Milan Assoc., L.P. v Alliance BJJ NYC, Inc.
2026 NY Slip Op 30885(U)
January 9, 2026
Supreme Court, New York County
Docket Number: Index No. 653958/2021
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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THE MILAN ASSOCIATES, L.P.,

Plaintiff,

- v -

ALLIANCE BJJ NYC, INC., and FABIO CLEMENTE,

Defendants.

----------X

INDEX NO. 653958/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

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

The Price Law Firm, LLC, New York, NY (Joshua C. Price of counsel), for plaintiff.
Steven R. Miller, Oakland Gardens, NY, for defendants.

Gerald Lebovits, J.:

This matter arises out of a commercial landlord-tenant dispute. Plaintiff-landlord, Milan Associates, L.P., alleges that defendant-tenant Alliance BJJ NYC, Inc., and defendant-guarantor Fabio Clemente breached the parties' lease guaranty. Defendants raise 15 affirmative defenses and two counterclaims in response.

BACKGROUND

Plaintiff owns the premises located at 123 East 12th Street in Manhattan. In 2016, the prior tenant assigned the lease to Alliance. (NYSCEF No. 15 at ¶ 6.) Plaintiff alleges that Alliance defaulted under the lease by failing on several occasions to pay rent and additional rents owed, causing arrears to grow from October 2020 to May 2021. Plaintiff served tenant a notice dated August 19, 2020, requesting payment of arrears owed. Tenant failed to remit payment and continued to use and occupy the premises. Thereafter, plaintiff served tenant a notice of default. (NYSCEF No. 1 at ¶ 19.)

Defendants claim that the outbreak of the COVID-19 pandemic and related laws in March 2020 forced tenant to cease operating its martial-arts studio, the only permitted use of the premises under the lease. On May 4, 2020, tenant requested a rent reduction or termination of the lease, claiming financial difficulties. The parties exchanged emails and text messages discussing the feasibility of this request. On June 3, 2020, plaintiff's principal, who purportedly had the requisite authority, emailed Clemente, allegedly offering to terminate the lease. Defendants claim they accepted the offer by removing their items from the premises and delivering to plaintiff's

counsel a written surrender agreement, together with the keys to the premises, in August 2020. (NYSCEF No. 27.)

Plaintiff claims that no agreement, written or otherwise, allowed defendants to vacate while cutting off plaintiff's right to enforce the lease and seek arrears owed. (NYSCEF No. 15 at ¶ 37.) The parties also dispute when vacatur occurred. Plaintiff claims that surrender occurred in October 2021, when tenant vacated (NYSCEF Nos. 1, 15); and defendants claim that surrender occurred in August 2020 (NYSCEF Nos. 26, 27).

Plaintiff asserts four causes of action: breach of lease; breach of guaranty; money judgment against guarantor; and attorney fees. (NYSCEF No. 1.) Defendants' answer raises 15 affirmative defenses and asserts two counterclaims. (NYSCEF No. 6.)

On this motion, plaintiff seeks summary judgment on its complaint and to strike defendants' second-through-fifteenth affirmative defenses. (NYSCEF No. 14.) The branch of the motion for summary judgment is denied. The branch of the motion to dismiss the affirmative defenses is granted in part and denied in part.

DISCUSSION

I. Plaintiff's Motion for Summary Judgment (CPLR 3212)

A. Plaintiff alleges that Alliance violated the lease by occupying the premises without paying rents owed, and that Clemente is liable for tenant's default under the personal guaranty. (NYSCEF No. 15 at ¶ 10-22.) To establish a prima facie case for breach of the lease, plaintiff must show the existence of a valid lease, landlord's performance, tenant's default, and resulting damages. (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016].) Similarly, on a breach-of-guaranty claim, plaintiff must establish the existence of the guaranty, the underlying debt, and the guarantor's breach. (*Id.*)

Plaintiff has not made out its prima facie case. To support its motion, plaintiff submits an affidavit from its principal, Thijs Menger, and a ledger. But neither the affidavit nor the ledger identifies when tenant stopped paying rent—or which months of rent tenant failed to pay. (*See* NYSCEF No. 15 at ¶8 [Menger affidavit] ["There came a time when BJJ stopped paying the rent that the lease required be paid."]; NYSCEF No. 25 at 1 [ledger].) Additionally, to the extent plaintiff claim rents running from August 2020—the alleged surrender date, according to defendants—the ledger reflects a $0 balance by the end of October 2020. (*See* NYSCEF No. 25 at 1.) And to the extent plaintiff seeks rent accrued through October 2021, the ledger reflects only rent charges through May 2021. (*See id.*)

Although plaintiff seeks $450,992.47 in damages, the ledger reflects only $308,678.10 in accrued rent. (*See id.*) And that amount is based on the assessment of charges for approximately $20,000 per month—yet the monthly rent set by the lease for 2020-2021 is approximately $17,500. (*Compare* NYSCEF No. 25 at 1 [ledger] *with* NYSCEF No. 19 at 5 [lease].) Moreover, the ledger repeatedly reflects double and triple charges of per month of that $20,000 figure. (*See* NYSCEF No. 21.) Plaintiff does not explain these discrepancies.

Because plaintiff has not provided internally consistent evidence in admissible form about which payments tenant failed to make and when, plaintiff has not made out its prima facie case for summary judgment on its breach-of-lease and breach-of-guaranty claims.

B. Even assuming that plaintiff made out its prima facie case, defendants have raised an issue of fact about whether they owe any rent at all. The parties do not dispute that tenant stopped paying rent by August 2020. According to defendants, Alliance surrendered the premises in August 2020 and therefore may not be held liable for rent accrued after that date. Defendants provide an email that Clemente received from Menger, which, they say, constitutes an offer to terminate the lease. The email stated:

> "I talked to my lawyer and we can basically do 2 things:
>
> "1. We cancel the lease and you return the keys and clear out the space of any items that don't belong to the space.
>
> "2. We can modify the lease with a new adjusted rent schedule with a base rent that we can both live with.
>
> "I'm talking to my broker as well to check what the space is worth when it comes to rent.
>
> "Please let me know your thoughts." (NYSCEF No. 32.)

Defendants argue that Alliance accepted the offer through conduct—by vacating and removing their personal property from the premises. (*See* NYSCEF No. 27 at 5.) Clemente further represents that Alliance delivered a lease surrender agreement and returned the premises' keys to plaintiff's counsel. (*Id.*) And plaintiff did not file a reply to seek to refute defendants' contentions.

Defendants have thus raised an issue of fact about whether they owe rent after their alleged surrender in August 2020. Moreover, because plaintiff's ledger on this motion reflects only sums accrued after *October* 2020 (*see* NYSCEF No. 25), an issue of fact exists about whether defendants owe *any* unpaid rent.

The branch of plaintiff's motion for summary judgment in its favor is denied.

II. Branch of Motion to Strike Defendants' Affirmative Defenses

Plaintiff moves to strike defendants' second through fifteenth affirmative defenses.[1] Whether affirmative defenses should be stricken as insufficient depends on whether they have

[1] Plaintiff's notice of motion demands summary judgment on its complaint, not to strike defendants' affirmative defenses and counterclaims. The parties' papers nonetheless discuss the propriety of striking defendants' affirmative defenses and dismissing defendants' counterclaims. (See NYSCEF Nos. 14, 15, 26.) As such, "the court is satisfied that no one has been prejudiced

"pleaded conclusions of law without supporting facts," or instead "reasonably explained the basis for asserting" those defenses." (*170 W. Vill. Assocs. v G & E Realty, Inc.*, 56 AD3d 372, 372–373 [1st Dept 2008].) Whether counterclaims should be dismissed depends on "whether the facts as alleged fit within any cognizable legal theory." (*Wand, Powers & Goody, LLP v Yuliano*, 144 AD3d 1017, 1018 [2d Dept 2016].)

A. Pending Prior Action (Second Affirmative Defense)

Defendants' second affirmative defense is that a prior action (Index No. 654937/2016) remains pending, arising from plaintiff's alleged failure and refusal to apply for tenant's legalized occupancy. (NYSCEF No. 6 at ¶ 7.) Plaintiff argues the prior action sought only equitable relief; was abandoned years ago; and did not include all parties to the instant damages action. (NYSCEF No. 14 at ¶ 12-18.)

Defendants evidently seek dismissal under CPLR 3211 (a) (4). Dismissal under this statute is unwarranted because defendants have failed to establish identity of the parties and the nature of the recovery sought. (*See Guilden v Baldwin Sec. Corp.*, 189 AD2d 716, 716 [1st Dept 1993].) The prior action did not include guarantor Clemente, who is a defendant only in the instant action. Moreover, the prior action sought a *Yellowstone* injunction, whereas this action seeks only damages. Defendants' second affirmative defense is dismissed.

B. Plaintiff Breached the Lease (Third Affirmative Defense)

i. Certificate of Occupancy

Defendants' third affirmative defense is that plaintiff breached the lease by "failing and refusing to use its reasonable commercial efforts" to obtain a Certificate of Occupancy for the premises before tenant's vacatur. (NYSCEF No. 6 at ¶ 8.) According to defendants, tenant could not legally occupy the premises as a martial arts school, the only use contemplated in the lease, because of the building lacked a certificate of occupancy (*Id.* at ¶ 9.) Plaintiff argues that defendants were able to lawfully operate as a martial arts studio while they occupied the premises. (NYSCEF No. 14 at ¶ 22-24.)

A landlord's failure to obtain a final certificate of occupancy before the beginning of a tenancy does not give the tenant the right to terminate the lease. (*See Progressive Image Gruppe, Inc. v 162 Charles St. Owners, Inc.*, 272 AD2d 66, 66 [1st Dept 2000].) Nor does this failure relieve tenant of its rental obligations for the time it occupied the premises. (*Phillips & Huyler Assocs. v Flynn*, 225 AD2d 475, 475 [1st Dept 1996].)

Critically, defendants do not show that plaintiff's alleged breach in failing or refusing to obtain a certificate of occupancy prevented tenant from using the leased premises. (*Cf. 549 LLC v Luna*, 219 AD3d 1209, 1209 [1st Dept 2023] [holding that evidence the landlord "prevented the tenant from using the leased premises by failing to obtain the appropriate certificate of

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by the formal omission to demand it specifically." (*HCE Assocs. v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774, 774–775 [2d Dept 1991] [internal citations omitted].)

occupancy" precluded summary judgment].) This branch of the third affirmative defense is dismissed.

ii. Fire Suppression System

Defendant Clemente argues that plaintiff breached the lease by failing to install a fire-suppression system. (NYSCEF No. 27 at ¶ 5.) Although plaintiff agreed to provide a suppression system in § 6.04 of the lease, this obligation is superseded by the First Amendment to the lease. Under § 8 of the First Amendment, the parties agreed that the tenant would install the sprinkler system; "[t]he Landlord's sole obligation [would be] to review the plans and reimburse the Tenant." Defendants' third affirmative defense is dismissed.

C. Guaranty Law (Fourth Affirmative Defense)

Defendants' fourth affirmative defense is that New York City Administrative Code § 22-1005 (the "Guaranty Law") bars plaintiff's claims against guarantor Clemente to the extent plaintiff seeks rents that accrued during the statute's protection period. (NYSCEF No. 6 at ¶ 11.) Consequently, defendants argue that plaintiff's assertion of a breach-of-guaranty claim constitutes commercial tenant harassment, entitling defendants to damages. (*Id.* at 12.) The Guaranty Law provides that a personal liability provision "in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement" is unenforceable against tenants who (1) had to close due to COVID-19 executive orders; and (2) defaulted between March 7, 2020, and June 30, 2021.

Plaintiff argues that defendants' fourth affirmative defense fails because the Guaranty Law does not bar plaintiff's breach-of-guarantee claim. (NYSCEF No. 14 at ¶ 26.) Plaintiff relies on a federal-district-court decision concluding that the Guaranty Law violated the U.S. Contracts Clause (*see Melendez v City of New York*, 668 F Supp 3d 184, 189 [SD NY 2023].) However, this ruling is merely persuasive and does not bind this court. (*See People v Kin Kan*, 78 NY2d 54, 60 [1991].) And the First Department—binding on this court—has made clear that the Guaranty Law "bars . . . claims against guarantors seeking rent that came due within the law's protection period.'" (*Tamar Equities Corp. v Signature Barbershop 33 Inc.*, 223 AD3d 421, 424 [1st Dept 2024] [alteration omitted].)

The branch of plaintiff's motion seeking to dismiss the fourth affirmative defense is denied.

D. Agreement to Cancel the Lease (Fifth Affirmative Defense)

Defendants' fifth affirmative defense is that plaintiff's claims are barred by the agreement to cancel the lease. (NYSCEF No. 6 at ¶ 13-22.) For the reasons discussed in Point I.B, an issue of fact exists about whether defendants validly surrendered the lease in August 2020. Plaintiff's request to strike defendants' fifth affirmative defense is denied.

E. Documentary Evidence (Sixth Affirmative Defense)

Defendants' sixth affirmative defense is that plaintiff's claims are barred by documentary evidence, namely, the agreement to cancel the lease. (NYSCEF No. 6 at ¶ 23.) This defense is duplicates defendants' fifth affirmative defense, and is dismissed on that basis.

F. Commercial Tenant Harassment (Seventh Affirmative Defense)

Defendants' seventh affirmative defense is that plaintiff engaged in commercial tenant harassment. (NYSCEF No. 6 at ¶ 24.) This defense duplicates defendants' fourth affirmative defense.

G. Waiver (Eighth Affirmative Defense)

Defendants' eighth affirmative defense, which asserts the doctrine of waiver (NYSCEF No. 6 at ¶ 25), is bereft of any factual basis or legal reasoning. This defense is insufficient as a matter of law. (*See Chelsea 8th Ave. LLC v Chelseamilk LLC*, 220 AD3d 565, 566 [1st Dept 2023].) In any event, defendants do not meaningfully oppose the branch of plaintiff's motion seeking to strike this affirmative defense. Defendants' eighth affirmative defense is dismissed.

H. Estoppel (Ninth Affirmative Defense)

Defendants' ninth affirmative defense is that plaintiff "is estopped from asserting certain claims." (NYSCEF No. 6 at ¶ 26.) This defense is dismissed for the same reasons as defendants' eighth affirmative defense.

I. Mitigation (Tenth Affirmative Defense)

Defendants' tenth affirmative defense is that plaintiff's damages are offset by the landlord's failing to mitigate its damages. (NYSCEF No. 6 at ¶ 27-31.) Defendants claim plaintiff violated the law and the lease by arbitrarily refusing the relet the premises to a qualified tenant in January 2021. (NYSCEF Nos. 26, 36.)

But as plaintiff correctly points out, it has no duty to mitigate damages in a commercial leasehold beyond what the lease imposes. (*See Holy Props. v Cole Prods.*, 87 NY2d 130, 133-134 [1995].) And the lease here permits landlord to refuse to relet to a prospective tenant that landlord views as unsatisfactory, as long as that refusal is made in good faith and is not arbitrary. (*See* NYSCEF No. 19 at § 16.03.) Defendants have provided evidence only that landlord refused to relet to a prospective tenant—not that the refusal was arbitrary. Defendants' tenth affirmative defense is dismissed.

J. Impossibility (Eleventh Affirmative Defense)

Defendants' eleventh affirmative defense is that the doctrine of impossibility excuses performance under the lease. (NYSCEF No. 6 at ¶ 32.[2]) Following the outbreak of the COVID-19 pandemic, and the ensuing executive orders, tenant was forced to shut down after March 2020; fitness studios were reopened to the public in March 2021. (NYSCEF No. 27 at ¶ 8, 9, 23.) Plaintiff argues the COVID-19 pandemic did not excuse performance. (NYSCEF No. 14 at ¶¶ 78-81.) Plaintiff acknowledged that defendants could not operate their business during this time, but argues that it did nothing to impair defendants' ability to operate. (NYSCEF No. 15 at ¶¶ 34-36.)

Defendants' argument is without merit. The COVID-19 pandemic does not excuse a tenant's lease obligations on the grounds of impossibility, because the pandemic did not destroy the leased premises themselves. (*See Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480, 480 [1st Dept 2022] [holding that the pandemic "did not render plaintiff's performance impossible, even if its ability to provide a luxury experience was rendered more difficult, because the leased premises were not destroyed"] [internal quotation marks omitted].) Defendants' operations also could have resumed once the shutdown orders were lifted. Defendants' eleventh affirmative defense is dismissed.

K. Frustration of Purpose (Twelfth Affirmative Defense)

Defendants' twelfth affirmative defense is that the doctrine of frustration of purpose excuses performance under the lease. (NYSCEF No. 6 at ¶ 33.) This doctrine is inapplicable here: "[F]rustration of purpose is not implicated by temporary governmental restrictions on in-person operations, as the parties' respective duties were to pay rent in exchange for occupying the leased premises" (*Valentino U.S.A., Inc. v. 693 Fifth Owner LLC*, 203 A.D.3d 480, 480, 160 N.Y.S.3d 858 [1st Dept. 2022]). Defendants' twelfth affirmative defense is dismissed.

L. Constructive Eviction (Thirteenth Affirmative Defense)

Defendants' thirteenth affirmative defense is that constructive eviction excuses performance under the lease. (NYSCEF No. 6 at ¶ 34.) Plaintiff argues that "[t]here was no eviction of any kind." (NYSCEF No. 14 at ¶ 92.)

Defendants' argument is without merit. Defendants do not plead that tenant was wrongly ousted from the premises. Absent an ouster, the defense of constructive eviction fails. (*See Universal Communications Network, Inc. v 229 W. 28th Owner, LLC*, 85 AD3d 668, 669 [1st Dept 2011] [collecting cases].) Defendants' thirteenth affirmative defense is dismissed.

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[2] Defendants argues that tenant's business was "totally destroyed and thus could not pay rent." (NYSCEF No. 26 at ¶ 15.) Defendant Clemente avers that "[w]ere it not for the Covid 19 pandemic, Alliance would still be in business, fulfilling its Lease commitments." (NYSCEF No. 27 at ¶ 39.)

M. Actual Eviction (Fourteenth Affirmative Defense)

Defendants' fourteenth affirmative defense is that defendants' actual eviction excuses performance under the lease. (NYSCEF No. 6 at ¶ 35.) But tenant left the premises on its own; plaintiff did not evict it. Defendants' fourteenth affirmative defense is dismissed

N. Unclean Hands (Fifteenth Affirmative Defense)

Defendants' fifteenth affirmative defense is that plaintiff's claims are barred by the doctrine of unclean hands. (NYSCEF No. 6 at ¶ 36.) Fatally for defendants, "[t]he doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages." (*Manshion Joho Ctr. Co. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005].) Defendants seek only damages in this action. Defendants' fifteenth affirmative defense is dismissed.

III. Branch of Motion to Strike Defendants' Counterclaims

A. Commercial Tenant Harassment (First Counterclaim)

Defendants' first counterclaim is that plaintiff's claim against Clemente constitutes commercial tenant harassment, entitling defendants to damages. (NYSCEF No. 6 at ¶ 41-43.) Plaintiff argues that it did not commit tenant harassment, because the Guaranty Law is unconstitutional. As discussed above, this argument lacks merit. The branch of plaintiff's motion to strike this counterclaim is denied.

B. Attorney Fees (Second Counterclaim)

Defendants' second counterclaim is that "[d]efendants are entitled to recover their reasonable legal fees and disbursements." (NYSCEF No. 6 at ¶ 45.) Although defendants do not specify the basis for this counterclaim, it appears to rest on plaintiff's purported breach of the lease. Defendants do not, however, cite any provision in the lease or the guaranty that would permit tenant or guarantor to receive legal fees if landlord breaches the lease. Generally, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." (*Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989].) Here, the lease and guarantee provide only that in an action to enforce the lease, the landlord is entitled to recover attorney fees if it prevails. (*See* NYSCEF No. 19 at § 16.12 [lease]; NYSCEF No. 21 at § 2 [guaranty].) Defendants' second counterclaim is dismissed.

Accordingly, it is

ORDERED that the branch of plaintiff's motion seeking summary judgment in its favor is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking to strike defendants' affirmative defenses is granted with respect to defendants' second, third, and sixth through fifteenth affirmative defenses, and otherwise denied; and it is further

ORDERED that the branch of plaintiff's motion seeking to dismiss defendants' first counterclaim is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking to dismiss defendants' second counterclaim is granted.

1/9/2026
DATE

HON. GERALD LEBOVITS
J.S.C.

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