

**Eujoy Realty Corp. v Van Wagner Communications,
LLC**

2008 NY Slip Op 33675(U)

July 31, 2008

Supreme Court, New York County

Docket Number: 116655/2007

Judge: Richard F. Braun

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This opinion is uncorrected and not selected for official publication.

PRESENT: **HON. RICHARD F. BRAUN**
J.S.C.

PART 23

Index Number : 116655/2007
EUJOY REALTY CORP.
 VS.
VAN WAGNER COMMUNICATIONS INC
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE 5/1/08
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

FILED
 AUG 04 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

all cross motions
 this motion to/for Summary Judgment

PAPERS NUMBERED	
1	
2,3	
4	

Notice of Motion/ Order to Show Cause — Affidavits ...
 Notice of Cross Motion
 Answering Affidavits — Exhibits

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ~~is denied~~ and it is further
 ORDERED that the cross motion is granted to
 the extent of awarding defendant summary judgment
 dismissing this action, and it is further
 ORDERED that the Clerk shall enter judgment
 accordingly.
 This constitutes the decision and order of this
 Court. See separate Opinion.

FOR THE FOLLOWING REASON(S):

Dated: New York, New York, July 30, 2008 ENTERED: RB
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

----- X
EUJOY REALTY CORP.,

Plaintiff,

- against -

VAN WAGNER COMMUNICATIONS, LLC,

Defendant.
----- X

Index No. 116655/07

OPINION

FILED

AUG 04 2008

COUNTY CLERK'S OFFICE
NEW YORK

RICHARD F. BRAUN, J.:

This is an action for rent and counsel fees. Plaintiff moves for summary judgment in the amount of \$94,133.57 on the first cause of action and a hearing to assess plaintiff's counsel fees on the second cause of action. Defendant cross-moves for summary judgment dismissing this action, or, if the action is not dismissed, leave to amend defendant's answer. The parties stipulated that, if both of their summary judgment motions are denied, then plaintiff consents to the amendment of the answer.

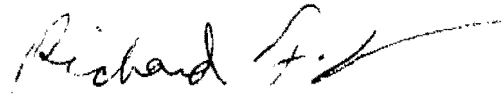
A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 382 [2005]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff has not demonstrated that it is entitled to summary judgment, but defendant has. Paragraph 53 of the second rider to the subject lease gave defendant the right to terminate the lease under the circumstances, and defendant did so. Paragraph C of schedule A gave plaintiff the right

to keep any basic rent that was paid in advance pursuant to paragraph A for the subject lease year 7. Defendant did not pay any such rent because defendant stopped payment on the rent check before plaintiff cashed it (*see Hutzler v Hertz Corp.*, 39 NY2d 209, 214 [1976]).

Therefore, the motion was denied, by this court's separate July 30, 2008 decision and order. The cross motion has been granted to the extent of awarding summary judgment dismissing this action.

Dated: New York, New York
July 31, 2008



RICHARD F. BRAUN, J.S.C.

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AUG 04 2008
COUNTY CLERK'S OFFICE
NEW YORK