounts it may have received from the Industrial and Commercial Abatement Program. Plaintiff insists that defendant waived this defense because under the terms of the lease, defendant had 30 days to give written notice disputing these real estate charges. It observes that this defense deals with charges for real estate escalations. Plaintiff also emphasizes that section 2.C.(i)(g) of the lease required the defendant to pay these charges without regard to any abatement.

Defendant points to a provision in the lease amendment that states "Notwithstanding anything to the contrary contained herein, Landlord shall not be obligated to seek benefits under the Program nor shall any of Tenant's obligations under the Lease, as amended hereby, be reduced as a result of Landlord's failure to seek or obtain benefits thereunder" (NYSCEF Doc. No. 86, § 4[C]). Defendant argues that the "clear inference" from this statement is that if the plaintiff did, in fact, get an abatement it would also reduce the defendant's real estate obligations.

The problem is that the lease does not provide that the defendant was supposed to receive a credit if plaintiff got one. Defendant's argument rests on an inference and what it claims to be the intent of the parties. But the Court cannot stretch this part of the agreement to fit defendant's preferred reading. In fact, the lease provides that defendant had to pay, as additional rent, tax

escalations and defined the comparative year assessment to mean the "the actual assessed value (without regard or giving effect to any abatement, exemption or credit)" (NYSCEF Doc. No. 85, § [C][i][g]).

Given that defendant could not point to any provision of the lease that permits it to receive a credit in the event that plaintiff received a credit, the Court dismisses this fourteenth affirmative defense.

The fifteenth affirmative defense asserts that plaintiff cannot recover anything after May 31, 2021 because that is the stated date of surrender in the settlement agreement. The Court dismisses this affirmative defense. Of course, this purported fact was included in a proposed settlement agreement that never became effective against the plaintiff because the defendant never paid the settlement sum; the Court declines to bind plaintiff to a part of an agreement that defendant apparently failed to effectuate by not making the settlement payment.

And, as plaintiff points out, defendant sent an email on July 7, 2021 in which it claimed that it turned over the keys that same day (NYSCEF Doc. No. 88). That shows the surrender date was July 7, 2021 regardless of the provision in the agreement.

The second counterclaim concerns defendant's assertion that it was never told the location of the bank which held the security deposit and the third counterclaim insists that plaintiff breached its fiduciary duty not to commingle the security deposit funds. Plaintiff insists that the security deposit funds were never commingled or converted and was held in a separate account at Chase bank. Plaintiff attaches a copy of a statement for the security deposit account (NYSCEF Doc. No. 98).

Defendant's contention that plaintiff did not produce evidentiary proof that the former landlord (plaintiff's predecessor) provided the required notice to defendant about the identity of

the banking institution where the security deposit was held is besides the point. Certainly, plaintiff admits that it did not provide defendant with the banking information where the security deposit was held. But the purpose of these laws (under General Obligations Law § 7-103) is to ensure that a landlord keep clear records so that a tenant can adequately seek to recover the security deposit when appropriate. The goal is to avoid the landlord absconding with the security deposit (*i.e.*, if the tenant knows the bank where the money is held, that reduces the chances it won't get back the security deposit). But that's not the case here where plaintiff produced evidence of where the security deposit was held (in its own account) and evidence that it applied the security deposit to defendant's arrears.

In other words, it makes little sense to permit defendant to pursue its counterclaim for the return of the security deposit when it was already applied for the tenant's benefit (it reduced the arrears). The Court declines to create a situation where the defendant might get back this security deposit but it increases the total amount defendant owes.

Fourth Counterclaim—the Safe and the Counter

The fourth counterclaim seeks damages based on conversion—namely, that plaintiff took a safe valued at $8,500 and a bullet-proof counter for $45,000. Plaintiff seeks to dismiss this counterclaim and seeks reimbursement for the cost of removal. It claims that defendant left the items when it vacated the property and that the lease provides that any property left is conveyed to the landlord.

Defendant complains that plaintiff never gave it a credit for this property. It asserts that its email stating that it was leaving the property was an offer and that plaintiff accepted these

items by taking the counter and the safe. It also argues that this lease provision is so overbroad as to render it unenforceable.

The Court's analysis on this counterclaim begins with the email sent by defendant on July 7, 2021. In the email, defendant states, "For your information, we left behind our safe and our counter. Just in case you would consider a fresh takeoff. These items['] replacement is highly costly" (NYSCEF Doc. No. 88). Nothing about this email suggests that any agreement was reached. Although it may be an offer of some kind by defendant, there is no evidence that plaintiff accepted that offer.

The relevant portion of the lease provides that:

> "Tenant shall surrender the premises to Landlord at the expiration or sooner termination of this lease in good order and condition, except for reasonable wear and tear and damage by fire or other casualty, and Tenant shall remove all of its property. Tenant agrees that any personal property remaining in the demised premises following the expiration of the term of this lease (or such earlier date as of which the term hereof may have been terminated) shall for all purposes be deemed conveyed to and to be the property of Landlord who shall be free to dispose of such property, at Tenant's cost, in any manner Landlord deems desirable. Landlord may retain or assign any salvage or other residual value of such property" (NYSCEF Doc. No. 85, § 12).

The lease is clear that defendant was not permitted to just leave property and somehow get a credit for it. In fact, the lease expressly provides that the landlord was permitted to dispose of any leftover property at the tenant's cost. And plaintiff attached an invoice for the removal (NYSCEF Doc. No. 95). Defendant did not dispute the reasonableness of this removal cost.

Defendant's attempt to assert that this lease provision is unconscionable is without merit. It simply contains an incentive for defendant to remove its property or it would be deemed abandoned and left it up to the landlord to decide what to do. Plaintiff was under no obligation to accept defendant's offer for the property as a credit towards the unpaid rent. Surely, if it was that

valuable, defendant could have advertised it and sold it to a third party prior to its vacatur from the premises.

Summary

This is a straightforward commercial lease case where the tenant failed to pay the rent and left property in the premises for the landlord to clean up. Although the parties got very close to reaching a settlement agreement, that settlement never took effect because defendant did not make the settlement payment. Therefore, plaintiff is not bound by the terms of that agreement. Contrary to defendant's assertion, no discovery is required as there is no dispute that defendant did not pay the rent. The Court emphasizes that plaintiff has now filed its reply to the counterclaims, rendering defendant's claim that issue has not been joined as moot.

Plaintiff is entitled to the recover: $41,655.00 for unpaid rent and additional rent. The Court subtracted a $24 fee for electricity which plaintiff admitted (although buried in a footnote in reply) "may be in error" (*see* NYSCEF Doc. No. 118, n 5). Plaintiff asks for interest but did not include a specific date when interest should commence. The Court therefore finds that interest shall run from January 1, 2021 (a reasonable midpoint from the time defendant stopped paying the rent in May 2020 and when it vacated in July 2021).

The Court also awards plaintiff legal fees as it is the prevailing party in this litigation. It demands $10,491.47 through October 2022 and requests that the Court "provide a mechanism for the award of fees since that date." Therefore, plaintiff is directed to make a motion for all of the legal fees it seeks in this case on or before November 30, 2023. This should exclude any costs or disbursements as those will be awarded by the County Clerk as discussed below.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted and defendant's affirmative defenses and counterclaims are severed and dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $41,655.00 plus statutory interest from January 1, 2021 along with costs and disbursements as taxed by the Clerk upon presentation of proper papers therefor; and it is further

ORDERED that plaintiff is entitled to reasonable legal fees, this issue is severed, and plaintiff shall make a separate motion for the fees it seeks on or before November 30, 2023.

11/6/2023
DATE

ARLENE P. BLUTH, J.S.C.

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