

<b>Empire LLC v Sharapov</b>
2018 NY Slip Op 32823(U)
November 5, 2018
Supreme Court, New York County
Docket Number: 151039/2018
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2**

*Justice*

-----X  
INDEX NO. 151039/2018

EMPIRE LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ZAKHAR SHARAPOV,

Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this action seeking damages for breach of a lease, plaintiff Empire LLC moves: 1) pursuant to CPLR 3025 (c), to amend the complaint to conform the pleadings to the proof; 2) pursuant to CPLR 3212, awarding it summary judgment on its complaint against defendant Zakhar Sharapov; awarding it \$246,547.13, plus statutory interest, costs, fees, and disbursements; and referring this matter to a Special Referee for the purpose of calculating attorneys' fees it is owed by defendant; 3) pursuant to CPLR 3211 (a), dismissing defendant's affirmative defenses; and 4) for such other and further relief as this Court deems proper. The motion, which is unopposed, is granted in part.

Plaintiff, as landlord, entered into a commercial lease with nonparty O & D Studio, Inc. (tenant) for a term commencing on October 1, 2015 and ending on September 30, 2020. Doc.

14.<sup>1</sup> Defendant signed a limited guaranty pursuant to which he personally guaranteed tenant's obligations pursuant to the lease. The limited guaranty provided, inter alia, as follows:

Anything herein and contained to the contrary notwithstanding, upon Tenant's (a) having vacated and surrendered the demised premises to [plaintiff] free of all subleases or licenses and in a broom clean condition and as otherwise required by this lease and (b) having notified [plaintiff] or Managing Agent in writing and (c) delivered the keys to the demised premises to [plaintiff] or its Managing Agent, [defendant] shall not be liable under this guarantee to pay rent, additional rent or other charges or payments accruing under the lease after the date of said surrender and shall be released from all obligations under the lease and this Guaranty.

Doc. 15.

According to Adam Abramson, plaintiff's principal, who submits an affidavit in support of the instant motion, tenant was lawfully evicted from the premises on March 20, 2018 after he failed to pay rent and additional rent due and vacated the premises without prior written authorization from plaintiff. Doc. 9, at par. 5.

In November of 2017, plaintiff commenced an action against tenant in the Civil Court, New York County to collect rent arrears. Doc. 9, at par. 13. The action, styled *Empire LLC v O&D Studio Inc.*, was commenced under Civil Court, New York County Index Number LT-081348-17. On February 15, 2018, the Civil Court granted plaintiff a judgment of possession and money judgment in the amount of \$22,378.36 representing all monies owed to plaintiff pursuant to the lease through December 31, 2017. Docs. 9, at par. 13; Doc. 16. By judgment entered March 12, 2018, the Civil Court also awarded plaintiff a judgment for legal fees and costs in the amount of \$7,329.81. Doc. 17.

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<sup>1</sup> All references are to the documents efiled with NYSCEF in this matter.

On February 1, 2018, plaintiff commenced the instant action against defendant, tenant's principal, seeking damages arising from tenant's breach of the lease, claiming that defendant, as guarantor, was liable for unpaid rent and additional rent, late fees, interest, and unreimbursed attorneys' fees in the amount of \$42,673.87 through February of 2018. Doc. 10. Plaintiff further alleged in its complaint that this amount was "to be adjusted upward though the judgment date of this action". Doc. 10.

In his answer filed April 5, 2018, defendant denied the substantive allegations against him and asserted numerous affirmative defenses. Doc. 4.

On June 14, 2018, plaintiff filed the instant motion: 1) pursuant to CPLR 3025 (c), to amend the complaint to conform the pleadings to the proof; 2) pursuant to CPLR 3212, awarding it summary judgment on its complaint against defendant; awarding it \$246,547.13, plus statutory interest, costs, fees, and disbursements; and referring this matter to a Special Referee for the purpose of calculating attorneys' fees it is owed by defendant; 3) pursuant to CPLR 3211(a), dismissing defendant's affirmative defenses; and 4) for such other and further relief as this Court deems proper.

Leave to conform a pleading \* \* \* to the proof pursuant to CPLR 3025 (c) should be freely granted absent prejudice or surprise resulting from the delay." (citation omitted). *New York Fuel Distribs., LLC v Eljamal*, 162 AD3d 892, 894 (2d Dept 2018). It is within the court's discretion whether to permit a party to amend its complaint. *See Peach Parking Corp. v 345 W. 40<sup>th</sup> Street, LLC*, 43 AD3d 82 (1<sup>st</sup> Dept 2007). On a motion for leave to amend, a plaintiff need not establish the merit of its proposed new allegations (*see Lucindo v Mancuso*, 49 AD3d 220, 227 [1<sup>st</sup> Dept 2008]), but must show that the proffered amendment is not palpably insufficient and not clearly devoid of merit. *See Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 (1<sup>st</sup> Dept 2007);

*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1<sup>st</sup> Dept 2010). A court should also consider whether any prejudice would result from allowing an amendment. *See Lanpoint v Savvas Cab Corp., Inc.*, 244 AD2d 208, 2090-210 (1<sup>st</sup> Dept 1997).

After considering the foregoing factors, this Court grants that branch of plaintiff's motion seeking to amend the complaint to conform to the proof but only to the following extent. As noted above, plaintiff claims in its complaint, filed February 1, 2018, that it is entitled to unpaid rent and additional rent, late fees, interest, and unreimbursed attorneys' fees in the amount of \$42,673.87 through that date. It now seeks to amend the complaint to reflect that it is owed a total of \$246,547.13 for such damages through the end of May, 2018.

However, tenant was evicted from the premises on March 20, 2018 and, as noted previously, there is thus no obligation pursuant to the guaranty for defendant to pay rent, additional rent or other charges incurred by tenant after that date. Although Adam Abramson, a member of plaintiff corporation, admits in his affidavit in support of the motion that "[u]nder the Guaranty, [defendant] is liable for all amounts due from Tenant *through the date Tenant surrenders possession of the Premises*" (Doc. 9, at par. 17) (*emphasis added*), and that tenant was evicted on March 20, 2018 (Doc. 9, at par. 15), he nevertheless maintains that defendant is obligated to pay damages past the date on which the premises were vacated because the tenant vacated the premises "mid-lease without [plaintiff's] prior written authorization." Doc. 9, at par. 5. However, this contention is disingenuous since plaintiff commenced an action in Civil Court to evict tenant and thus obviously had actual knowledge tenant was evicted on March 20, 2018.

Given the foregoing facts, this Court will allow amendment of the complaint to conform to the proof, but only insofar as plaintiff may claim rent, additional rent, late fees, and interest

accruing from January 1, 2018<sup>2</sup> through March 31, 2018, plus statutory interest, costs, fees, and disbursements. Plaintiff has established its prima facie entitlement to recover for such damages by submitting, among other things, the pleadings, affirmation of its attorney, Abramson's affidavit, the lease, the guaranty, the Civil Court judgment, the Civil Court judgment awarding legal fees, and legal bills. Since this Court will not grant summary judgment against defendant in the amount of \$246,547.13, the amount plaintiff claims is owed by defendant through May of 2018, this matter is hereby referred to a Special Referee for a hearing to calculate the amount of damages to which plaintiff is entitled from January 1, 2018 through March 31, 2018 (which sum excludes the judgment of \$22,378.36 awarded by the Civil Court for damages through December 31, 2017), as well as any attorneys' fees to which plaintiff is entitled as a result of the commencement of this action (which sum excludes the judgment of \$7,329.81 awarded by the Civil Court for attorneys' fees). Plaintiff has further established that it is entitled to summary judgment in the amount awarded in the Civil Court judgments (\$22,378.36 plus \$7,329.81 for attorneys' fees incurred in that action).

Finally, defendant's affirmative defenses are dismissed pursuant to CPLR 3211(b) as inapplicable, conclusory, or without merit.

In light of the foregoing, it is hereby:

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<sup>2</sup> As noted previously, the Civil Court had already awarded plaintiff a judgment for damages through December 31, 2017, as well as legal fees incurred in the Civil Court action.

ORDERED that the branch of the motion by plaintiff Empire LLC seeking to amend the complaint to conform to the proof is granted to the extent that the complaint is deemed amended to include a claim against defendant Zakhar Sharapov for unpaid rent and additional rent, late fees, and interest accruing from January 1, 2018 until March 31, 2018; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment is granted against defendant Zakhar Sharapov to the extent of awarding plaintiff \$22,378 based on the judgment entered against defendant O & D Studio Inc. in the Civil Court action entitled *Empire LLC v O & D Studio Inc.*, Civil Court, New York County Index Number LT-081348-17, on February 15, 2018; and it is further

ORDERED that that the branch of plaintiff's motion for summary judgment is granted against defendant Zakhar Sharapov to the extent of awarding plaintiff \$7,329.61 based on the judgment against O & D Studio Inc. in the Civil Court action entitled *Empire LLC v O & D Studio*, Civil Court, New York County Index Number LT-081348-17, on March 12, 2018; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment is granted to the extent that plaintiff is entitled to recover from defendant Zakhar Sharapov unpaid rent and

additional rent, late fees, and interest from January 1, 2018 until March 31, 2018, plus statutory interest, costs, fees, and disbursements; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment seeking legal fees against defendant Zakhar Sharapov is granted to the extent of awarding plaintiff legal fees incurred as a result of commencing this action, including, but not limited to, the filing of the instant motion; and it is further

ORDERED that the branch of plaintiff's motion seeking dismissal of defendants' affirmative defenses is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

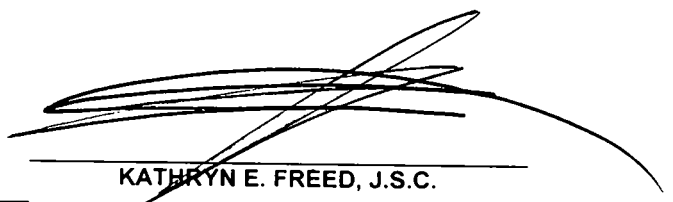
ORDERED that the calculation of damages owed by defendant to plaintiff for unpaid rent and additional rent, late fees, and interest from January 1, 2018 until March 31, 2018, as well as reasonable attorneys' fees owed to plaintiff by defendant, is hereby referred to a Special Referee to hear and report or, if the parties so agree, to hear and determine; and it is further

ORDERED that, within 20 days of the date hereof, plaintiff's attorney is to serve this decision, order, and judgment, with notice of entry, on counsel for defendant; and it is further

ORDERED that this matter is 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/supctmanh at the "Local Rules" link), shall assign the issue to an available Special Referee as specified above; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this decision, order and judgment with notice of entry, together with a completed Information Sheet (which can be accessed at http://www.nycourts.gov/courts/ljd/supctmanh/SR-JHO/SRP-InfoSheet.pdf) containing all the information called for therein, on the Special Referee Clerk by fax (212-401-9186) or email spref@courts.state.ny.us. and, 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 Referee's Part; and it is further

ORDERED that this constitutes the decision, order and judgment of the court.

  
KATHRYN E. FREED, J.S.C.

11/5/2018  
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

APPLICATION:

CHECK IF APPROPRIATE: