

Vernon Towers, LLC. v M.A. Loft II, LLC.
2024 NY Slip Op 35361(U)
July 12, 2024
Supreme Court, Queens County
Docket Number: Index No. 710301/2020
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**
Justice

IAS PART 4

FILED & RECORDED
7/15/2024
3:05 PM
COUNTY CLERK
QUEENS COUNTY *CP*-----x
VERNON TOWERS, LLC.,Index
No.: 710301/2020

Plaintiff(s),

Motion
Date: October 31, 2023

-against-

Motion
Cal. No.:

M.A. LOFT II, LLC., and JOMAR SMART

Motion
Seq. No.: 5Defendant(s).
-----x

The following papers numbered EF 95-113, EF 55, EF 115-117 read on this motion by plaintiff Vernon Towers, LLC for an Order: granting summary judgment, pursuant to CPLR § 3212, against defendant M.A. Loft II, LLC and defendant Jomar Smart, for damages arising out of breach of contract.

	PAPERS
	NUMBERED
Notice of Motion Affid.-Exhibits.....	EF 95-98, EF 100-112
Answering Affid.-Exhibits.....	EF 113, ¹ EF 55
Reply Affid.-Exhibits.....	EF 115 - 117
Memorandum of Law.....	EF 99

Upon the foregoing papers, it is ordered that this motion by plaintiff for summary judgment is determined as follows:

This is an action for relief by a landlord against a tenant and the tenant's guarantor under a Lease, Lease Amendment and Guaranty. On July 16, 2020 plaintiff Vernon Tower, LLC commenced this action, asserting two causes of action: (1) as against defendant M.A. Loft II, LLC and defendant Jomar Smart, for an Accounting of the \$88,207.00 paid to defendant M.A. Loft II, LLC for work completed by defendant M.A. Loft II, LLC, and if unable to account, for a money judgment in that amount against both defendants; and (2) as against

¹This Court shall disregard defendants' additional late opposition papers, served after plaintiff landlord's reply and without leave of Court.

defendant M.A. Loft II, LLC, for a Declaratory Judgment declaring that the rental commencement date is April 1, 2020. Plaintiff also seeks an award of court costs and attorneys' fees. On August 24, 2020, defendants filed a Verified Answer and Counterclaimed for Revision of Contract and Breach of Contract.² Plaintiff filed a Reply to the Counterclaim on or about September 9, 2020.

I. Commercial Lease between Plaintiff Vernon Tower, LLC and Defendant M.A. Loft II, LLC

Plaintiff Vernon Tower, LLC (plaintiff landlord) is the owner of real property located at 31-57 Vernon Boulevard, Long Island City, New York 11106. According to the Verified Complaint, on November 12, 2019, defendant M.A. Loft II, LLC, (defendant tenant) entered into a Lease with plaintiff to rent the first floor and mezzanine of a commercial space at 31-57 Vernon Boulevard, Long Island City, New York 11106 (subject property) for use as an event space. By its terms, November 12, 2019 was the Lease commencement date.

The Lease provides for a five (5) year term with an option for the tenant to renew for an additional five (5) year Lease period, an annual rent of \$120,000.00 with a three percent (3%) annual increase, and a three (3) month rent concession period. The date set for the first rent payment was February 1, 2020.

The "Default" section of the Lease provides that if the tenant defaults in performing under the Lease, the landlord is to provide tenant with a thirty (30) days' Notice to Cure. This section imparts the remedies available to the landlord for a tenant's breach of the Lease, which include rent owed under the Lease, liquidated damages and attorneys' fees with interest at twelve percent (12%). Under the "Waiver" section, if the landlord fails to seek redress for a violation of the Lease, if a subsequent violation occurs, the landlord is entitled to treat it as if it were the original violation and seek redress. Paragraph 20 of the Lease contains a merger clause which requires that any change to the Lease be in writing and signed by the party against whom enforcement or modification is sought.

²Defendants failed to timely amend their Verified Answer within 20 days after such service (CPLR §3025[a]). Thereafter, defendants filed a "Verified Crossclaim" adding a party to the action and filed a "Verified Counterclaim" outside the time periods specified in CPLR §§1003 and 3025(a), without obtaining leave of Court or a stipulation of the parties who had appeared in the action (plaintiff served a Notice of Rejection of both pleadings). Accordingly, the additional pleadings are nullities warranting dismissal of such amended pleadings, and will not be considered (*id.*; *Hulse v Wirth*, 175 AD3d 1276, 1279 (2019)).

II. “Alterations” - Tenant Improvement Allowance

Lease Paragraph 3, entitled “Alterations,” sets forth the requirement that tenant is to make no changes to the subject premises without landlord’s prior written approval.

This section also contains a tenant improvement allowance³ provision for significant construction and leasehold improvements to be done, as outlined in the parties’ Lease, with the costs for improving the leased commercial space to be borne by landlord through a cash allowance of \$150,000.00 to be paid directly to the tenant. According to the Lease, the list of the work to be done using the tenant improvement is, as follows:

(1) new flooring on the ground floor, of the premises, (2) a chandelier, (3) lighting, (4) an HVAC system, (5) security room, (6) Bar/Kitchenette, and shall further be permitted to frame the ceiling and paint and finish the premises. Landlord hereby gives its consent to the aforementioned Alterations to the premises.

These payments from the landlord to the tenant are separate and apart from the tenant’s obligations to timely pay rent during the leasehold improvement period. The Lease provides that the landlord is to make a cash allowance payment within seven (7) business days after receipt of an invoice. However, if the landlord fails to timely pay the cash allowance, the Lease provides that the tenant would be entitled to an extension of one day of the rent concession period for each day the invoice has not been paid. This tenant improvement allowance provision further states that in the event the landlord failed to pay any of the cash allowance within ninety (90) days after being given an invoice, tenant would have the right to terminate the Lease.

III. Lease Guaranty

On November 12, 2019, co-defendant Jomar Smart (defendant Smart), the managing member of defendant tenant, executed a Guaranty which guarantees to plaintiff landlord, the full payment of all rent and additional rent which may come due under the Lease between

³A tenant improvement allowance is a provision in a commercial lease which, “[u]nder current practice, a commercial tenant will often receive, among other concessions, a ‘tenant allowance’ under a new lease whereby the landlord will agree to bear the costs, up to a specified amount, to build out the premises to the commercial tenant’s unique specifications, and then recover those significant costs by absorbing them into future rents under the lease” (Sherry Millman and Genna Grossman, *Cap on Lease Rejection Claims Under the Bankruptcy Code and Its Damaging Effect on Commercial Landlords*, NYLJ, September 16, 2022 p.3).

plaintiff landlord and defendant tenant. In the Guaranty, defendant Smart agrees to the legality of the agreement and that it shall not be ended, or changed by reason of the claims to Landlord against Tenant of any of the rights or remedies given to Landlord as agreed in the attached Lease . . . [t]he Guarantor further agrees that this guaranty shall remain and continue in full force and effect as to any . . . change . . . of the Lease . . .”

IV. Letter Agreement for Escrowed Funds - Tenant Improvement Allowance

On December 4, 2019, plaintiff landlord and defendant tenant sent a Letter Agreement to Barristers Title Agency, LLC, an escrow agent. The Letter Agreement was required as a condition precedent to a loan given by BSPRT CMBS Finance, LLC (lender) to plaintiff Vernon Tower, LLC and secured by a Consolidated, Amended and Restated Mortgage and Security Agreement for the property located at 31-43 Vernon Boulevard, Astoria, New York 11106. The lender required the Letter Agreement to govern the usage of the tenant improvement allowance of \$150,000.00 as set forth in the “Alterations” section of the parties’ November 12, 2019 Lease, for the specified improvements to be performed by defendant tenant at the subject premises. The Letter Agreement states, in part “[t]herefore, as portions of the Work are completed, Tenant shall submit a written request for payment to Landlord and Escrow Agent, accompanied by a paid invoice(s) associated with such portion of the Work completed.”

Annexed to the December 4, 2019 Letter Agreement is (1) “Exhibit A,” which consists of the work to be done at the subject premises, which precisely mirrors the language in the Lease; (2) “Exhibit B,” entitled “MA Loft Work Budget,” dated November 12, 2019 which contains a list of the type of work to be performed and the costs associated with each project, with the total adding up to \$150,000.00; and (3) “Exhibit C” which is the wiring information for the disbursement bank account for Barristers Title Agency, LLC, the escrow agent. The Letter Agreement is signed by plaintiff and by defendant tenant M.A. Loft II, LLC, by defendant Smart as “Owner.” By authorized signatory, the document indicates that the escrow agent “Accepted and Agreed” the Letter Agreement on December 4, 2019.

V. Lease Amendment

On January 30, 2020, plaintiff landlord and defendant tenant each signed a hand written document entitled “\$150,000.00 Building Budget” which sets forth amounts of money and the dates by which those funds were to be paid to defendant tenant and indicates that the work was to be completed by March 12, 2020. The handwritten document amended the Lease by extending defendant tenant’s rent concession period to April 1, 2020, and by providing defendant tenant with a rent reduction of \$2,500 a month for 12 months.

VI. Tenant Improvement Allowance - Payment and Work Progression

It is undisputed that by February 2020, plaintiff landlord had paid defendant tenant \$107,000.00 pursuant to the tenant improvement allowance in the Lease. On March 1, 2020, plaintiff landlord alleges that after an inspection of the subject premises, it was apparent that defendant tenant had not commenced the renovation work. On March 5, 2020, plaintiff landlord claims that after it requested the written confirmation of the work that defendant tenant's contractors had completed, defendant tenant was only able to verify work performed at the premises in the sum of \$18,793.00, a shortfall of \$88,207.00 from the \$107,000.00 defendant tenant had been paid to date.

On July 15, 2020, plaintiff landlord claims that defendant tenant filed a plumbing application for the subject premises which included modifications to the plumbing system and the installation of a range hood and a fire suppression system, all of which was not part of the tenant improvement work outlined in the Lease or approved in writing by plaintiff landlord. Plaintiff landlord claims that thereafter, several complaints were made to the Department of Buildings regarding illegal construction being conducted at the subject premises.

On September 30, 2020, plaintiff landlord sent defendant tenant and defendant guarantor a thirty (30) day Notice to Cure dated September 22, 2020. The Notice instructed defendant tenant to cure the Lease violations. On November 13, 2020, a notice was sent to defendant tenant's attorney, warning that if defendant tenant did not cure all defects at the subject premises and to stop illegal construction, legal action would be taken. Plaintiff landlord maintains that defendant tenant did not cure the defects.

In April 2021, plaintiff landlord claims that it hired an electrical contractor to inspect the subject premises and make any necessary alterations. According to the affidavit of Rahlou Smith, an electrician, on June 9, 2021, he conducted an inspection of the subject premises and he flagged seven (7) different violations of Building Code requirements. In April 2021, plaintiff landlord claims that it hired ECNY Electrical Contractors to inspect and make any necessary alterations to the premises to correct the dangerous conditions allegedly created by defendant tenant at a cost of \$8,073.03. Additionally, plaintiff landlord claims that it hired NY Interior Construction at a cost of \$5,500.00, to create plans and file the required permits.

VII. Contentions of the Parties

Plaintiff landlord argues that it is entitled to judgment as a matter of law as it has demonstrated that it has demonstrated its entitlement to an Accounting and a money judgment for the \$88,207.00, representing the difference between the \$107,000.00 plaintiff landlord paid defendant tenant for the tenant improvement allowance and the amount of work actually done,

in the amount of \$18,793.00. As a result of defendant tenant's claimed breach of the parties' agreements and defendant Smart's Guaranty, plaintiff claims it is owed a money judgment in significant damages from defendants, including the deficiency between the rent covenanted to be paid and the net amount, if any, of the rents collected for the balance of the Lease term, liquidated damages, attorneys' fees with interest at twelve percent (12%), and reimbursement for the expenditures made by plaintiff landlord to address defendant tenant's breach, including hiring an electrician and correcting the electrical issues at a cost of \$13,573.03.

Plaintiff landlord claims defendant tenant breached the November 12, 2019 commercial Lease by: (a) performing alterations, installations, additions or improvements at the subject premises not included in the Lease or approved by the plaintiff landlord including filing a plumbing application submitted on July 15, 2020; (b) failing to obtain permits, approvals and certificates required by governmental or quasi-governmental bodies; (c) causing complaints to be filed for electrical and plumbing work done without obtaining a permit; (d) failing to complete the renovation work by March 1, 2020; (e) failing to comply with plaintiff landlord's Notices to Cure dated September 22, 2020 and November 13, 2020, which directed defendant tenant to cure all violations with the Department of Buildings and to reverse any alterations done to the demised premises which were not permitted under the Lease; and (f) failing to pay rent for the subject premises pursuant to the Lease and the Lease amendment for the period from April 1, 2020 through December 31, 2020.

In addition to the affidavits in support annexed to the motion, plaintiff annexes, *inter alia*, (1) the Lease dated November 12, 2019; (2) the Letter Agreement dated December 4, 2019; (3) the Lease amendment dated January 30, 2020; (4) defendant tenant's bank statements indicated that amounts totaling \$107,000.00 were deposited; (5) defendant tenant's plumbing application; (6) New York City Department of Building's Electrical Inspection Report indicating that on June 9, 2021, the first floor of the subject premises failed inspection; (7) a New York City Department of Buildings Complaint Overview List with individual complaints; and (8) a Statement of Material Facts pursuant to 22 NYCRR § 202.8-g(a).

Plaintiff also submits the transcript of defendant Jomar Smart's deposition, held on June 22, 2022, in which defendant Smart indicates that (a) on November 12, 2019, he signed a Guaranty in which he personally guaranteed the parties' Lease; (b) defendant tenant received \$107,000.00 from plaintiff landlord for the specified work; (c) on January 30, 2020, the parties agreed to amend the Lease including the work payment dates, a changed date to April 1, 2020 for the first rent payment due and a rent concession of \$2,500.00 monthly; (d) defendant Smart may or may not have signed a written agreement on January 30, 2024; and (e) the renovation work defendant tenant contracted to do was not completed.

In opposition to the motion, defendant tenant and defendant Smart submit an

affirmation from their attorney dated October 17, 2023, without any exhibits annexed. The affirmation argues that plaintiff's motion must be denied because there remain discovery requests dated August 11, 2021, including a subpoena served on a non-party, that are unresolved. It further directs the Court to defendant Smart's affidavit filed on NYSCEF under EF 55 on an earlier motion (motion sequence number 2). Defendant Smart's affidavit dated August 11, 2021, challenges the propriety of the accounts used for the cash allowance, claiming that plaintiff landlord improperly credited as rental payment monies received from the escrow fund to another property in Brooklyn, New York. In addition, defendant Smart claims that it is not his signature on the December 4, 2024 Letter Agreement regarding the \$150,000.00 cash allowance.

In reply, plaintiff landlord argues that defendants have not requested discovery for more than one year and its attorney claims that he responded to defendants' attorney in an attempt to work any issue out but that he received no response.

VIII Legal Standard - Summary Judgment

"Summary judgment should be granted only when it 'clearly appear[s] that no material and triable issue of fact is presented' (*Matter of Aaron Manor Rehabilitation & Nursing Ctr, LLC v Zucker*, __ NY3d __ [2024], 2024 NY Slip Op 02126, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). '[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tending sufficient evidence to demonstrate the absence of any material issues of fact' (*Matter of New York City Asbestos Litig. v Chevron Corp.*, 33 NY3d 20, 25-26 [2019], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, [1986]). Facts must be viewed 'in the light most favorable to the [non-moving party]' (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011]).

Once the movant makes the proper showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). The bare affirmation of a party's attorney who demonstrates no personal knowledge of the facts is without evidentiary value and insufficient to defeat a motion for summary judgment (*Zuckerman v New York*, 49 NY2d 557, 563 [1980]) as are "[b]ald, conclusory assertions or speculation (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]). A party who claims that summary judgment is premature "is required to put forth some evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Vikram Constr., Inc. v Everest Natl. Ins. Co.*, 139 AD3d 720, 721 [2016]).

A cause of action for the equitable remedy of an Accounting requires the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the Accounting has an interest (*Greenberg v Wiesel*, 186 AD3d 1336 [2020]). An Accounting claim cannot be maintained in the absence of a fiduciary relationship (*Royal Warwick S.A. v Hotel Representative, Inc.*, 106 AD3d 451, 452 [2013]). This is especially so when a plaintiff's claim is based on a contractual, not fiduciary, obligation (*id.*). Where, however, a plaintiff sues for Breach of Contract but also seeks an Accounting to determine amounts at issue, the claim for an Accounting is proper even without a fiduciary relationship as the Accounting is incidental to the contract claims (*Consolidated Edison Co. of N.Y., Inc. v East Coast Power & Gas LLC*, 224 AD3d 496, 497 [2024]; *Cadwalader Wickersham & Taft v Spinale*, 177 AD2d 315, 316 [1991]). In order to be entitled to an Accounting, a party must sufficiently set out that it demanded an Accounting of funds and that the opposing party refused the demand (*see, McKinnon Doxsee Agency, Inc. v Gallina*, 187 AD3d 733, 738 [2020]; *New York Studios, Inc. v Steiner Digital Studios*, 151 AD3d 454, 455 [2017]).

On a motion for summary judgment to enforce a written guarantee, the creditor must prove an absolute and unconditional guaranty, the underlying debt, and evidence that the defendant failed to make payment in accordance with the terms of those instruments (*Capital One Taxi Medallion Fin. v JEB Mgt. Corp.*, 192 AD3d 1072, 1073 [2021]).

Here, plaintiff landlord has failed to meet its burden of showing entitlement to a judgment as a matter of law on its claim for an Accounting as it has not alleged that a fiduciary relationship between the parties exists or otherwise pleaded a claim for a Breach of Contract. Accordingly, the motion for summary judgment on the First Cause of Action for an Accounting and, thereafter, for a money judgment for the amounts owed against defendant tenant and, based on the Guaranty, against defendant Smart, is denied without regard to the opposition papers. While plaintiff landlord's motion seeks summary judgment "for damages arising out of breach of contract," that claim was not plead.

Plaintiff landlord has met its burden of demonstrating prima facie entitlement to its second Cause of Action for a Declaratory Judgment declaring that, based on the parties' Lease Amendment dated January 30, 2020, the period for the rent concession was extended and the date for defendant tenant to pay rent was April 1, 2020. In opposition, defendant tenant fails to raise an issue of fact or to even address this branch of the motion.

Accordingly, the branch of the plaintiff's motion for an Order directing the entry of summary judgment on plaintiff's First Cause of Action for an Accounting, is denied.

The branch of the plaintiff's motion for a declaratory judgment to determine the rental

commencement date as to plaintiff's Second Cause of Action, is granted. It is Adjudged and Declared that the date for defendant tenant to begin paying rent was April 1, 2020.

Any remaining requests for relief not specifically addressed are denied.

Dated:

7/12/24



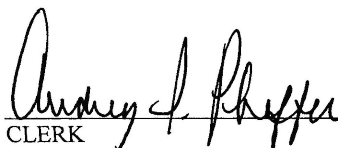
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