32 W. 39th St. Sole Member LLC v Regency NYC Inc.
2023 NY Slip Op 34332(U)
December 7, 2023
Supreme Court, New York County
Docket Number: Index No. 654189/2022
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON**, ***Justice*** — **PART** **42**

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32 W.39TH STREET SOLE MEMBER LLC,

Plaintiff,

- v -

THE REGENCY NYC INC., SAMUEL MEISELS and YOSEF LOEB

Defendants.

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INDEX NO. 654189/2022

MOTION DATE 05/15/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 35, 40, 41

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

I. INTRODUCTION

In this breach of contract action to recover, $80,573.96 in unpaid rent and additional rent plus attorney's fees allegedly due under a commercial lease and guaranty, the plaintiff, owner of commercial property at 32 West 39th Street in Manhattan, moves (1) pursuant to CPLR 3212 for summary judgment on its complaint against defendant The Regency NYC Inc. (Regency), the tenant on the premises, and defendants Samuel Meisels and Yosef Loeb (Loeb), the guarantors on the lease (collectively, Guarantors), and (2) pursuant to CPLR 3211(b) for dismissal of the defendants' six affirmative defenses. The defendants oppose the motion and cross-move pursuant to CPLR 3025(b) for leave to amend their answer. The motion is granted and the cross-motion is denied.

II. DISCUSSION

A. Motion for Summary Judgment - First and Second Causes of Action

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

In support of its motion, the plaintiff submits, *inter alia*, the deed to the property, the subject lease agreement to Suite 1201 of the property (the Premises) and the guaranty agreement (Guaranty), both dated March 3, 2016; two lease modification agreements dated April 18, 2016, and January 31, 2021 (the lease agreement and the two lease modification agreements are, collectively, the Lease). The last lease modification agreement extended the Lease term to March 21, 2024, and granted a one-time rent abatement of approximately $23,094.00 immediately payable on default or notice of intent to vacate before the end of the Lease. The plaintiff also submits an affidavit of Aron Rosenberg, the plaintiff's managing member, who alleges that the defendant tenant defaulted on its obligation by failing to timely pay rent on July 1, 2022 and thereafter, causing the abated amounts to become due. Rosenberg further alleges that the defendant tenant vacated the Premises and stopped making payments altogether on October 1, 2022, after which the rent, additional rent and late fees continued to accrue. The plaintiff also submits a rent ledger dated January 11, 2023, the date the plaintiff filed the instant motion, showing an outstanding balance of rent and additional rent of $57,479.96. The ledger reveals that the last payment made was made on September 2, 2022.[1]

The defendants' opposition papers consist of an affidavit of Yosef Loeb, one of the two Guarantors and a shareholder of the defendant tenant, and various e-mail communications concerning complaints made by the tenant relating to break-ins that occurred on the Premises in September 2021, April 2022, and July 2022.

The plaintiff's proof establishes, *prima facie*, the necessary elements of the first and second causes of action of the complaint alleging breach of contract, in regard to the lease and the guaranty agreement, respectively. The proof establishes (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and

[1] The court notes that both the plaintiff and the defendants have failed to submit copies of the pleadings as required by CPLR 3212(b). "The court has discretion to overlook the procedural defect of missing pleadings when the record is sufficiently complete." Washington Realty Owners, LLC v 260 Washington St., LLC, 105 AD3d 675, 675 (1st Dept. 2013). As a complete set of the papers is available for the court's consideration through the parties' electronic filings, the court overlooks the defect and proceeds to review the motions. See Studio A Showroom, LLC v Yoon, 99 AD3d 632 (1st Dept. 2012).

(4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). It is well-settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), *aff'd* 88 NY2d 716 (1996). It is also well settled that "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991). The defendants do not show any fraud, duress or other wrongful act on the part of the plaintiff, or otherwise raise any triable issue of fact to warrant denial of summary judgment on the breach of contract causes of action. See Alvarez, supra; Zuckerman, supra.

The defendants do not dispute that the tenant vacated the Premises and caese paying rent on October 1, 2022. Rather, they maintain in their Memorandum of Law that the plaintiff breached the covenant of quiet enjoyment by failing to provide adequate safeguards against further break-ins by, for example, installing locks on the doors. This contention fails upon review of the Lease terms. The Lease expressly provides that the tenant was obligated to pay rent and additional rent through the end of the Lease term "without any setoff or deduction whatsoever." Moreover, the Lease provides that the tenant "waives the protections of Section 227 of the [New York] Real Property Law and agrees that the provisions of this article shall govern and control in lieu thereof." (Paragraph 9 of Lease). New York Real Property Law (NYRPL) § 227 permits tenants to surrender possession of a leasehold and cease payment of rent when a building becomes untenantable. "Where a commercial tenant has waived its rights under Real Property Law § 227, the tenant may not claim constructive eviction, but is limited to the remedies set forth in the lease." Dance Magic, Inc. v Pike Realty, Inc., 85 AD3d 1083, 1087 (2nd Dept 2011); see Hudson Towers Hous. Co., Inc. v VIP Yacht Cruises, Inc., 63 AD3d 413, 413 (1st Dept. 2009).

Furthermore, the Lease expressly provides that the landlord is not liable for any damage to the Premises for any loss or damage caused by "theft or otherwise," or "any cause of whatsoever nature, unless caused by, or due to, the negligence of [the landlord], its agents, servants or employees." (Paragraph 8 of Lease). The Lease also provides, "This lease and the obligation of Tenant to pay rent hereunder and perform all of the other covenants and

agreements hereunder . . . shall in no way be affected, impaired or excused because [the landlord] is unable to fulfill any of its obligations under this lease." (Paragraph 27 of Lease). The Lease also provides that no acceptance of surrender occurs unless it is "in writing and subscribed by Landlord or its duly authorized agent." (Paragraph 25 of Lease). Accordingly, the tenant was not entitled to withhold rent, regardless of any alleged failure of the landlord to "fulfill any of its obligations under this lease." (Paragraph 27 of Lease).

Neither do the defendants' obligations under the Lease and Guaranty terminate by virtue of the tenant's surrender of the Premises. Although the tenant vacated the Premises on October 1, 2022, no surrender occurred, as the landlord had not accepted any surrender. The Lease expressly provides that "no act or acts … done by the Landlord … shall be deemed an acceptance of a surrender of the demised premises … unless the same be in writing and subscribed by Landlord or its duly authorized agent." (Paragraph 25 of Lease). The defendants have not shown that the landlord manifested any intent to so accept surrender.

Furthermore, the defendants do not dispute that the tenant went into default in July 2022 by failing to timely pay rent, making the abated amount become immediately due. Instead, Loeb merely points out that the landlord failed to provide any notice about the default in subsequent communications to the tenant. However, the Lease does not premise payment of rent or additional rent on the provision of notice. Indeed, the Guaranty expressly provides that the Guarantors "waive notice of any and all defaults by Tenant in the payment of annual rent, additional rent or other charges." (Paragraph 4 of Guaranty).

Nor is there merit to the defendants' contention that the Guarantors are not in breach of the Guaranty because they are not liable for any payments accruing after the "Surrender Date" as defined in the Guaranty. However, the Guaranty expressly provides that the "Surrender Date" only occurs after the tenant has "paid the landlord all rent, additional rent and other charges due up to the date of surrender." (Paragraph 1, Guaranty). The defendants do not dispute that the tenant defaulted starting in July 2022, and continued to be in default thereafter. As such, the "Surrender Date" did not occur within the meaning of the Guaranty and the Guarantors are liable for all unpaid rent and additional rent under the Lease. By the affidavit of Aron Rosenberg and the detailed ledger, the plaintiff has established that amount to be $80,573.96 - consisting of $57,476.96 in rent, additional rent (not including the abated amount), interests and fees for the four months between October 2022 and January 2022; and $23,094.00 for the amount that was abated from October 1, 2020 to March 31, 2021.

Generally, interest is computed "from the earliest ascertainable date the cause of action existed". CPLR 5001(b). In a breach of contract action, interest "accrues from the time of an actionable breach." Kellman v Mosley, 60 AD3d at 457 (1st Dept. 2009); see generally Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256 (1998); Love v State of New York, 78 NY2d 540 (1991). The plaintiff is entitled to statutory interest from July 1, 2022.

To the extent that the plaintiff seeks any amounts due beyond the date of the motion, January 11, 2022, that application is denied. It is well settled that "no action can be brought for future rent in the absence of an acceleration clause." 23 E. 39th St. Dev., LLC v 23 E. 39th St. Mgt. Corp., 172 AD3d 964 (2nd Dept. 2019) *quoting* Beaumont Offset Corp. v Zito, 256 AD2d 372, 373 (2nd Dept. 1998).

B. Motion for Summary Judgment - Third Cause of Action

In its third cause of action, the plaintiff seeks contractual attorney's fees. Attorney's fees are recoverable, where, as here, there is a specific contractual provision for that relief. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). The defendants proffer no cogent argument or proof in opposition to an award of attorney's fees.

Paragraph 19 of the parties' Lease provides that "If [the landlord], . . . in connection with any default by the Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any action or proceeding, and prevails in any such action or proceeding, then Tenant will reimburse [the landlord] … with interest and costs." The plaintiff is the prevailing party in this action. See Board of Mgrs. of 55 Walker Condo. v Walker St., 6 AD3d 279 (2004); Quik Park W. LLC v Bridgewater Operating Corp., 189 AD3d 488 (1st Dept. 2020). Furthermore, Paragraph 6 of the Guaranty provides that "Guarantor[s] … will pay attorneys' fees, court costs and other expenses incurred by Landlord in enforcing or attempting to enforce this Guarantee." Thus, the defendant Guarantors are also liable for the plaintiff's attorney's fees.

However, the plaintiff has not submitted any affirmation, billing records or other proof to establish the amount of fees incurred in this action. The plaintiff may submit such supplemental papers, if so advised, within 60 days.

C. Dismissal of Affirmative Defenses

In their answer, the defendants assert six affirmative defenses – failure to state a cause of action, Statute of Limitations, defective service of process, Statute of Frauds, "laches, estoppel/collateral estoppel, unclean hands and/or entire controversy doctrine", and "no contract between parties." These purported affirmative defenses are dismissed as they are improperly asserted in a conclusory manner without any detail. See Commr. of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Mfrs.Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). CPLR 3013 expressly requires that all "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." In any event, in light of the grant of summary judgment to the plaintiff on its claims, the defendants cannot argue that the complaint fails to state a cause of action. The others are patently devoid of merit. Moreover, all equitable defenses are unavailable since this action is one exclusively for breach of contract damages. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012).

D. Cross-Motion for Leave to Amend

The defendants cross-move for leave to amend their answer to delete all but the part of the fifth affirmative defense that alleges unclean hands and to add three counterclaims for (1) a judgment declaring there was no breach, (2) breach of implied covenant of good faith and fair dealing, and (3) breach of the covenant of quiet enjoyment. The cross-motion is denied. Initially, the plaintiff correctly observes the cross-motion is untimely by several weeks, as it was filed after several extensions agreed to by the plaintiff. See CPLR 2214. Even were it timely, the motion must be denied in its entirety.

Inasmuch as the court has dismissed all of the affirmative defenses, there are none to amend. Therefore, that much of the cross-motion is moot. Nor is any defense of unclean hands viable. As a general rule, where, as here, a party seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is.

R.R. Co., supra; JDF Realty, Inc. v Sartiano, supra. Indeed, the defendants state no cognizable defense of unjust enrichment, which requires a party to demonstrate that (i) the other party was enriched, (ii) at that party's expense, and (iii) "it is against equity and good conscience to permit the [other party] to retain what is sought to be recovered." Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972) (citations omitted).

The proposed counterclaims are also meritless. As to the first proposed counterclaim, "[t]he general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations. Where there is no necessity for resorting to the declaratory judgment it should not be employed." Walsh v Andorn, 33 NY2d 503, 507 (1974) (ellipses omitted); see Touro College v Novus Univ. Corp., 146 AD3d 679, 679-680 (1st Dept. 2017] [internal citations and quotations omitted]). Here, the proposed declaratory judgment counterclaim serves no purpose. It is, in effect, merely opposition to the plaintiff's breach of contract causes of action.

As to the second proposed counterclaim, "New York law …. does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled." Harris v Provident Life and Acc. Ins. Co., 310 F3d 73, 81 (2nd Cir 2002); see Berkeley Research Group, LLC v FTI Consulting, Inc., 157 AD3d 486 (1st Dept. 2018); Deadco Petroleum v Trafigura AG, 151 AD3d 547 (1st Dept. 2017); Cambridge Capital Real Estate Investments, LLC v Archstone Enterprise LP, 137 AD3d 593 (1st Dept. 2016).

As to the third proposed counterclaim, it is well settled that "[t]he tenant must . . . have performed all covenants which are a condition precedent to its right to insist upon the covenant [of quiet enjoyment]." Dance Magic, Inc. v Pike Realty, Inc., 85 AD3d 1083, 1088 (2nd Dept. 2011), *citing* Dave Herstein Co. v Columbia Pictures Corp., 4 NY2d 117, 121 (1958). Since it defaulted in its lease obligations, the tenant cannot avail itself to any claim for breach of the covenant of quiet enjoyment. See Leider v 80 Williams St. Co., 22 AD2d 952 (2nd Dept. 1964). To the extent the defendants are alleging constructive eviction here, they expressly waived any such claim in the Lease, as discussed herein.

The court has considered and rejected the defendants' remaining contentions.

III. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the branch of the plaintiff's motion seeking summary judgment on the first and second causes of action of the complaint is granted, and it is further

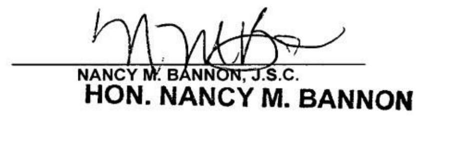
ORDERED that the Clerk shall enter judgment in favor of the plaintiff, 32 W. 39th Street Sole Member LLC, and against the defendants, The Regency NYC Inc., Samuel Meisels, and Yosef Loeb, jointly and severally, in the sum of $80,573.96, plus costs and statutory interest from July 1, 2022, and it is further

ORDERED that the branch of the plaintiff's motion seeking summary judgment on the third cause of action of the complaint is granted on the issue of liability and the plaintiff may file supplemental papers to establish the amount of attorney's fees incurred, if so advised, within 60 days of the date of this order and shall notify the Part 42 Clerk of any such filing, and it is further

ORDERED that the branch of the plaintiff's motion seeking dismissal of the defendant's affirmative defenses is granted, and the affirmative defenses are dismissed, and it is further

ORDERED that the defendants' cross-motion for leave amend its answer is denied.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

12/7/2023
DATE

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