

**61 Broadway Owner, LLC v Deorchis & Partners,  
LLP**

2012 NY Slip Op 33536(U)

December 18, 2012

Sup Ct, New York County

Docket Number: 155128/2012

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

61 Broadway

INDEX NO. 155128/12

-v-

MOTION DATE 12/7/12

Deorchis & Partners

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant Deorchis & Partners, LLP is granted on the issue of liability; and it is further

ORDERED that it appearing to the Court that a reference to determine is proper and appropriate pursuant to CPLR 4317 (b) in that an examination of a long account will be required, an issue of damages separately triable and not requiring a trial by jury is involved, a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: (1) the issue of the amount due and owing under the Lease for rent and additional rent and (2) the issue of attorneys' fees; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/suptctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to determine as specified above, and it is further

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

Page 1 of 2

Dated: \_\_\_\_\_, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401 -9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further

ORDERED that the plaintiff(s)/petitioner(s) shall serve a proposed accounting within 24 days from the date of this order and the defendant(s)/respondent(s) shall serve objections to the proposed accounting within 20 days from service of plaintiff(s)/petitioner's(s') papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further


ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 12/18/12

ENTER:  J.S.C.

**HON. CAROL EDMEAD**

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: PART 35

-----X  
61 BROADWAY OWNER, LLC,

Plaintiff,

Index No. 155128/2012  
Motion Seq. 001

-against-

DEORCHIS & PARTNERS, LLP,

Defendant.

-----X  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover monies due under a lease agreement, plaintiff 61 Broadway Owner, LLC (“plaintiff”) moves for summary judgment against defendant Deorchis & Partners, LLP (“defendant”).

*Factual Background*

On September 10, 2009, plaintiff’s predecessor, as owner of the building located at 61 Broadway, New York, New York (the “Building”), leased to defendant’s predecessor the 26th floor thereat for 10 years (the “Original Lease”). On May 16, 2001, said predecessors executed a letter agreement, modifying the Original Lease to include a storage space (the "Storage Space") at additional rent of \$624.00 per month.

On February 27, 2009, plaintiff, as landlord, and defendant, as tenant, entered into a First Amendment of Lease (the "Lease Amendment"), in which defendant surrendered the 26th floor of the Building and leased the 19th floor the Building (the "Premises"). The Lease Amendment also extended the term of the Original Lease to February 28, 2019 (the Original Lease and Lease Amendment is collectively referred to as the “Lease”).

Under the Lease, defendant was obligated to pay to plaintiff, among other things, monthly rent of \$26,725.75 (with rent escalations), electric charges and other miscellaneous fees. In the event of a default, defendant was also obligated to pay late charges, interest and attorneys' fees.

On February 27, 2012, defendant advised plaintiff that it would be vacating the Premises on or before March 30, 2012, before the expiration of the lease term. In response the following day, plaintiff advised defendant that its surrender of the Premises was without prejudice to all of plaintiff's rights pursuant to the Lease. Defendant vacated the Premises as of March 30, 2012.

According to plaintiff, defendant had fully paid all rent and additional rent due through March 30, 2012, but failed to pay any rent or additional rent after it vacated the Premises. Plaintiff did not re-rent the Premises or the Storage Space, and thus, defendant owed plaintiff \$67,746.27 for rent and additional rent through August 2, 2012, the date this action was commenced. Plaintiff applied defendant's \$82,532.00 security deposit (in the form of a letter of credit) for the Premises to the arrears.

Plaintiff commenced the instant action against defendant for rent additional rent owed by defendant through August 2, 2012, and for attorneys' fees. In response, defendant asserted one counterclaim, alleging that all rent was paid through March 2012, that plaintiff improperly drew down on defendant's security deposit, and that plaintiff overcharged for electric usage.

In support of summary judgment, plaintiff contends that it has not re-rented the Premises or Storage Space, accepted rent or any other monies from any person or entity relating to the Premises or Storage Space, or mitigated its damages in any way, despite plaintiff's commercially reasonable efforts to re-let the Premises.

Pursuant to paragraph 4(b) of the Lease Amendment, the base Rent for the Premises for

the 4th year of the Lease (March 1, 2012 through February 28, 2013) is \$26,725.75 per month. Defendant failed to pay for April 2012 through October 2012, totaling \$187,080.25. Pursuant to paragraph 41 of the Lease, the Premises is sub-metered and defendant is liable for these electric charges. Total electric charges for the months of April 2012 through October 2012 are \$10,900.38, as per the invoices submitted. Pursuant to paragraph 42 of the Lease and paragraph 8 of the Lease Amendment, defendant is liable for a percentage of increases in real estate taxes attributable to the Building, over a certain base year. Defendant's share of the real estate taxes, billed on July 1, 2012, was \$4,530.95, as per the invoices submitted. Thus, the total base rent, electric and real estate taxes owed by defendant for the months of April, 2012 through October 2012 is \$202,512.08. After application of defendant's \$81,532.00 security deposit, defendant owes plaintiff \$120,980.08.

Plaintiff also contends that the rent for the Storage Space is \$624.00 per month, and defendant failed to pay for the months of April 2012 through October 2012. After application of defendant's two months of security deposit for the Storage Space, the total owed is \$3,120.00.

Therefore, the total owed by defendant for the Premises and Storage Space is \$124,100.08 through October 31, 2012, and plaintiff is entitled to summary judgment against defendant on the first and second causes of action in such amount.

Plaintiff also contends that defendant is liable for the costs and attorneys' fees plaintiff incurred herein pursuant to paragraph 65 of the Lease.

Finally, plaintiff argues that defendant's counterclaim lacks merit, since the Lease permits plaintiff to draw down the Security Deposit and apply it to the unpaid rent and additional rent, and the invoices demonstrate the validity of the electric charges.

In opposition, defendant argues that issues of fact exist as to whether plaintiff improperly drew against the Letter of Credit with regard to two months (June and/or July, 2012) as to which defendant was not (at the time of the draw-down) in default in the payment of rent. The determination of the motion should be held in abeyance pending the taking and completion of plaintiff's deposition pursuant to CPLR 3212(f) and the submission of additional opposing papers, as facts essential to justify opposition may exist but cannot be stated.

In reply, plaintiff argues that defendant does not deny its failure to pay rent between April 2012 and October 2012 and that it owed plaintiff \$124,100.08 as of October 31, 2012 (after applying the Security Deposit to the arrears). Also, defendant provides no factual detail challenging the electricity charges. And, even assuming plaintiff prematurely drew down on a small portion of the Security Deposit, plaintiff would have clearly been able to do so in the subsequent month. Defendant failed to pay any rent after it vacated the Premises in March 2012, and owed plaintiff rent far in excess of the amount of the Security Deposit. Further, defendant failed to demonstrate that further discovery will likely lead to evidence of a triable issue of fact.

#### *Discussion*

On a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762

NYS2d 386 [1<sup>st</sup> Dept 2003]). Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

To establish a breach of contract claim against defendant, plaintiff was required to show the existence of a valid contract, breach of the contract by defendant and resulting damages (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009]; *Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

Plaintiff's submissions clearly establish a valid and binding lease agreement between the parties, and defendant's failure to pay the amounts due thereunder, including attorneys' fees. The Lease establishes the annual rental due under paragraph 4 of the Lease and under the letter agreement (for the Premises and Storage Space, respectively), and defendant's obligation to pay electricity under paragraph 41 of the Lease. Paragraph 42 of the Lease also established defendant's obligation to pay a certain amount of real estate taxes. Pursuant to paragraph 65 of the Lease, defendant agreed to pay, "as additional rent, a sum equal to all costs and expenses (including reasonable attorneys fees, costs of investigation and disbursements) incurred by Landlord in enforcing any or all of its rights hereunder, specifically including the cost of collecting sums due, whether or not an action or proceeding is commenced ..." Plaintiff further established defendant's failure to pay such amounts due.

Plaintiff further established that defendant's counterclaim lacks merit. As to the Security

Deposit, the Lease, paragraph 68(C) provides:

*In the event Tenant shall default beyond the expiration of any applicable grace or cure period expressly set forth in the Lease during the period in which the Letter of Credit shall be in place, Landlord shall have the right, and regardless of the exercise of any other remedy Landlord may have be reason of a default, to immediately draw against the Letter of Credit to the extent necessary to cure the amount of any default of Tenant ..."* (Emphasis added).

As such, plaintiff was entitled to draw down the Security Deposit and apply said amounts to the unpaid rent and additional rent.

In opposition, defendant failed to raise an issue of fact as to its liability to plaintiff for the rent and additional rent.

A “claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment” (*Hariri v Amper*, 51 AD3d 146, 854 NYS2d 126 [1<sup>st</sup> Dept 2008]; *Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3d 426, 427 [2d Dept 2008] (An argument opposing summary judgment on the grounds of insufficient discovery “is unavailing where the nonmoving party has failed to ‘produce some evidence indicating that further discovery will yield material and relevant evidence’”) quoting *Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]; *Steinberg v Abdul*, 230 AD2d 633, 633 [1st Dept 1996] [“We add that the mere hope, expressed by plaintiffs, that evidence sufficient to establish defendants’ assumption of a duty to plaintiffs’ decedent may be obtained during discovery does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212[f]) and, thus, is insufficient to defeat defendants’ motions for summary judgment”]).

The mere hope that evidence sufficient to defeat a motion for summary judgment may be

uncovered during the discovery process is insufficient to deny such a motion (*Flores v City of New York*, 66 AD3d 599, 888 NYS2d 27 [1<sup>st</sup> Dept 2009]).

Defendant has provided no evidence in its moving papers indicating that further discovery will yield material and relevant evidence. Therefore, defendant's argument lacks merit.

Although plaintiff established entitled to summary judgment on the issue of liability, the sole issue is the amounts due and owing for rent and additional rent, and for attorneys' fees, all of which shall be referred to a Special Referee to hear and determine.

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant Deorchis & Partners, LLP is granted on the issue of liability; and it is further

ORDERED that it appearing to the Court that a reference to determine is proper and appropriate pursuant to CPLR 4317 (b) in that an examination of a long account will be required, an issue of damages separately triable and not requiring a trial by jury is involved, a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: (1) the issue of the amount due and owing under the Lease for rent and additional rent and (2) the issue of attorneys' fees; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the

"References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to determine as specified above, and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401 -9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further

ORDERED that the plaintiff(s)/petitioner(s) shall serve a proposed accounting within 24 days from the date of this order and the defendant(s)/respondent(s) shall serve objections to the proposed accounting within 20 days from service of plaintiff(s)/petitioner's(s') papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further

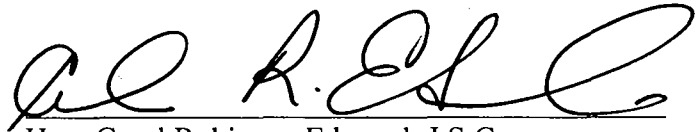
ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until

completion; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 18, 2012



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMED**