SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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TRINITY CENTRE LLC,

Plaintiff,

- v -

SUBWAY REAL ESTATE CORP. and SUBCON INC.,

Defendants.

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INDEX NO. 654220/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, and 54

were read on this motion by plaintiff for SUMMARY JUDGMENT (& CROSS-MOTION for limitation of damages).

LOUIS L. NOCK, J.

Upon the foregoing documents, plaintiff's motion for summary judgment against defendant Subway Real Estate Corp., doing business as Subway Real Estate LLC ("SRE" or "defendant"),[1] is granted as to liability, and SRE's cross-motion to limit its damages to $40,000 and the value of its subtenant's security deposit is granted, in accordance with the following memorandum.

Background

The following is largely undisputed. Plaintiff leased the "Trinity Level" of the building located at 111 Broadway, New York, New York to SRE (Lease, NYSCEF Doc. No. 27), who, in turn, subleased it to a series of nonparties who were franchisees of nonparty Doctor's Associates Inc., the owners of the trademark for Subway Restaurants (sublease, NYSCEF Doc. No. 45;

[1] Plaintiff did not seek summary judgment against defendant Subcon Inc., which denied having any involvement with this matter (answer, NYSCEF Doc. No. 18).

assignment and assumption of sublease, NYSCEF Doc. No. 46; addendum to sublease, NYSCEF Doc. No. 47; Franchise Agreement, NYSCEF Doc. No. 48). Invoices for rent were sent to the subtenant (rent invoices, NYSCEF Doc. No. 29). After defendant's default in paying those invoices, plaintiff served a termination notice dated June 8, 2021 (Complaint ¶ 36).

The complaint seeks various categories of relief. After seeking a judgment for ejectment (first cause of action), it seeks a judgment for "Rent Arrears" (second cause of action) in an amount of $266,561.36 "representing the Rent Arrears due and owing under the Lease through the June 18, 2021 Termination Date . . . ." (Complaint ¶ 61.) The complaint then seeks "Use and Occupancy" (third cause of action) seeking a post-termination amount of $169,382.41 (Complaint ¶ 69). Thereafter, the complaint seeks what it refers to as "Liquidated Damages" (fourth cause of action) "measured from the Possession Date through and including the balance of the original lease term, as calculated pursuant to Article 37 of the Rider to the Lease" (Complaint ¶ 81).[2]

The complaint's reference to "Article 37 of the Rider to the Lease" (*id.*) does not lead the court to any guidance on the calculation intended by the foregoing cause of action for "Liquidated Damages," as said paragraph, instead, deals with the "Commencement Date" and "Term" of the lease (*see*, NYSCEF Doc. No. 3 at NYSCEF page 11 of 73). Rather, as pointed out in plaintiff's briefing (NYSCEF Doc. No. 26 at 9-10), a liquidated damages provision is found in Article 18 of the original form of lease, titled "Remedies of Owner and Waiver of Redemption," as follows:

> Tenant . . . shall also pay Owner, ***as liquidated damages,*** for the failure of Tenant to observe and perform said Tenant's covenants herein contained, ***any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises***

[2] A fifth cause of action seeks an award of attorneys' fees.

> ***for each month of the period which would otherwise have constituted the balance of the term of this lease.*** The failure of Owner to re-let the demised premises or any part or parts thereof shall not release or affect Tenant's liability for damages. In computing such liquidated damages there shall be added to the said deficiency such expenses as Owner may incur in connection with re-letting, such as legal expenses, reasonable attorneys' fees, brokerage, advertising and for keeping the demised premises in good order, or for preparing the same for re-letting. . . .

(NYSCEF Doc. No. 3 [lease] art 18 [emphasis added].)

But while plaintiff focuses on the above-quoted liquidated damages provision – Article 18 of the original form of lease – in seeking a judgment for all arrears plus an acceleration of all future rents to become due for the balance of the term, minus mitigation through optional re-letting, defendant opens its opposition briefing by drawing the court's attention to an entirely different liquidated damages provision found at Article R13 of the second rider to the lease (*see*, NYSCEF Doc. No. 44 [defendant's memorandum] at 1) (the "Rider II Liquidated Damages Provision"). That second rider (contained within NYSCEF Doc. No. 3 and starting on NYSCEF page 49 of 73 thereof) opens with the express proviso that "Notwithstanding any clause in this Lease to the contrary, the following provisions shall prevail" (*id.*). That would clearly render Article 18's liquidated damages provision (NYSCEF page 3 of 73) – relied on by plaintiff – overridden by the Rider II Liquidated Damages Provision insofar as it sets forth a new concept of liquidated damages that conflicts with that of Article 18's; and that is precisely what defendant's opposition argument rests on. In defendant's counsel's words: "Plaintiff's recovery on causes of action encompassing past due and future Base Rent and regularly recurring Additional Rent payable under the Lease are capped by the limitation of liability provision found in Article R13 of Rider II to the Lease" (NYSCEF Doc. No. 44 [defendant's memorandum] at 1). The Rider II Liquidated Damages Provision provides:

> Landlord and Tenant agree that in the event of a default by Tenant and termination of this lease, Landlord shall make commercially reasonable efforts to mitigate its damages by

> promptly listing the Premises for rent with a reputable real estate broker. Further, upon any default in the payment of Base Rent and/or any other regularly recurring installments of additional rent hereunder (collectively, "Recurring Rent Obligations"), Landlord's claim against Tenant for such Recurring Rent Obligations shall not exceed the lesser of (i) the sum of $40,000.00 and the amount of the Security Deposit hereunder, or (ii) the aggregate Recurring Rent Obligations due and payable for the remainder of the Term.

(NYSCEF Doc. No. 3 at NYSCEF page 52 of 73.)[3]

First, unlike Article 18's grant of discretion to the plaintiff as to mitigation through re-letting, the Rider II Liquidated Damages Provision mandates such mitigation ("in the event of a default by Tenant and termination of this lease, Landlord ***shall*** make commercially reasonable efforts to mitigate its damages by promptly listing the Premises for rent with a reputable real estate broker" [emphasis added]).

Second, unlike Article 18's liquidated damage measurement of straight deficiency between all arrears and future accelerated rents, on the one hand, and any mitigated amounts through optional re-letting, on the other hand, the Rider II Liquidated Damages Provision (with mandatory mitigation in mind) calculates the deficiency as "not [to] exceed the lesser of (i) the sum of $40,000.00 and the amount of the Security Deposit hereunder, or (ii) the aggregate Recurring Rent Obligations due and payable for the remainder of the Term." Obviously, the "lesser of" component of the calculation envisions a temporally sliding scale whereby a termination toward the beginning of the lease term would presumably result in Item 1 being the "lesser" amount ($40,000 + Security Deposit), whereas a termination toward the end of the lease term would presumably result in Item 2 being the "lesser" amount (accelerated future obligations).

[3] Recurring Rent Obligations is defined as "the payment of Base Rent and/or any other regularly recurring installments of additional rent" (*id.*). Additional rent is defined as "all other payments required to be made by Tenant [under the lease] . . . whether or not the same shall be designated as such" (lease, NYSCEF Doc. No. 27, § 60 [c] [NYSCEF page 42 of 73]).

In April 2020, the current subtenant failed to pay the monthly rent, prompting plaintiff to send defendant a default notice (default notice, NYSCEF Doc. No. 30). When the rent default continued, plaintiff terminated the lease as of June 18, 2021 (termination notice, NYSCEF Doc. No. 32). The sublessee eventually vacated the premises on September 8, 2021 (Albert aff., NYSCEF Doc. No. 23, ¶ 28). SRE does not dispute that it is liable to plaintiff in some manner (transcript of proceedings, NYSCEF Doc. No. 54 at 12-13, 16). It is undisputed that the rent and additional rent due following the initial default in the payment of rent is well in excess of $40,000 plus the value of the security deposit ($54,022.12) (Albert aff., NYSCEF Doc. No. 23, ¶ 31). Accordingly, based on application of the Rider II Liquidated Damages Provision, as understood by defendant, plaintiff may retain the security deposit and further recover the sum of $40,000 as plaintiff's complete recovery in this action – not the vastly higher amounts sought by plaintiff in the complaint and on its instant motion for summary judgment.

As noted, the complaint, and plaintiff's motion, seek a judgment for rent arrears, in an amount of $266,561.36 (Complaint ¶ 61); for use and occupancy during the time that the sublessee remained in the space after plaintiff terminated the lease, in an amount of $18,562.40 (*id.*, ¶ 71); for "liquidated damages" for the remainder of the lease term, in an undescribed amount (*id.*, ¶¶ 73-81); and for attorneys' fees. SRE cross-moves for summary judgment capping its damages as aforesaid based on its proffer and reading of the Rider II Liquidated Damages Provision.

In reply to SRE's aforesaid proffer and reading, plaintiff's counsel argues that the Rider II Liquidated Damages Provision "only applies to unpaid post-vacatur rent for the balance of the Lease Term; it does not limit Trinity's right to recover actual, past due, rent for the nearly two-years Defendant's Sublessee/Franchisee remained in possession, or use and occupancy for the

period it held over after Trinity terminated the Lease" (NYSCEF Doc. No. 53 [plaintiff's memorandum] at 2). However, the Rider II Liquidated Damages Provision does not express such a qualification; nor does it compel any inference of same. And insofar at it makes passing reference to "Articles 17 and 18 of this Lease" (NYSCEF page 52 of 73), it expressly limits that reference to "Landlord's non-monetary remedies" (*id.*), such as re-entry, dispossession "by summary proceedings or otherwise," removal of tenant's effects (Article 17), re-letting, alteration, and injunction (Article 18). That passing, limited, reference to Article 18 cannot be read to expand into a preservation of the much broader liquidated damages regime set forth in Article 18 which, by defendant's account, and as seems apparent, has been overridden in the second rider's express preamble, superseding any prior inconsistent lease provisions, including the monetary portion of Article 18.

Plaintiff's counsel urges this court to take note of its decision in the unrelated case of *Trinity Centre LLC v Sun Broadcast Group, Inc.* (index No. 650281/2018 [Sup Ct NY County] [Nock, J.]) which, counsel posits, "awarded Trinity money judgments in the amount of the past due rent, in near identical circumstances, and under the identical pre-printed form Lease provisions" (NYSCEF Doc. No. 26 [plaintiff's memorandum] at 6). But a review of the filings in that case uncovers no rider provision such as the one governing this case – the Rider II Liquidated Damages Provision – which clearly supersedes the Article 18 liquidated damages provision found in the original form of lease in this case; but which remained in force in said unrelated case.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof

to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

As the Court of Appeals has summarized, the basic principles of contract interpretation are as follows:

> It is fundamental that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms, and that courts should read a contract as a harmonious and integrated whole. Courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreements. In that regard, a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect.

(*Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, N.A. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017] [internal quotation marks and citations omitted].) In

accordance with these principles, the court finds that SRE's liability to plaintiff is capped at $40,000 and the amount of the security deposit.

As observed above, any reasonable interpretation of the lease as a whole, which is subject to the plain language of its second rider in general and the Rider II Liquidated Damages Provision in particular, requires the foregoing conclusion that plaintiff's damages are capped as aforesaid. Plaintiff asserts that this reading makes no commercial or common sense, but as SRE points out, an agreement between the parties to a contract to limit damages is a valid and enforceable means of allocating the risk of economic loss and should not be disturbed by the court (*Metropolitan Life Ins. Co. v Noble Lowndes Intern., Inc.*, 84 NY2d 430, 436 [1994] ["Parties sometimes make agreements and expressly provide that they shall not be enforceable at all, by any remedy legal or equitable. They may later regret their assumption of the risks of non-performance in this manner; but the courts let them lie on the bed they made"]).

As discussed above, plaintiff's counsel's self-proposed construct, that the Rider II Liquidated Damages Provision "only applies to unpaid post-vacatur rent for the balance of the Lease Term" (NYSCEF Doc. No. 53 [plaintiff's memorandum] at 2), finds no support whatsoever in the plain language of that provision. If plaintiff had desired to preserve the broader liquidated damages regime of Article 18 of the original form of lease, and defendant was inclined to agree to that, plaintiff could have, and should have, done so by employing such preservation language. This is especially so, given that provision's express reference to Article 18, but restricting its reach to non-monetary remedies, as noted above. In any case, absent a special relationship between the parties, a statute, or public policy concerns, limitations on damages are enforceable (*Duane Reade v 405 Lexington, L.L.C.*, 22 AD3d 108, 111 [1st Dept 2005]).

Accordingly, the limitation on damages, as advocated by defendant, applies. It is undisputed that the rent and additional rent due following the initial default in the payment of rent is well in excess of $40,000 plus the value of the security deposit ($54,022.12) (Albert aff., NYSCEF Doc. No. 23, ¶ 31). Accordingly, plaintiff may retain the security deposit and further recover the sum of $40,000. All further recovery is barred. This includes the claim for attorneys' fees, and any pre-judgment interest.

Finally, to the extent it is implicated by the motion practice, SRE's defenses of frustration of purpose and impossibility of performance due to the Coronavirus pandemic are unavailing. The Appellate Division, First Department, has established that such defenses are not implicated by temporary closures and reduced capacity because of the pandemic (*88 Greenwich Owner LLC v 21 Rector St LLC*, 217 AD3d 432, 433 [1st Dept 2023]). Relatedly, SRE's first through third counterclaims predicated on those defenses (*see*, NYSCEF Doc. No. 19 ¶¶ 134-61) must be dismissed. As for SRE's fourth counterclaim for attorneys' fees (*id.*, ¶¶ 162-64), the lease contains an attorneys' fee clause in the event that the landlord prevails (*see*, NYSCEF Doc. No. 3 § 19). Pursuant to Real Property Law § 234, reciprocity of right is afforded a tenant who prevails. However, based on the within disposition, which grants plaintiff summary judgment on liability and, at the same time, grants SRE's cross-motion limiting plaintiff's damages, both parties can be said to have "prevailed." Accordingly, SRE's counterclaim for prevailing-party attorneys' fees is dismissed.

As for defendant Subcon Inc., it has filed an answer denying any involvement with this matter (NYSCEF Doc. No. 18);[4] and, in apparent acknowledgment of same, plaintiff has not moved for judgment against it as it has in relation to SRE. This court, therefore, in assumption

[4] Defendant Subcon Inc. points out that it is not a party to the lease and never occupied the premises (NYSCEF Doc. No. 18).

of its authority to grant summary judgment to "any party other than the moving party . . . without the necessity of a cross-motion" (CPLR 3212[b]), grants summary judgment dismissing the complaint as against defendant Subcon Inc. The court is aware of the pending counterclaim of defendant Subcon Inc., seeking a sanction against plaintiff under 22 NYCRR 130-1.1 (*see*, NYSCEF Doc. No. 18 ¶ 94). However, in light of plaintiff's determination not to include Subcon in its motion for summary judgment, the court is loathe to characterize plaintiff's conduct, vis-à-vis Subcon, as frivolous. Accordingly, Subcon's counterclaim for sanctions against plaintiff is dismissed.[5]

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted as to liability, and the cross-motion of defendant Subway Real Estate Corp., doing business as Subway Real Estate LLC, for summary judgment limiting the amount of plaintiff's recovery to $40,000 and the value of the security deposit is granted; and it is further

ADJUDGED and DECLARED that plaintiff may retain the security deposit; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Subway Real Estate Corp., doing business as Subway Real Estate LLC, in the amount of $40,000.00; and it is further

ORDERED that the counterclaims asserted by the defendants are dismissed.

[5] Plaintiff has filed replies to both defendants' counterclaims (NYSCEF Doc. Nos. 20, 21) and is, therefore, not in default in regard thereto.

This constitutes the decision and order of the court.

ENTER:

7/17/2024
DATE

LOUIS L. NOCK, J.S.C.

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