Mayore Estates LLC v Century 21, Inc.

2024 NY Slip Op 30823(U)

March 11, 2024

Supreme Court, New York County

Docket Number: Index No. 653645/2021

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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MAYORE ESTATES LLC,80 LAFAYETTE ASSOCIATES LLC

Plaintiff,

- v -

CENTURY 21, INC.,

Defendant.

INDEX NO. 653645/2021

MOTION DATE 04/28/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

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

Upon the foregoing documents and for the reasons stated on the record (*tr.* 3.11.24), the Plaintiffs' motion for summary judgment and to dismiss Defendant's counterclaims and affirmative defenses is granted except insofar as it requests reimbursement for elevator restoration work to be performed by the Defendant pursuant to Article 37(ii) of the 9th Floor Lease (hereinafter defined). As discussed (tr. 3.11.24), as to this claim, the Plaintiffs simply has not demonstrated that it is entitled to judgment ***at this time.*** What is clear however is that the Plaintiffs has not waived its rights under the Ninth Floor Lease to require the Tenant to pay for the cost of restoration and that the $10 million of security under the 4-5-6 Lease (hereinafter defined) does not relate to this obligation.

The Plaintiffs are owners of a commercial building located at 22 Cortland Street in Manhattan (the **Premises**). The Defendant formerly leased the fourth, fifth, sixth, and ninth floors of the

Premises from the Plaintiffs pursuant to two separate leases (the **4-5-6 Lease**, NYSCEF Doc. No. 79; **9th Floor Lease**, NYSCEF Doc. No. 80; and together, the **Leases**). The Plaintiffs move for summary judgment as to liability and damages for rent arrears and liquidated damages the Defendant allegedly owes, and as to liability for certain elevator restoration charges allegedly owed pursuant to the 9th Floor Lease, and attorney's fees under both Leases.

The 4-5-6 Lease provides for minimum rent payments (**Minimum Rent**) and additional rent payments (**Additional Rent**), which latter category includes certain HVAC, electrical, real estate tax, and late fee charges. The Defendants stopped paying the Minimum or Additional Rent due under the 4-5-6 Lease starting November 1, 2020. As this Court found in its Decision and Order dated February 15, 2023 (NYSCEF Doc. No. 65), the Plaintiffs validly terminated the 4-5-6 Lease by a Notice to Cancel Lease dated May 24, 2021 (NYSCEF Doc. No. 59). The Defendant subsequently acknowledged the termination by letter and surrendered possession of the fourth, fifth, and sixth floors on June 7, 2021, the effective termination date of the 4-5-6 Lease (NYSCEF Doc. No. 60). The originally intended termination date of the lease was January 31, 2022, subject to renewal (NYSCEF Doc. No. 79, § 39[B]).

Article 18 of the 4-5-6 Lease unambiguously provides that "[i]n the case of any such default, re-entry, expiration and/or dispossess by summary proceedings or otherwise, (a) the rent shall become due thereupon and be paid up the time of such re-entry, dispossess and/or expiration" (NYSCEF Doc. No. 79, § 18[a]). Article 18(c) of the 4-5-6 Lease provides for continued Minimum Rent payments as liquidated damages in the case of tenant's default, and relieves the landlord of any obligation to re-let the premises or otherwise mitigate (*id.*, § 18[c]). As such, the

Plaintiffs are entitled to summary judgment as to liability and damages on their claims for the unpaid Minimum Rent, as defined in Article 39 of the Lease, from November 1, 2020 until the originally intended termination date of January 31, 2022 (*id*., § 39[A]). The Defendant in its opposition does not oppose Plaintiffs' Minimum Rent claims.

The Plaintiffs are also entitled to a judgment on liability and damages as to the Additional Rent and late fees owed under the 4-5-6 Lease. The Defendant argues summary judgment is inappropriate as to the Additional Rent because the Plaintiffs fail to provide the formulas demonstrating how the HVAC, electrical, and real estate charges were calculated, and further that Plaintiffs have not made the proper demand necessary to trigger Defendants' obligation to pay these charges as required by the 4-5-6 Lease.

Article 74 of the 4-5-6 Lease, however, provides that no such demand is necessary to trigger the Defendant's obligation to pay Additional Rent:

> Tenant's obligation to make any Additional Rent payments under this Lease ***shall be absolute and not conditioned on the happening of any act, thing or occurrence, including without limitation, the time or timeliness at or with which such statement, bill or demand is furnished to or made upon Tenant.*** Landlord's failure during the term of this Lease to prepare and deliver any statements or bills required to be delivered to Tenant hereunder, or Landlord's failure to make a demand under any Articles of this Lease shall not in any way be denied to be a waiver of, or cause Landlord to forfeit or surrender its rights to collect, any Additional Rent which may have become due pursuant to any such Articles of this Lease during the term of this Lease. Tenant's liability for the Additional Rent due under any Articles of this Lease shall continue unabated during the remainder of the term of this Lease and shall survive the expiration or sooner termination of this Lease for a period of eighteen (18) months.

(NYSCEF Doc. No. 79, § 74[A] [emphasis added]).

The Defendant's argument that the Plaintiffs' fail to submit evidence in admissible form as to Defendants' liability for the Additional Rent is simply not true. The Plaintiffs submitted statements showing the HVAC (and the basis for the calculation), electrical, and real estate charges due (NYSCEF Doc. Nos. 82-84, 89 and 119), and Mr. Moshe Drizin's affidavit in support of the Plaintiffs' motion contains the sworn statement that these records are kept in the regular course of the Plaintiffs' business (NYSCEF Doc. No. 76 ¶ 104). The formulas for the various charges are also provided in the 4-5-6 Lease (NYSCEF Doc. No. 79, §§ 39, 41, 42, 58, 62). The Plaintiffs have also adduced the correspondence with the Defendants in which Plaintiffs demand such Additional Rent payments (NYSCEF Doc. No. 119). As such, the Plaintiffs are entitled to summary judgment as to liability and damages on the Additional Rent owed under the 4-5-6 Lease from November 1, 2020 until the originally intended termination date of January 31, 2022.

The Plaintiffs are similarly entitled to summary judgment on their Minimum and Additional Rent claims under the 9th Floor Lease. As with the 4-5-6 Lease, the Defendant does not oppose its liability for the Minimum Rent due under the 9th Floor Lease. The Defendant's arguments as to the HVAC, electrical, real estate, and late fees due as Additional Rent pursuant to the 9th Floor Lease mirror those made as to the Additional Rent due under the 4-5-6 Lease and fail for the same reasons as given above. As such, the Plaintiffs are entitled to summary judgment as to liability and damages on the Minimum and Additional Rent due under the 9th Floor Lease, from November 1, 2020, until its termination on May 31, 2021.

The Plaintiffs are also entitled to late fees pursuant to Article 58 of each of the Leases, which provide for a late charge of $0.05 per $1.00 of Minimum or Additional Rent in arrears (NYSCEF Doc. Nos. 79, § 58; 80, § 58). The Defendant does not specifically oppose such late fees in its opposition papers (*see* NYSCEF Doc. No. 116). To the extent that the Defendant opposes a grant of summary judgment on the issue of late fees on the same grounds as to other Additional Rent amounts claimed (*i.e.*, that Plaintiffs have failed to adduce the formula), the Court finds that the relevant formula is given in Article 58 of each Lease.

The Plaintiffs are entitled to summary judgment on their fourth cause of action for a declaratory judgment that the Plaintiffs may retain the proceeds of the Letter of Credit as liquidated damages pursuant to Section 91 of the 4-5-6 Lease. Pursuant to Article 91 of the 4-5-6 Lease, the parties agreed that the Defendant would deliver to the Plaintiffs a $10 million letter of credit which, in the event of a default by the Defendant, could be retained by Plaintiffs as liquidated damages to cover the damages, costs, and expenses required to restore the fourth, fifth, and sixth floors of the Premises back to general office use (NYSCEF Doc. No. 79, § 91). The parties specifically agreed in this provision that the letter of credit "***constitutes a reasonable estimate*** of the Restoration Costs likely to be suffered by Landlord to restore and renovate the Demises Premises to be suitable and appropriate for general office use" (*id.* [emphasis added]).

The party challenging the enforceability of a liquidated damages clause bears the burden of demonstrating that (i) damages were readily ascertainable at the time the parties entered into the agreement, or (ii) that the liquidated damages were conspicuously disproportionate to the foreseeable or probable losses (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380

[2005]). Liquidated damages provisions must be viewed from the time entered into (*id*). The 4-5-6 Lease commenced in June 2010 and was renewable ***such that it could have terminated as late as 2059 – i.e., 49 years later!*** Thus, the $10 million liquidated damages provided for in Article 91 cannot be said to be disproportionate because the cost of a restoration to take place at any time over the next 49 years was not readily ascertainable in 2010. As noted above, the Defendants expressly agreed that the $10 million number was a "reasonable estimate" in the 4-5-6 Lease (NYSCEF Doc. No. 79, § 91). Thus, the Defendant are not entitled to void the liquidated damages clause. It is wholly irrelevant that the restoration costs may turn out to be substantially less or that the Defendant offers a proposed cost estimate as to demolition only some 20% into the potential term that suggests a lower cost as to the demolition (*Victoria's Secret Stores, LLC v Herald Sq. Owner LLC*, 2022 N.Y. Slip Op. 31356[U], 4 [N.Y. Sup Ct, New York County 2022], *affd*, 2022 N.Y. Slip Op. 07529 [1st Dept 2022]). Accordingly, the Defendants' first, second, and third counterclaims and eighth and ninth affirmative defenses are dismissed, as they are all predicated on the liquidated damages provision being unenforceable.

As discussed above, the Plaintiffs are not however entitled to summary judgment as to the issue of liability on their claim that the Defendants are liable under Article 37(ii) of the 9th Floor Lease for the costs of restoring the elevator shafts to their original condition. Although the record does not establish waiver (and the leases contained no waiver clauses), the email and other correspondence suggest that there came a time when Plaintiffs indicated they were going to undertake the restoration work themselves. To wit, both the June 25, 2021 letter and January 25, 2022 email from the Plaintiffs to the Defendant contain express reservations of rights in regard to the elevator restoration work (NYSCEF Doc. Nos. 111, 114). Inasmuch as it is not clear whether

the Plaintiffs were going to perform this work because the Defendant failed to do so or otherwise breached the leases or whether the Plaintiffs actually performed any such work and whether any actual costs were incurred, it can not be said that the Plaintiffs are entitled to summary judgment at this time. It is however clear that the $10 million security in the 4-5-6 Lease related to the restoration of the demised premises under that Lease and not the restoration of the elevators under the Ninth Floor Lease.

Finally, the Plaintiffs are entitled to a judgment as to liability for the Plaintiffs' reasonable attorney's fees pursuant to Article 66 of both Leases, which each provide, in relevant part:

> Tenant agrees to pay Landlord upon demand, as Additional Rent, a sum equal to all costs and expenses (including reasonable attorneys' fees, costs of investigation and disbursements) which are incurred by Landlord in enforcing Tenant's performance of its obligations under this Lease or in enforcing any or all of Landlord's rights hereunder, specifically including, without limitation, the cost of collecting sums due, whether or not an action or proceeding is commenced, or levying and collecting on any judgment or arbitration award in Landlord's favor, and the cost incurred in any litigation, negotiation or transaction in which Tenant causes Landlord to become involved or concerned (including, but not limited to, any sums incurred by Landlord in preparing and reviewing any documents associated with Tenant's requests or requirements)

(NYSCEF Doc. Nos. 79, § 66; 80, § 66).

This matter will also be referred to a JHO for a determination of the amount of attorneys' fees due.

Lastly, the Defendants' fourth through ninth counterclaims must be dismissed, as they are all predicated on the assertion that the action captioned *Mayore Estates LLC et al v. Century 21 Inc*,

Index No. 656373/2020 (the **Related Action**) was a sham litigation. While the Court must take the facts alleged as true in determining a motion to dismiss, the allegation falls flat. By Decision and Order dated April 18, 2022, this Court held for the Plaintiffs to the extent that the Defendant failed to properly exercise its renewal rights under the retail lease (NYSCEF Doc. No. 85, in the Related Action; *Mayore Estates LLC v Century 21 Inc.*, 2023 NY Slip Op 5689 [1st Dept Nov. 14, 2023]). Thus, it cannot be said that the Related Action was a "sham" such that the *Noerr-Pennington* doctrine does not apply. Thus, the Defendants' fourth through ninth counterclaims are dismissed.

The Defendant's affirmative defenses are dismissed without opposition except as to Defendant's eighth and ninth affirmative defenses which are dismissed for the reasons set forth above.

The Court has considered the parties' remaining arguments and finds them unavailing.

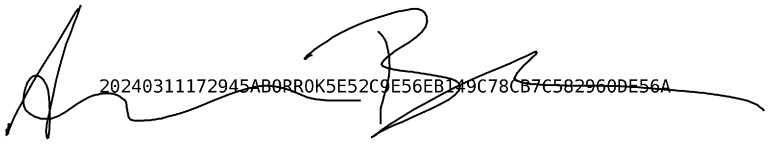
The Plaintiffs may submit judgment on notice.

Accordingly, it is hereby

ORDERED that the Plaintiffs' motion for summary judgment is granted except as to the Plaintiffs' request for reimbursement for the elevator restoration work; and it is further

ORDERED that the Defendant's counterclaims and affirmative defenses are dismissed; and it is further

ORDERED that the amount of elevator restoration costs and attorney's fees due shall be referred to a JHO for determination.



3/11/2024
DATE

ANDREW BORROK, J.S.C.

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