

**Forty Four Eighteen Joint Venture v Medium**

2004 NY Slip Op 30221(U)

October 12, 2004

Supreme Court, New York County

Docket Number:

Judge: Rosalyn H. Richter

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

PRESENT: Richter PART 24

*Justitia*

0602632/2003

FORTY FOUR EIGHTEEN JOINT  
VS  
RARE MEDIUM

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

SEQ 1

AMEND SUPPLEMENT PLEADINGS

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 18 2004

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/12/04 Rosalyn Richter  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST HON. ROSALYN RICHTER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 24

-----X

Forty Four Eighteen Joint Venture,  
Plaintiff,

-against-

Decision and Order  
Index No. 602632/03  
Motion Sequence No. 1

Rare Medium,

Defendant.

-----X

**RICHTER, J:**

In this motion, plaintiff landlord seeks summary judgment to recover rents allegedly due from defendant tenant, as well as dismissal of defendant tenant's affirmative defenses and counterclaims. For the following reasons, plaintiff's motion for summary judgment is granted with regard to liability only.

The lease at issue here was executed by the parties on September 9, 1997 and set forth a term of November 1, 1997 to December 31, 2007. It is not disputed that in January 2003, defendant stopped paying all rents and has made no further payments since then. At some point, either December 2002 or March 2003, defendant physically vacated the premises. Plaintiff argues that defendant's non-payment is a violation of the lease, for which it is entitled to summarily recover.

In opposition, defendant argues that plaintiff itself violated the lease by wrongfully refusing to consent to an assignment request put forward by defendant on February 28, 2003. The basis for plaintiff's denial of the assignment was defendant's outstanding rent obligations. Defendant further argues that plaintiff then sought to re-let the premises for its own benefit, and

thereby accepting defendant's surrender of the lease, releasing defendant from any further contractual liability.

Paragraph 56 of the lease provides in part that landlord shall not unreasonably withhold its consent to a sublet or assignment of the premises provided that certain criteria are met, including, that "tenant shall not be in default in the performance of any of its obligations under this lease." The Court finds this language to be unambiguous. *W.W.W. Assoc., Inc. v. Giancontieri*, 77 N.Y.2d 157 (1990) ("Whether or not a writing is ambiguous is a question of law to be resolved by the courts."). The plain terms of paragraph 56 set forth eight conditions, the satisfaction of which is required before the landlord must consider and not unreasonably withhold its consent to an assignment. Any other construction of this provision would render the provision illusory and leave the landlord without the right to refuse an assignment by a defaulting tenant. For example, defendant's interpretation, which allows tenant until the date of a potential assignment's closing to correct defaults, requires landlord to consider and grant any reasonable assignment request, even when tenant was in default of its lease obligations. Defendant's arguments, if accepted, would mean that if on the date of the closing of the assignment the tenant had failed to correct its defaults, landlord would have no ability to block the assignment, having already granted its consent. This is not a reasonable interpretation of this contract provision.

What is clear from the uncontested facts is that at the time the defendant put forth its assignment request to plaintiff, defendant was several months in default of its rent obligations. Thus, according to the unambiguous language of paragraph 56 of the lease, plaintiff was well within its contractual rights to reject, without consideration, any assignment requests put to it by defendant. As there are no material issues of fact in dispute as to defendant's outstanding lease

obligations, the court grants plaintiff's motion for summary judgment on liability.

Plaintiff's motion, pursuant to CPLR 3025(b), for leave to amend its complaint to add to the first cause of action the unpaid rent accrued pursuant to the lease for the period of September 2003 through April 2004 is granted. The amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof. However, the Court finds the amendment request to pertain only to the amount of damages, which shall be assessed at a separate hearing on damages. Accordingly, an assessment on damages against the defendant is ordered on the issues in the original and amended complaints; and it is further

ORDERED that defendant shall serve an answer to the amended complaint within 20 days from the date of said service; and it is further

ORDERED that within 60 days from the date hereof, plaintiff shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office, and shall pay the proper fees, if any, and said Clerk shall thereupon place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that if the plaintiff fails to comply with the immediately preceding paragraph, the action will be dismissed.

This constitutes the decision and order of the Court.

October 12, 2004

**FILED**  
**OCT 18 2004**  
CLERK OF THE TRIAL SUPPORT OFFICE  
*Rosalyn Richter*  
Justice Rosalyn Richter