

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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NATIONAL ASSOCIATION OF WATER COMPANIES

Plaintiff,

- v -

CKR LAW, LLP,

Defendant.

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INDEX NO. 656483/2019

MOTION DATE 01/12/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

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

In this action to recover unpaid rent and additional rent, the plaintiff sublessor moves pursuant to CPLR 3212 for summary judgment (1) on its first cause of action seeking \$34,261.87, representing sums due for the period May 15, 2019 to November 30, 2019, (2) on liability on the second cause of action alleging that the defendant sublessee abandoned the subject commercial property and repudiated the lease, and (3) on the third cause of action for attorney’s fees. The defendant opposes the motion and cross-moves pursuant to CPLR 3025 for leave to amend its answer to add allegations that the plaintiff “accepted the abandonment” of the subject premises in September or October 2019 and offered the premises for rent and that the defendant is therefore entitled to a set-off. The defendant, a law firm, claims that it abandoned the premises because it no longer needed the office space after a number of attorneys and staff left the firm. It does not dispute that it owes at least \$34,261.87. The plaintiff opposes the cross-motion on the ground that the amendments are meritless, inconsistent with the clear and unequivocal terms of the parties’ lease and without factual support. The motion is granted in part and the cross-motion is denied.

(1) Plaintiff’s Motion

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR

3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra, at 324; Zuckerman, supra, at 562. The plaintiff, who submits, *inter alia*, the lease, a rent ledger and an affidavit of its representative, Robert Powelson, has satisfied its *prima facie* burden for entitlement to summary judgment as to liability against the tenant for breach of the lease for the period May 15, 2019 to November 30, 2019, rent and additional rent in the sum of \$34,261.87. As noted, the defendant does not dispute that sum or oppose that part of the motion. Therefore, the plaintiff is entitled to an immediate judgment in that sum.

The plaintiff has also met its burden as to the second cause of action for which it seeks summary judgment on liability as to the balance of the lease term, December 1, 2019, through March 30, 2021, and a hearing on damages. As correctly observed by the plaintiff, the parties' lease expressly provides that the plaintiff may continue to collect rent from the defendant until the end of the lease term. The plaintiff estimated this amount to be \$179,058.45. The defendant fails to raise any triable issue as to that claim. To the extent the defendant argues that the plaintiff chose to re-let the premises, the purported webpage from a real estate broker's website submitted is insufficient to raise a triable issue particularly in view of the affidavits submitted by the plaintiff denying any re-let and stating that the premises remain vacant.

That portion of the plaintiff's motion which seeks summary judgment on liability as to its third cause of action, for contractual attorney's fees, is granted, as the parties' lease provides for that remedy upon a default. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1 (1986). No triable issue is raised in regard to this cause of action. The amount due is to be determined at a hearing.

(2) Defendant's Cross-Motion

It is well settled that leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). Nevertheless, a court must examine the merit of the proposed amendment in order to conserve judicial resources." 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552, 553 (1st Dept. 2011). Therefore, "leave to amend will

be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law.” Davis & Davis v Morson, 286 AD2d 584, 585 (1st Dept 2001) (internal citations omitted).

Here, the proposed amendment lacks factual support as the additional allegations therein are based on an assertion of Jason Frazer, a partner at the defendant firm, that he contacted Brad Molotsky, Esq. of the plaintiff about the firm’s surrender of the property and requested that he attempt to mitigate damages by re-letting the premises. Frazer states that he never heard back from Molotsky, and he apparently interpreted the silence as acquiescence. However, the defendant does not also mention that Molotsky’s e-mail response said only that he would pass the request to his client, rejected the defendant’s minimal monetary offer of settlement and reminded Frazer that the defendant continued to be in breach of the lease. In any event, there is no dispute that the lease expressly allows the plaintiff the option to not re-let the premises and continue to collect rent from the defendant.

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the plaintiff’s motion is granted to the extent that it is (1) granted summary judgment on the first cause of cause of action and is entitled to an immediate judgment against the defendant in the sum of \$34,261.87, plus costs and statutory interest from November 30, 2019, and (2) granted summary judgment on liability on the second and third causes of action, a hearing to be held on the issue of damages, and it is further

ORDERED that defendant’s cross-motion is denied, and it is further

ORDERED that the parties shall comply with the court’s ADR order, issued separately, in regard to the remaining issue of damages.

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.



 NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/15/2021

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER