

<b>Roza 14W LLC v Fordham Fin. Mgt., Inc.</b>
2019 NY Slip Op 30950(U)
April 2, 2019
Supreme Court, New York County
Docket Number: 652997/2012
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X  
ROZA 14W LLC,

Plaintiff,

Index No.: 652997/2012

-against-

Motion Seq. No. 007

FORDHAM FINANCIAL MANAGEMENT, INC.,

Defendant.

-----X  
FORDHAM FINANCIAL MANAGEMENT, INC.,

Third-Party Plaintiff,

-against-

CRP/CAPSTONE 14W PROPERTY OWNER, LLC,  
W12/14 WALL ACQUISITION, LLC and 14 WALL  
STREET HOLDING 1, LLC,

Third-Party Defendants.

-----X  
Masley, J.:

In motion sequence number 007, plaintiff Roza 14W LLC (Roza) and third-party defendant CRP/Capstone 14W Property Owner, LLC (CRP) move for summary judgment pursuant to CPLR 3212, dismissing Fordham Financial Management, Inc.'s (Fordham) counterclaims, affirmative defenses, and third-party complaint. Fordham opposes, and requests that the court search the record pursuant to CPLR 3212 (b), ultimately dismissing Roza's complaint and granting Fordham summary judgment on its counterclaims against Roza and third-party claims against CRP.

**Background**

This action arises out of an alleged breach of a lease agreement (Lease) that Fordham entered into for a portion of the 18<sup>th</sup> Floor located at 14 Wall Street, New York, NY 10005 (Premises). It is undisputed that the terms of the lease commenced in 1999

and ended on March 31, 2012. (NYSCEF Doc. No. 236; NYSCEF Doc. No. 241 at 1.) On November 15, 1999, Fordham leased the Premises from the landlord at the time, third-party defendant W12/14 Wall Acquisition Associates LLC (W12). (NYSCEF Doc. No. 236.) On June 13, 2003, W12 sold and transferred ownership of the premises to nonparty W12/14 Wall Realty LLC (W12 LLC). (NYSCEF Doc. No. 237.) On April 15, 2005 and September 13, 2005 respectively, W12 LLC sold and transferred ownership of the premises to third-party defendant 14 Wall Street Holdings I, LLC (14 Wall Street) and nonparty 14 Wall/Spring Street, LLC (14 Wall/Spring). (NYSCEF Doc. No. 238.) On October 3, 2006, 14 Wall Street and Fordham entered into the "First Amendment of Lease" agreement (Amendment). The Amendment extended the lease "for the period of February 1, 2007 through March 31, 2012" and provided that Fordham's monthly payment was \$21,563.08. (NYSCEF Doc. No. 243 at 1.)

On January 12, 2007 and April 5, 2007 respectively, 14 Wall Street and 14 Wall/Spring sold and transferred the premises to third-party defendant CRP/Capstone 14W Property Owner, LLC (CRP). (NYSCEF Doc. No. 239.) On April 4, 2012, CRP sold and transferred the premises to Roza 14W LLC. (NYSCEF Doc. No. 240.) On April 4, 2012, CRP also entered into an Assignment and Assumption of Leases agreement (AA Agreement) with Roza. (NYSCEF Doc. No. 241.) The AA Agreement provides that CRP is "the landlord under the leases set forth on Schedule A" (NYSCEF Doc. No. 241 at 1) and Schedule A provides that Fordham occupies Suite ID 1109 and 1901. (*Id.* at 11, 12.) With respect to Suite ID 1109, Schedule A further provides that Fordham's rent started on January 1, 2002 and the date of expiration is March 31, 2012. (*Id.* at 11.) As to Suite ID 1901, Schedule A provides that Fordham's rent started on

February 1, 2007 and the date of expiration is March 31, 2012. (*Id.* at 12.) The AA Agreement further provides that CRP

“assigns, transfers, releases and sets over unto [Roza] all of the right, title, and interest of [CRP] in, to and under (a) the Leases, (b) the Security Deposits, and (c) the accounts referred to on Schedule C (the “Security Deposit Accounts”), which Security Deposit Accounts contain all Security Deposits ...”

(*Id.* at 2.) It further provides that Roza,

“accepts the foregoing assignment and hereby assumes (a) all of the obligations of Assignor under the Leases and (b) all obligations of Assignor with respect to the Security Deposits and the Security Deposit Accounts, including, without limitation, the obligation to return same to the tenants under the Leases in accordance with the terms of such Leases.

(*Id.* at 2-3.) Fordham, Roza, and CRP agree that the Security Deposit amount is \$66,776.00. (*Id.* at 18; NYSCEF Doc. No. 293 at 6, 8.)

Now, Roza and CRP argue that Fordham (1) did not make certain rental payments from the period of July 2011 to July 2012 under the Lease, (2) held over in the premises for four months past the expiration of the Lease specifically in April, May, June and July of 2012, and (3) did not surrender possession of the leased premises until July 31, 2012. (NYSCEF Doc. No. 281 at 4, 8.)

In opposition, Fordham contends that (1) Roza does not have “standing” to seek or demand unpaid rent that allegedly accrued prior to April 4, 2012, (2) Fordham moved out and surrendered the premises on May 16, 2012, (3) Roza still retains Fordham’s security deposit in the amount of \$66,776 and (4) Fordham is entitled to \$38,114.31 on its counterclaim with interest from May 16, 2012, representing the return of its security deposit less use and occupancy for the period from May 1, 2012 through May 16, 2012. (NYSCEF Doc. No. 293 at 6, 8.)

### Discussion

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR 3212 [b]). This standard requires the movant to make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The court views this evidence in the light most favorable to the non-moving party opposing summary judgment and draws all reasonable inferences in that party’s favor (*see Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]). Should the movant make a prima facie showing of entitlement to summary judgment, the burden shifts to the non-moving party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*see Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]). Additionally, this court is empowered to search the record and award summary judgment to a nonmoving party. (*Merritt Hill Vineyards Inc. v Windy Heights Vineyard, Inc.*, 61 NY2d 106, 111 [1984].)

The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage” (*Flomenbaum*, 71 AD3d at 91).

#### Holding Over Provision

Roza has made a prima facie showing of entitlement to judgment as a matter of law with respect to its breach of contract claim as to the “Holding Over” provision of the

Lease. (NYSCEF Doc. No. 236 at 31-32.) Roza established formation of the contract by submitting the Lease (NYSCEF Doc. No. 236 at 31-32), the deeds establishing chain of title concluding with CRP selling and transferring the premises to Roza (NYSCEF Doc. No. 240), and the AA Agreement (NYSCEF Doc. No. 241.) Notably, the "Holding Over" provision provides that,

"Tenant acknowledges that possession of the demised premises must be surrendered to Landlord at the expiration or sooner termination of the terms of this lease ... Tenant, therefore, agrees that if possession of the demises premises is not surrendered to Landlord within twenty-four (24) hours after the date of the expiration or sooner termination of the term of this lease, then Tenant shall pay to Landlord, as liquidated damages, a sum equal to two (2) times the per diem fixed rent and additional rent which was payable during the calendar month preceding the calendar month in which the term ended for each day Tenant holds over and fails to deliver possession of the demised premises. Nothing herein contained shall be deemed to permit Tenant to retain possession of the demised premises after the expiration or sooner termination of the term of this lease.

(NYSCEF Doc. No. 236 at 32.) Roza also established its performance, Fordham's nonperformance, and damages by submitting the affidavit of its Managing Director, David Rosen, who affirms that Fordham did not make rental payments though July 2012, despite the Lease expiring on March 31, 2012 and Fordham's alleged holdover. (NYSCEF Doc. No. 235 at ¶ 6; NYSCEF Doc. No. 243 at 1.) Rosen states that the arrears have not been paid as of August 8, 2018, the date of his affidavit. (NYSCEF Doc. No. 235 at ¶ 8.) As additional support, Roza submits its Rent Ledger (NYSCEF Doc. No. 249), the contents of which indicate that Fordham held over for April, May, June, and July bringing the rate Fordham owes to \$222,127.84 notwithstanding other costs. (NYSCEF Doc. No. 249.)

Accordingly, the burden shifts to Fordham. Fordham concedes that it did not vacate the premises on March 31, 2012 (NYSCEF Doc. No. 261 at 29), but asserts that it surrendered and vacated the premises on May 16, 2012. (NYSCEF Doc. No. 286 at 3; NYSCEF Doc. No. 293 at 6, 8.) Although there is no dispute that Fordham violated the holdover provision of the Lease and Amendment, there is an issue of fact as to whether Fordham surrendered and vacated the premises in May or July of 2012. This issue of fact stems from the deposition testimony provided by Fordham's Chief Financial Officer, Richard Adams, who testified that upon vacating the premises, Fordham left behind "[d]esks and computers." (NYSCEF Doc. No. 261 at 30.) Adams further stated, "They had a value to me, yeah." (*Id.* at 33.) Adams also noted that the portion of the premises that Fordham leased was essentially office space. (*Id.* at 31 ["If you know the setup, you know there were private offices all around with a very big board room in the middle"].) On matters such as these, the First Department has plainly stated that,

"[t]he question of whether the leaving by the tenant of property on the leased premises after expiration of the lease constitutes a holding over is usually a question of fact to be determined by taking into consideration the nature of the property leased, the amount paid as rent, the value of the real property, the value of the personal property left on the leased premises, the intent with which it was left, and all the other facts and circumstances surrounding the transaction."

(*Lordae Realty Corp v Monetefiore Medical Center*, 232 AD2d 338, 338 [1st Dept 1996].) Because evidence in the record indicates that (1) the nature of the leased premises was office space, (2) there was value to the desks and computers left at the premises, the exact amount of which is unclear, and the (3) intent with which it was left behind is unclear (NYSCEF Doc. No. 261 at 31, 33), there is a genuine issue of material fact. Fordham's reliance on *ONX-1, LLC v New Process Gear, Inc.*, (2017 WL 6039504

[Sup Ct, NY County 2017]) is unavailing because that action concerned a tenant who allegedly left behind petroleum waste on the walls, floors, ceilings, and pipes among other areas. Although the court noted that leaving behind excessive filth, structural alterations, and major installations does not constitute a constructive holdover, none of those categories are applicable to the desks and computers left here in the leased office space. (*Id.* at \*9.)

### Rental Payments

With respect to the rental payments, there is no issue of fact that Fordham owed rental payments to Roza. However, there are issues of fact as to how much money Fordham owes from the period of July 2011 to the month Fordham vacated, whether May 2012 or July 2012. In his affidavit, Rosen, provides that Fordham was in default on its rental payment beginning in July 2011 through July 2012. (NYSCEF Doc. No. 235 at ¶ 6.) Roza submits its Rent Ledger (NYSCEF Doc. No. 249), the contents of which indicate that Fordham did not pay its base rent for February 1, 2012 and May 1, 2012. With the addition of other costs such as late fees and sale tax, the ledger provides that Fordham owes a total of \$335,582.18. (*Id.*)

In opposition, Fordham argues that it was not obligated to pay Roza the rents at issue from the period of July 2011 through July 2012 because Roza was not entitled to any rental arrears that accrued prior to Roza's purchase of the premises. However, Fordham's argument that Roza is not the proper entity to which it is liable for rent is unpersuasive. Rent that has accrued may be assigned. (*Sullivan v Rosson*, 223 NY 217, 222 [1918].) By the terms of the assignment, CRP assigned, transferred, released, and set over unto Roza "all of the right, title, and interest of [CRP] in, to and under (a)



the Leases.” (NYSCEF Doc. No. 241 at 2.) As to any rent that accrued after Roza purchased and received the premises, Roza submitted the recorded deed (NYSCEF Doc. No. 240), which presumptively establishes CRP’s transfer of the premises to Roza. (*Smith v Andre*, 43 AD3d 770, 772 [1st Dept 2007].) “[T]he transfer of title to the property was, in legal effect, a transfer of the lease with its rights and obligations, and thus entitles [Roza] to sue for the unpaid rent.” (*Southern Associates, Inc. v United Brands Co.*, 67 AD2d 199, 202 [1st Dept 1979].) Fordham’s reliance on *Getty Realty Corp. v 2 E. 61st St. Corp* (171 Misc. 101, [1st Dept 1939]) is unpersuasive because that court noted that a present landlord had no right to rents which had become due at the time of passing of title in the absence of a transfer of that right.

Nevertheless, the court notes that Fordham’s Chief Financial Officer, Richard Adams, testified at his deposition that he was in charge of paying the rent for Fordham in 2011. (NYSCEF Doc. No. 261 at 26.) He further testified that in October 2011, November 2011, December 2011, January 2012, and March 2012, Fordham paid its rent. (*Id.* at 27 - 28.) He further testified that Fordham did not pay rent in April of 2012 and May of 2012. (*Id.* at 28.) As to July 2011, August 2011, and September 2011, it is unclear from the transcript whether Adams testified that he knew Fordham paid its rent for these periods or that Fordham actually tendered payment of its rent for these periods. (*Id.* at 27.) Additionally, Fordham submits an invoice from Roza dated September 1, 2012 that indicates that Fordham’s outstanding balance is \$102,531.62.

Based on the discrepancies in this record, the court cannot grant summary judgment as a matter of law because genuine issues of fact exist concerning what rent Fordham paid for the period spanning July 2011 to July 2012.

Lastly, there is no admissible evidence in Fordham's nine submissions (NYSCEF Doc. Nos. 285, 286, 287, 288, 289, 290, 292, 293.) filed in opposition to this motion for summary judgment that supports or articulates the basis for the causes of action alleged in the third-party complaint (NYSCEF Doc. No. 5, 246.) For instance, the first cause of action does not articulate any cognizable claim at law and Fordham does not elaborate on this claim in its opposition to this motion. Although the second cause of action seeks attorneys' fees, the complaint does not allege facts supporting this claim, and Fordham makes no effort to support this claim in its opposition to this motion. The affirmative defenses and counterclaims in Fordham's answer largely mirror the third-party complaint, and to the extent that they differ, Fordham has not submitted any evidence of their merit. (NYSCEF Doc. No. 3). Accordingly, Fordham's claims in the third-party complaint together with its counterclaims and affirmative defenses in its answer are dismissed.

Accordingly, it is

ORDERED that Roza 14W LLC and CRP/Capstone 14W Property Owner, LLC's motion for summary judgment is granted to the extent outlined in this decision; and it is further

ORDERED that the parties appear for a pre-trial conference in Part 48 at 9:30 AM on Tuesday April 24, 2019.

Dated: 4/2/19

ENTER:

  
**HON. ANDREA MASLEY**  
J.S.C.