

615 E. 138th St. LLC v Emergency Rights, Inc.
2016 NY Slip Op 33175(U)
May 4, 2016
Supreme Court, Bronx County
Docket Number: Index No. 21957/2015E
Judge: Rubén Franco
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**NEW YORK SUPREME COURT
COUNTY OF BRONX - IAS PART 26**

615 EAST 138TH STREET LLC,

Plaintiff,

-against-

EMERGENCY RIGHTS, INC. and
AWILDA CORDERO,

Defendants.

Index No.: 21957/2015E

**MEMORANDUM
DECISION/ORDER**

HON. RUBEN FRANCO

This is an action by plaintiff to recover unpaid rent and other ancillary charges in connection with commercial premises leased to defendant, Emergency Rights, Inc. (“Emergency”), in which defendant Awilda Cordero (“Cordero”) served as guarantor of Emergency’s obligations. Plaintiff moves for summary judgment, without opposition, claiming that defendants were evicted from the premises owing the sum of \$29,430.08, plus attorneys fees. On October 23, 2014, the parties executed a stipulation of settlement in a non-payment proceeding in Civil Court, which required that Emergency vacate the premises by November 7, 2014, and the money claims were severed and reserved for a plenary proceeding. However, Emergency did not vacate and was evicted on or about January 13, 2015.

The lease executed by the parties covered the period of April 1, 2014, through March 31, 2019. Emergency’s rental obligation was as follows:

<u>YEAR</u>	<u>TERM</u>	<u>MONTHLY</u>	<u>ANNUAL</u>
1	April 1, 2014 –March 31, 2015	\$2,300.00	\$27,600.00
2	April 1, 2015 –March 31, 2016	\$2,500.00	\$30,000.00
3	April 1, 2016 –March 31, 2017	\$2,500.00	\$30,000.00
4	April 1, 2017 –March 31, 2018	\$2,700.00	\$32,400.00
5	April 1, 2018 –March 31, 2019	\$2,700.00	\$32,400.00

Victor Castillo (“Castillo”), plaintiff’s managing member, submits an affidavit wherein he states that plaintiff’s records indicate that Emergency owes the sum of \$29,430.08, plus reasonable legal fees. Castillo computes this amount as follows: \$2,300 per month for rent from June 1, 2014 through July 31, 2015, with the property having been re-rented on June 1, 2015; a rent concession to defendants from June 1, 2015 to June 30, 2015; late fees from June 2014 through June 2015, in the amount of \$2,990.00; the amount of \$5,400 is credited for the security deposit; \$1,940.08 in repair costs for an elevator which Emergency allegedly broke.

Plaintiff re-rented the premises to another tenant on June 1, 2015. The lease sets forth the rental obligation of the new tenant as follows:

<u>YEAR</u>	<u>TERM</u>	<u>MONTHLY</u>	<u>ANNUAL</u>
1	June 1, 2015 –May 31, 2016	\$2,500.00	\$30,000.00
2	June 1, 2016 –May 31, 2017	\$2,625.00	\$31,500.00
3	June 1, 2017 –May 31, 2018	\$2,756.25	\$33,075.00
4	June 1, 2018 –May 31, 2019	\$2,984.06	\$34,728.71
5	June 1, 2019 –May 31, 2020	\$3,038.77	\$36,465.24

The moving party in a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hospital et.al., 68 NY2d 320, [1986]; Winegard v. New York Univ. Med Center, 64 NY2d 851, [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, [1957]). Failure of the movant to sustain its burden requires denial of the motion, regardless of the sufficiency of the opposition Winegard v. New York Univ. Med. Center, *supra*, at 853. Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action. Gaddy v. Eyler, 79 NY2d 955 (1992); Alvarez v. Prospect Hospital, et al., *supra*; Zuckerman v. City of New York, *supra*.

The Court of Appeals stated in Holy Properties Ltd. v. Kenneth Cole Productions, Inc., 87 N.Y.2d 130, 133-134 (1995), that:

When defendant abandoned these premises prior to the expiration of the lease, the landlord had three options: (1) it could do nothing and collect the full rent due under the lease (*Becar v. Flues*, 64 N.Y. 518, *supra*; *Sancourt Realty Corp. v. Dowling*, 220 App. Div. 660, 222 N.Y.S. 288), (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. If the landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and reletting and then pay to the tenant's rent obligation (*see*, lease para 18; *Underhill v. Collins*, 132 N.Y. 269, 30 N.E. 576; *Centurian Dev. v. Kenford Co.*, *supra*).

Pursuant to the dictates of Holy Properties Ltd., the court concludes that the defendants are entitled to an offset of \$4,015.60, representing the increase in rent which plaintiff received from the subsequent tenant for the period during which the two leaseholds overlapped, which was June 1, 2016 through March 31, 2019.

The court finds that plaintiff has shown its entitlement to judgment as a matter of law. Thus, plaintiff's motion for summary judgment is granted to the following extent: Plaintiff shall have judgment on its claim for the rent and ancillary charges covered by the lease, in the amount of \$23,474.40, with interest from June 15, 2015, together with costs and disbursements. Plaintiff's claim for damage to the elevator is denied as unproven. The claim for legal fees has also been established. Upon completion of discovery, plaintiff may file a Note of Issue. At the trial, the defendant's liability, if any, for the alleged damage to the elevator, and the cost therefor, and the amount of plaintiff's legal fees, shall be determined.

Plaintiff is directed to serve a copy of this Order with notice of entry, within 30 days of the date of its entry, and to settle judgment on notice to the defendants.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 4, 2016



Ruben Franco, J.S.C.

HON. RUBÉN FRANCO