

220 5th Realty LLC v RAM Dev., Inc.

2024 NY Slip Op 34459(U)

December 17, 2024

Supreme Court, New York County

Docket Number: Index No. 161119/2020

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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220 5TH REALTY LLC

Plaintiff,

- v -

RAM DEVELOPMENT, INC.,

Defendant.

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INDEX NO. 161119/2020
MOTION DATE 05/13/2024
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, plaintiff's motion for summary judgment and defendant's cross-motion for partial summary judgment is decided as follows.

This is an action for breach of a commercial lease for failure to pay rent. Plaintiff 220 5th Realty LLC now moves for partial summary judgment on its second and third causes of action and a money judgment against defendant Ram Development, Inc. for \$277,074.42. Defendant opposes the motion and cross-moves for summary judgment dismissing plaintiff's second and third causes of action.

Previously, in a decision/order dated February 14, 2024, the court denied defendants' motion for summary judgment on liability on its counterclaims and granted plaintiff's cross-motion to the extent of dismissing defendants' counterclaims. The 2/14/24 decision/order is herein incorporated by reference.

Briefly, the subject premises is a portion of the third floor of 220 5th Ave., New York, NY (Hereinafter referred to as the "Office"). Plaintiff is the lease holder and landlord for the building in which the Office is located. Pursuant to a written lease dated December 1, 2011 and naturally expiring December 31, 2022 between defendant and plaintiff's predecessor as landlord, defendant took possession of the Office.

Pursuant to a Lease Amendment dated August 2020, effective September 1, 2020, plaintiff had the option to terminate defendant's tenancy prior to the end of the lease term. Plaintiff terminated defendant's lease by a 30-day notice dated November 10, 2020 with an effective termination date of December 11, 2020. Defendant did not surrender possession of the premises thereafter, and thus plaintiff commenced this action on December 22, 2020. Only upon expiration of the lease on December 31, 2022 did plaintiff recover possession of the Office.

Plaintiff asserts four causes of action in its complaint. The first cause of action for ejectment is moot, and thus is severed and dismissed. The second cause of action is for unpaid rent through December 31, 2020 in the amount of \$12,474.42. The third cause of action is for all rent that came due during the pendency of this action through defendant's surrender, which plaintiff alleges amounts to the sum of \$177,347.76. The fourth cause of action seeks reimbursement for reasonable attorneys fees pursuant to the lease.

Plaintiff's motion is supported by the affidavit of Smajlje Srdanovic, an agent of the plaintiff, who claims that he is thus "familiar with the facts and circumstances involved herein." Although various exhibits were submitted in connection with the prior summary judgment motion, the

court does not have before it a rent ledger outlining plaintiff's purported damages either pre- or post-commencement of this action. Nor does the court find the affidavit of plaintiff's so-called agent sufficiently detailed to establish a prima facie case or plaintiff's damages as Mr. Srdanovic fails to lay a foundation for any of the facts asserted therein (*see generally Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Since plaintiff has not made a prima facie case, the motion must be denied without consideration of the sufficiency of defendant's opposition papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Defendant's cross-motion is also denied. Aside from arguing that there are triable issues of fact sufficient to defeat plaintiff's motion-in-chief, defendant argues that "significant portion's of Plaintiff's claims should be dismissed as they lack any factual basis". The court disagrees. The fact that there was a flood or that defendant has taken the position that it surrendered the Office in March 2021 does not mandate summary judgment dismissing plaintiff's claims for unpaid rent. To the extent that the parties dispute plaintiff's damages, that issue remains for trial. Otherwise, the court finds defendant's opposition and cross-motion to amount to nothing more than a rehash of previously unsuccessful arguments and/or a motion to reargue in disguise. For at least these reasons, the cross-motion is also denied.

This is plaintiff's second bite at the apple. Note of issue has not yet been filed in this matter. Therefore, the court hereby directs plaintiff to file note of issue within 90 days. Thereafter, this matter will be scheduled for trial in due course.

Conclusion

In accordance herewith, it is hereby


ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff is directed to file note of issue on or before March 28, 2025 so that this matter can be scheduled for trial.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

12/17/2024
 DATE


 LYNN R. KOTLER, J.S.C.

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