

**264 W. 35th St. Corp. v E&S Mgt., LLC**

2009 NY Slip Op 32279(U)

September 30, 2009

Supreme Court, New York County

Docket Number: 101417/09

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 7

264 WEST 35<sup>TH</sup> STREET CORP.,  
  
Plaintiff,

INDEX NO. 101417/09

- v -

MOTION DATE 7/9/09

MOTION SEQ. NO. 001

E&S MANAGEMENT, LLC, MICHAEL  
STEINBERG and ELLIOT SPITZER a/k/a  
ELIYAHU SPITZER,  
  
Defendants.

MOTION CAL. NO. 126

The following papers, numbered 1 to 4 were read on this motion for summary judgment

Notice of Motion— Affidavit — Exhibits A-F

PAPERS NUMBERED

1-2

Answering Affirmation – Exhibit A

3

Replying Affidavit—Exhibit A

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is hereby ORDERED that plaintiff's motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

**FILED**  
OCT 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

MICHAEL D. STALLMAN  
J.S.C.

Dated: 9/30/09  
New York, New York



J.S.C.

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

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

-----X  
264 WEST 35<sup>TH</sup> STREET CORP.,

Plaintiff,

Index No. 101417/09

- against -

E&S MANAGEMENT, LLC, MICHAEL STEINBERG and  
ELLIOT SPITZER a/k/a ELIYAHU SPITZER,

**Decision and Order**

Defendants.

**FILED**  
OCT 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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**HON. MICHAEL D. STALLMAN, J.:**

Plaintiff moves for summary judgment against a commercial tenant and its guarantors to recover unpaid rent due under a commercial lease, following the tenant's eviction.

**BACKGROUND**

By a lease agreement made as of February 11, 2005 between E & S Management LLC and plaintiff's agent, General Leasing and Management Corp., plaintiff leased the entire 21<sup>st</sup> floor in a building known as 494 Eighth Avenue a/k/a 264 West 35<sup>th</sup> Street in Manhattan, for a term of five years and one month, commencing from the Rent Commencement Date, as defined in the lease. Haddad Aff., Ex A.

Pursuant to Article 41 of the rider to the lease, the base rent was initially set at \$7,666.67 per month, which increased to \$8,000 per month within 30 days after the Rent Commencement Date, and increased thereafter by 2.5 percent. See Haddad Aff., Ex A. Pursuant to Article 42 of the rider, E & S Management LLC also agreed to pay, as additional rent, 4% of any increases in New York City real estate taxes. Ibid. In addition, E & S Management LLC agreed to pay for water used at the premises, and to pay \$95 per month as additional rent for sprinkler maintenance, as per Articles 28

and 29 of the lease, respectively. Ibid. Last, pursuant to Article 53 of the rider, E & S Management LLC agreed to a late charge of five cents on each dollar of rent overdue.

By identical "Possession Guaranties," defendants Michael Steinberg and Elliot Spitzer each guaranteed

"to Landlord, its successors, and assigns, that he shall pay to Landlord all Rent and Additional Rent that has accrued or may accrue under the terms of the herein Lease to the latest date that Tenant and its assigns and sublessees, if any shall have completely performed all of the following:

- i. Vacated and surrendered the Demised Premises to Landlord pursuant to the terms of this Lease . . . , and
- ii. Delivered the keys to the Premises to the Landlord, and
- iii. Paid to Landlord all Accrued Rent up to and including the date which is the later of (a) the actual receipt by Landlord of said Accrued Rent, (b) the surrender of the premises, or (c) the receipt by owner of the keys to the premises. . . ."

Haddad Aff., Exs B, C.

According to plaintiff, E&S Management LLC began to fall behind in its payment of rent in June 2008, and plaintiff commenced a nonpayment proceeding against it in the Civil Court of the City of New York. Haddad Aff. ¶ 8. According to plaintiff, E&S Management, LLC was evicted from the premises on January 23, 2009. Plaintiff commenced this action on February 3, 2009. The complaint alleges that defendant Elliot Spitzer is also known as Eliyahu Spitzer. See Haddad Aff., Ex E [Complaint ¶ 5]. Defendants admitted that the allegations in that paragraph were true. Haddad Aff., Ex G [Answer ¶ 5].

**DISCUSSION**

Plaintiff has established prima facie entitlement to summary judgment as a matter of law against defendants, for unpaid rent, by submitting a copy of the lease between plaintiff and defendant

E&S Management LLC, a copy of the guaranties with Steinberg and Spitzer, an affidavit from its vice-president, and a copy of a rent ledger. According to plaintiff, the monthly rent due under the lease was \$8,939.51, including a sprinkler charge of \$95.00. See Haddad Aff. ¶ 7. The rent ledger indicates that the total amount of rent due, including a sprinkler charge, late charges, escalation charges, and charges for water usage, amounting to \$96,642.40. Haddad Aff., Ex F.

Defendants claim that they surrendered the lease in December 2008. They argue that the parties agreed to terminate the lease, and so plaintiff should not be entitled to collect rent due under the remainder of the lease.

“The law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury. Leases are not subject to this general rule, however, for, unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property. Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages.

When defendant abandoned these premises prior to expiration of the lease, the landlord had three options: (1) it could do nothing and collect the full rent due under the lease, (2) it could accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the tenant's benefit. . . . Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease.

Holy Props. v Kenneth Cole Prods., 87 NY2d 130, 133 -134 (1995)(internal citations omitted); 85 John St. Partnership v Kaye Ins. Assoc., 261 AD2d 104 (1st Dept 1999).

Defendants fail to raise a triable issue of fact as to whether the parties agreed to terminate the lease, as opposed to defendants' abandonment of the lease and subsequent eviction. Defendants submit no affidavit from an individual with personal knowledge, and no evidence of a release from

plaintiff. Therefore, plaintiff's motion for summary judgment is granted on the first and fourth causes of action, in the amount of \$96,642.20.

There does not appear to an agreement as to prejudgment interest. Therefore, prejudgment interest shall accrue at the statutory rate of 9% per annum, for lack of a specific rate of interest prayed for by plaintiff. Hugh O'Kane Elec. Co., LLC v MasTec North Am., 45 AD3d 413 (1st Dept 2007); Spodek v Park Property Dev. Assocs., 279 AD2d 467, 468 (2d Dept 2001). According to plaintiff, E&S Management LLC began to fall behind in its payment of rent in June 2008, and E&S Management, LLC was evicted from the premises on January 23, 2009. Because plaintiff's damages were incurred at various times from June 2008 through January 2009, the Court designates October 1, 2008 as an intermediate date from which prejudgment interest shall be computed.

As to the second and fourth causes of action, "[a]lthough an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please. If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable." Holy Props., 87 NY2d at 134. Section 18 of the lease provides, in pertinent part:

"In case of any . . . dispossession by summary proceedings or otherwise, . . . (c) Tenant . . . shall also pay Owner as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any of the rents collected on account of the lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the terms of this lease. The failure of the Owner to re-let the premises or any part of thereof shall not release or affect Tenant's liability for damages."

Haddad Aff., Ex A. By virtue of this language, plaintiff is entitled to recover the rent due under the remaining term of the lease. Defendants do not contend that the premises were re-let after E & S Management LLC's eviction.

Article 40 of the rider to the lease defined the Rent Commencement Date as the date “when the Landlord has substantially completed Landlord’s Work as hereafter defined in Article 43 below.” Haddad Aff., Ex A. Article 43 requires the landlord to substantially complete construction on the demised premises by March 1, 2005. From this date, the lease was therefore set to expire on April 1, 2010, five years and one month later. Thus, plaintiff is entitled to payment of rent for the period of February 2009 until April 2010, i.e., 13 months of rent. According to plaintiff, the monthly rent per month as of February 1, 2009 was \$9,034.51 per month.

Therefore, plaintiff’s summary judgment motion is granted on the second and fifth causes of action in the amount of \$117,448.63 (\$9,034.51 per month x 13 months). Given the lack of a specific rate of interest, prejudgment interest shall accrue at the statutory rate of 9% per annum, as of February 1, 2009.

Plaintiff is entitled to summary judgment as to liability on the third and sixth causes of action, which seek to recovery attorneys’ fees from defendants. Plaintiff is entitled to recover attorneys’ fees pursuant to section 19 of the lease and section 71 of the rider to the lease, the payment of which falls within the scope of Steinberg’s and Spitzer’s guaranties. Accordingly, the third and sixth causes of action are severed and referred to a Special Referee to hear and determine, given that defendants waived their rights to a jury trial.

Finally, the fate of defendants’ alleged security deposit in the amount of \$18,325.96 should await the outcome of the reference on the reasonable attorneys’ fees. Section 31 of the lease permits plaintiff to

“use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any rent and additional rent or any other sum as to which Tenant is in default or for any sum which Owner may expend or may be required to

\* 7 ] ,  
expend by reason of Tenant's default in respect of any of the terms, covenants, and conditions of this lease, including but not limited to, any damages or deficiency accrued before or after summary proceedings or other re-entry by Owner."

Haddad Aff., Ex A. Given that plaintiff is entitled to recover reasonable attorneys' fees against defendants, the Court need not reduce the amount of the judgment granted against defendants.

### CONCLUSION

Upon the foregoing papers, it is ordered that plaintiff's motion for summary judgment is granted, and the Clerk is directed to enter judgment in plaintiff's favor and against defendants E & Management, LLC, Michael Steinberg, and Elliot Spitzer a/k/a Eliyahu Spitzer jointly and severally as follows:

1) on the first and fourth causes of action, in the amount of \$96,642.20; together with interest as prayed for at the rate of 9% per annum from the date of October 1, 2008, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate,

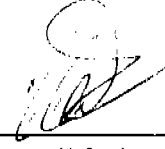
2) on the second and fifth causes of action, in the amount of \$117,448.63; together with interest as prayed for at the rate of 9% per annum from the date of February 1, 2009, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, and it is further

together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the third and sixth causes of action, for attorneys fees, are hereby severed

and are referred to a Special Referee to hear and determine.

**Dated: September , 2009**  
**New York, New York**

**ENTER:**   
\_\_\_\_\_  
**J.S.C.**

*McGraw-Hill Construction Information Group*

**FILED**  
OCT 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**NEW YORK COUNTY SUPREME COURT - SPECIAL REFEREE CALENDAR**

**INFORMATION SHEET**

**Title of Action: 264 West 35<sup>th</sup> Street Corp. v E&S Management LLC**

**Index No.: 101417/2009**

**Issues Referred to HEAR AND DETERMINE: Reasonable attorneys' fees in commercial landlord-tenant dispute**

**Estimated Time Needed for Hearing: 1 DAY**

**Attorney for Plaintiff:** Jeffrey Klarsfeld, Esq.  
Platte, Klarsfeld, Levine & Lachtman, LLP  
10 East 40<sup>th</sup> Street, 46<sup>th</sup> Floor  
New York, NY 10016  
(212) 726-4423

**Attorney for Defendant:** Law Office of Jeremy Rosenberg  
30 Broad Street, 27<sup>th</sup> Floor  
New York, NY 10004  
(212) 422-3843

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Please attach this form to a copy of the order of reference or transcript and file, as soon as possible after issuance and in any event within 60 days thereof, with:

Special Referee Clerk - Motion Support Office  
60 Centre Street - Room 119, New York, New York 10007

- You will be notified by mail of the date and time of the hearing.
- Please direct all inquiries to the Special Referee Clerk (646-386-3028)
- Usually, cases are assigned to a Referee and the hearing commences on the original hearing date. Counsel therefore should be prepared with witnesses and evidence on the original date. Counsel are required to consult with all adversaries in regard to requests or applications for an adjournment.