

**Matthew Flowers, Inc. v Mark Hotel LLC.**

2011 NY Slip Op 34319(U)

February 24, 2011

Supreme Court, New York County

Docket Number: 103297/09

Judge: Joan M. Kenney

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This opinion is uncorrected and not selected for official publication.

**FILED**

**MAR 01 2011**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS Part 8**

-----X  
MATTHEW FLOWERS, INC.,

Plaintiff,

-against-

MARK HOTEL LLC., et. al.,

Defendants.

-----X  
KENNEY, JOAN M., J.

**NEW YORK  
COUNTY CLERK'S OFFICE  
DECISION AND ORDER**  
Index Number.:103297/09  
Motion Cal.: 12/20/10  
Motion Seq. No. 003

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment and cross motion seeking a stay.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affirmation, Exhibits and Memorandum of Law	1 - 14
Opposition, Cross Motion and Memorandum of Law	15 - 29
Reply Affirmation and Opp to Cross Motion	30
Reply to Cross Motion	31

Upon the foregoing cited papers, the Decision and Order of this Motion is as follows:

Defendants, Mark Hotel LLC, Alexico Management Group., Inc., and Alexico Group LLC, seek an Order for partial summary judgment, pursuant to CPLR 3212, and dismissal of the complaint against two named defendants, pursuant to CPLR 3211(a)(7).

Plaintiff, Matthew Flowers, Inc., interposes a cross motion seeking an Order, pursuant to CPLR 2201 and/or 3212(e)(2), to stay the issuance and enforcement of any judgment amount which the Court may enter herein.

**FACTUAL BACKGROUND**

On March 24, 2003, plaintiff, Matthew Flowers, Inc., executed a ten (10) year commercial lease agreement (the lease) with Madison Avenue Hotel Partners (MAHP) for the rental of the front part of the second floor space located at 1000 Madison Avenue in New York City (the premises). MAHP is the predecessor-in-interest to defendant, Mark Hotel LLC (the landlord).

Briefly, on or about April 23, 2009, the landlord commenced a commercial landlord/tenant non-payment summary proceeding against plaintiff, as the tenant of the premises. This summary proceeding was commenced in New York County under L&T Index number 65601/09 (the non-payment proceeding). The tenant filed an answer to the non-payment proceeding, interposing affirmative defenses and counterclaims that were subsequently dismissed by decision and order of Judge Kennedy, JCC, dated August 14, 2009.

On or about November 30, 2009, Justice Shafer, JSC consolidated the non-payment summary proceeding with the within Supreme Court Action seeking injunctive relief (1<sup>st</sup> cause of action), damages for breach of contract (2<sup>nd</sup> cause of action) and damages as a result of a constructive eviction (3<sup>rd</sup> cause of action). By decision and order dated July 14, 2009, Justice Shafer denied the first cause of action seeking injunctive relief.

### ARGUMENTS

Defendant, Mark Hotel LLC, contends that summary judgment must be granted in its favor on its claims for rent and additional rent pursuant to the terms of the parties' lease because plaintiff has no viable defense to said claims. Moreover, defendants, Alexico Management Group., Inc., and Alexico Group LLC, assert that plaintiff's complaint must be dismissed as against them because: (1) they never executed a contract with plaintiff; (2) Alexico Group LLC was the landlord's agent as manager of the premises and cannot be held liable to the plaintiff on landlord/tenant matters; and (3) Alexico Management Group., Inc. is not an a/k/a of Alexico Group LLC, does not have a relationship with the landlord or the premises, and is a separate entity from Alexico Group LLC.

Plaintiff contends that the movants' applications must be denied and a stay of the within judgment amount, if any, must be issued until plaintiff prosecutes its claims against defendants.

## DISCUSSION

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a 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" (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

The burden of production as well as the burden of persuasion always rests with the proponent of the motion (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Consequently, the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact. Once that burden is satisfied, the opponent of the motion must produce sufficient evidence, in admissible form, establishing the existence of a triable issue of fact. Therefore, "if the [evidence] on the issue is evenly balanced, judgment must be rendered against the party bearing the burden of proof" (*300 East 34th Street Co. v Habeeb*, 248 AD2d at 50, [1st Dept 1997]).

When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc., et al.*, 111 AD2d 98 [1st Dept, 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff (*Joel v. Weber*, 166 Ad2d 130, [1st Dept, 1991]).

In this case, there can be no dispute that plaintiff has no defense to the assertions raised in the Petition and Notice of Petition with respect to the allegations of non-payment of rent and additional rent against plaintiff as the tenant of the premises. This Court, however, will not award judgment in the amount demanded of \$254,266.02. It is not clear when and to whom the premises were re-let, if at all, to mitigate the landlord's damages. Moreover the Petition and Notice of Petition have not been amended to reflect the judgment amount sought herein. This Court will allow movant to conform its pleadings to the proof presented at a hearing to determine the judgment amount to be awarded in favor of Mark Hotel, LLC.

Movants' application to dismiss the complaint against defendants, Alexico Management Group, Inc., and Alexico Group LLC, is granted, without any written opposition from plaintiff.

Plaintiff's cross motion for a stay, is denied. Neither the breach of contract claim, nor the constructive eviction claim may be used to defend against the non-payment of rent and additional rent due and owing and as asserted by the landlord. Any defense to the non-payment proceeding has been dismissed, on the merits, by Judge Kennedy. The staying of any judgment with respect to the non-payment proceeding, in the hopes that plaintiff prevails in its causes of action for breach of contract and constructive eviction, is unwarranted, would be based upon speculation and cannot be used to offset the awarded judgment amount. Accordingly, it is

ORDERED that plaintiff's first cause of action is dismissed, in accordance with Justice Shafer's August 14, 2009 decision and order; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants, Alexico Management Group, Inc., a/k/a Alexico Group LLC and against plaintiff, dismissing the complaint against these defendants only; and it is further

ORDERED that plaintiff's cross motion, is denied, in its entirety; and it is further

ORDERED that Mark Hotel LLC's motion for partial summary judgment, is granted; and it is further

ORDERED that that portion of Mark Hotel LLC's Petition and Notice of Petition that seeks judgment on its claim for rent and additional rent, is severed and an assessment thereof is directed; and it is further

ORDERED that an assessment of damages against plaintiff, Matthew Flowers, Inc. and in favor of defendant Mark Hotel LLC, as to the amount of rent and additional rent due and owing in accordance with the lease is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that the parties appear for a compliance conference on March 3, 2011 at 9:30 a.m. in Room 304, located at 71 Thomas Street, NYC 10013

Dated: February 24, 2011

**FILED**

**MAR 01 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

ENTER: 

Joan M. Kenney, J.S.C.