

Avenue 37 LLC v Imperial Palace II, Inc.

2024 NY Slip Op 34989(U)

July 5, 2024

Supreme Court, Queens County

Docket Number: Index No. 700608/2022

Judge: Denise N. Johnson

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This opinion is uncorrected and not selected for official publication.

Memorandum

NEW YORK SUPREME COURT - QUEENS COUNTY

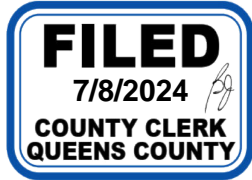
Present: HONORABLE DENISE N. JOHNSON IAS Part 11
Justice

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AVENUE 37 LLC Index No.:700608/2022
Plaintiff(s),
Motion Date:4/23/24
- and - Motion Cal. No.: 3

IMPERIAL PALACE II, INC., LAM PING Motion Seq. No: 5
CHENG
Defendant(s).
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The following papers numbered EF 98 - 157 read on this motion by the Plaintiff Avenue 37 LLC for an order granting Plaintiff summary judgment pursuant to CPLR §3212.



	Papers <u>Numbered</u>
Notice of Motion-Affirmation- Memorandum of Law -Exhibits-Service.....	EF 98-133
Affirmation in Opposition- Memorandum of Law -Exhibits-Service.....	EF134-149
Reply Affirmation- Memorandum of Law in Reply-Service.....	EF150 - 157

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action brought by Plaintiff which stems from a lease agreement for the premises located at 136-13 37th Avenue, Suite 1A, Flushing, New York signed on or about January 31, 2012. The lease term was for 15 years. Plaintiff asserts that on January 8, 2021, Plaintiff properly terminated the lease, pursuant to the lease terms, due to damage caused by the fire which occurred on that date (“fire”). This action was commenced on January 11, 2022, by the filing of a summons and complaint. Plaintiff is now seeking declaratory judgement against the Defendants declaring

that the lease to the subject premises (“lease”) was duly terminated on January 8, 2021, as a result of the fire occurring in the building located at 136-13 –136-17 37th Avenue, Flushing, New York 11354, also known as Block 4977 and Lot 102, (“Building”).

Plaintiff now moves, pursuant to CPLR §3212, inter alia, for an order of summary judgment in favor of Plaintiff granting a judgment of ejectment, an order determining there was a breach of lease by the Defendants and an award of damages for said for breach, an order awarding use and occupancy pursuant to RPL §220, an order awarding use and occupancy pursuant to quantum eruit, and an order awarding use and occupancy based upon unjust enrichment.

It is well-settled that the proponent of a summary judgment motion must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion.

Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law (*see*, CPLR §3212; *Friends of Animals, Inc., v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979]; *Orwell Bldg. Corp. v. Bessaha*, 5 A.D.3d 573 [2d Dept. 2003]). Plaintiff bears the burden of establishing that all triable issues of fact have been eliminated. The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (*see*, *Grivas v. Grivas*, 113 A.D.2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 N.Y.2d 553, 557 [1977]).

“When such a showing has been made by the movant, then to defeat summary judgment ‘the opposing party must show facts sufficient to require a trial of any

issue of fact'"(*Khorana v Stop & Shop Supermarket Co. LLC*, 2012 NY Slip Op 31878[U] [Sup Ct, Nassau County 2012]). Defendant must now come forward with competent admissible evidence sufficient to raise a triable issue of fact. Defendants' contentions that the building that sustained the damage was a "next-door" building is without merit. The building is one undivided parcel as determined by the Block and Lot designation, despite the building having a physical address of 136-13/136-15/136-17 37th Avenue. The vacate order was issued to the entire building not just the portion of the building where the fire initiated. Defendants have failed to raise triable issues of material fact as to whether the tenancy was duly terminated on January 8, 2021, as a result of the fire.

Regarding Plaintiff's Motion for Summary Judgment as to ejectment Plaintiff acknowledges that possession is no longer at issue as a stipulation resolving that portion of the dispute has been executed by the parties.

In order to establish that the entitlement of use and occupancy under the various causes of action Plaintiff offers the pleadings, the lease between the parties, the rent ledger, FDNY Fire report, DOB Vacate Order. Defendants oppose this motion arguing that there is a triable issue of fact as to whether the Plaintiff was in fact the landlord under the lease. They also argue that they were not in possession after the fire. These arguments are unavailing as Defendants prior arguments in this action were the complete opposite and the court does not find their arguments to the instant motion to be credible.

As it has previously been determined by this court that there was a lease between the parties that was validly terminated, and the Defendants have previously acknowledged that they remained in possession of the premises after the lease was validly terminated Plaintiff has produced sufficient evidence to establish that use and occupancy pursuant to RPL § 220 should be granted.

Further, once the lease was validly terminated because of the fire the parties were no longer in privity, and Plaintiffs have established that they are entitled to use and occupancy “because such a claim does not spring from a contract between the two, but is based on a quantum meruit theory, which is imposed to bring about a just result, irrespective of the parties' intentions. (*Ninety-Five Madison Co., L.P. v Karlitz & Co., Inc.*, 2014 NY Slip Op 30512[U], *25 [Sup Ct, NY County 2014]; see *Eighteen Assocs. v Nanjim Leasing Corp.*, 257 AD2d 559, 559-560, 683 N.Y.S.2d 291 [2d Dept 1999]; *450 7th Ave. Assoc. LLC v Global Economic Transactions, Inc.*, 2012 NY Slip Op 32043(U), *5, 2012 WL 3260301 [Sup Ct, NY County 2012]; see also *Hudson-Spring Partnership, L.P. v P+M Design Consultants, Inc.*, 112 AD3d 419, 420, 976 N.Y.S.2d 57 [1st Dept 2013]). Therefore, this portion of the instant motion is granted.

To recover for unjust enrichment, a plaintiff must demonstrate that (1) defendant was enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit defendant to retain what is sought to be recovered. Here, Plaintiff does not allege that Defendant was enriched and does not offer sufficient proof to establish that cause of action. Further Plaintiff failed to submit sufficient evidence to establish the appropriate amounts of use and occupancy, if any that should be awarded therefore this portion of the motion must be denied.

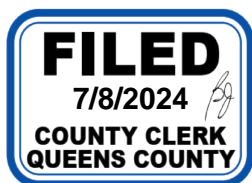
Therefore, it is

ORDERED, that Plaintiff's motion for Summary Judgment as to liability for use and occupancy due the breach of the lease, pursuant to RPL § 220, based upon a theory of quantum meruit are GRANTED.

ORDERED, any portion of the motion that was not expressly granted herein is DENIED.

The foregoing shall constitute the decision and order of this court.

Dated: July 5, 2024



Denise N. Johnson

DENISE N. JOHNSON
J.S.C.