

**1035 Third Ave. LLC v Pure Green NYC 62nd St.  
Corp.**

2020 NY Slip Op 32986(U)

September 11, 2020

Supreme Court, New York County

Docket Number: 158933/2019

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 2EFM**

*Justice*

-----X

**INDEX NO.** 158933/2019

1035 THIRD AVENUE LLC,

**MOTION SEQ. NO.** 001

Plaintiff,

- v -

PURE GREEN NYC 62ND STREET CORP. and JASON  
PAEZ,

**DECISION AND ORDER**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for

DISMISS

In this action for breach of a commercial lease, plaintiff 1035 Third Avenue LLC ("Third Avenue") moves, pursuant to CPLR 3211(a)(1), (5), (6), and (7), for dismissal of all counterclaims asserted by defendant Pure Green NYC 62<sup>nd</sup> Street Corp. ("Pure Green") or, in the alternative, pursuant to CPLR 3211(f), for an extension of time to serve and file a reply to said counterclaims (Docs. 9-20, 24). Pure Green opposes the motion (Docs. 22-23). After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

In September 2019, Third Avenue commenced this action as against Pure Green and its guarantor, defendant Jason Paez ("Paez"), by filing a summons and complaint (Doc. 1). In the complaint, Third Avenue alleged that Pure Green breached the terms of its commercial lease with respect to the premises located at 1035 Third Avenue a/k/a 200 East 62<sup>nd</sup> Street in Manhattan ("the

premises") by defaulting in rent payments and additional rent since September 2018 (*id.* ¶ 10). Pursuant to a judgment rendered in July 2019 by the Civil Court of the City of New York, New York County, bearing L&T Index No. 060548/19 ("the Civil Court"), Pure Green was evicted from the premises in August 2019 (Doc. 16). Third Avenue claimed that it was owed "rent and additional rent for the period of September 2018 to the present in the amount of \$276,053.77, plus the deficiency of rent and additional rent that continues to accrue for each month thereafter in an amount to be determined at trial," as well as legal fees and costs (Doc 1. ¶ 11, 19-22). Additionally, Third Avenue asserted that Paez was liable for the full amount of the debt owned pursuant to a written guaranty (*id.* ¶ 28-30).

Both Pure Green and Paez interposed an answer on November 15, 2019, and Pure Green asserted three counterclaims (Docs. 7-8). In its first counterclaim, Pure Green alleged, *inter alia*, that Third Avenue breached the lease because, when Pure Green sought to negotiate an assignment of the lease to non-party Fanzco LLC ("Fanzco"), Third Avenue willfully and intentionally undertook to frustrate and prevent it from exercising its rights under the lease by negotiating and entering into a new, direct lease agreement with Fanzco (Doc. 7 at 5-6 ¶ 4-11). According to Pure Green, the new lease requires that Fanzco pay less rent to Third Avenue, thereby creating a deficiency for which Third Avenue attempts to hold Pure Green liable (*id.* at 6 ¶ 10).

In its second counterclaim, Pure Green asserted a claim for tortious interference based on allegations that Third Avenue "interfered with [its] prospective economic advantage and business relations with Fanzco, maliciously and in bad faith and for the improper purpose of enriching and gaining economic and other advantage for itself at [Pure Green's] expenses [sic]" (*id.* at 6 ¶ 12-14).

Lastly, in its third counterclaim, Pure Green claimed that Third Avenue had breached express and/or implied obligations owed to it under the lease by, *inter alia*, misrepresenting the

scope of the plumbing connections and the ability to obtain reasonable available access at a commercially reasonable cost; withholding necessary mechanical, engineering and plumbing documents; and that it "had misrepresented obtaining necessary approvals from the Board of Managers" of the building," preventing Pure Green from realizing the benefit of the bargain under the lease (*id.* at 7 ¶ 15-23). Such conduct, claimed Pure Green, resulted in "excessive unanticipated construction and other expenses," as well as a delay in the opening of its retail business, resulting in substantial damages (*id.* at 7 ¶ 22).

Third Avenue now moves to dismiss Pure Green's counterclaims based on documentary evidence, collateral estoppel and failure to state a cause of action (Doc. 10 ¶ 6). Third Avenue argues, *inter alia*, that the counterclaims must be dismissed because Pure Green waived the right to interpose them in the lease (Doc. 10 ¶ 7-10). As relevant here, the lease contained the following provision:

"[Pure Green] hereby waives any right to plead all non-compulsory counterclaims or offsets in any action or proceeding brought by [Third Avenue] against [Pure Green] for any default" (*id.* ¶ 8; 13 at 21).

Third Avenue argues that, since New York has a permissive counterclaim rule and similar provisions have been found to be enforceable and not against public policy, the counterclaims must be dismissed (*id.* ¶ 9-10).

Alternatively, Third Avenue argues that the first counterclaim must be dismissed because it fails to state a cause of action and is subject to dismissal based on documentary evidence. Specifically, Third Avenue maintains that Pure Green fails to allege its own performance under the lease, which is a necessary element for a breach of contract claim (*id.* ¶ 14-15). Moreover, Third Avenue claims that, since Pure Green does not allege that a "request to transfer" was ever submitted to it, as required by the lease prior to an assignment, its obligation to even consider the

assignment was never triggered and there can thus be no basis for a breach of the lease claim based on these facts (*id.* ¶ 16-17). In addition, Third Avenue argues that the Civil Court's judgment is documentary proof of Pure Green's default and, since the lease allowed Third Avenue to deny transfers when, as here, there was a default of rent and additional rent, Pure Green cannot state a claim for a breach of the lease provision governing assignments (*id.* ¶ 17-19). Moreover, asserts Third Avenue, Pure Green's damages are speculative and are nevertheless barred by a provision in the lease limiting damages to "a declaratory judgment and an injunction for the relief sought without any monetary damages . . ." (*id.* ¶ 24). With respect to the third counterclaim, which is also based on a breach of the lease, Third Avenue argues, *inter alia*, that the lease precludes Pure Green's third counterclaim based on alleged misrepresentations and/or delays on the part of the Board of Managers (*id.* ¶ 32-40).

Third Avenue also argues that the second counterclaim fails to state a cause of action for tortious interference with business relations because Pure Green fails to allege that Third Avenue acted with the sole purpose of harming Pure Green or that it interfered with the prospective assignment by using means amounting to either a crime or an independent tort (*id.* ¶ 29).

In opposition to Third Avenue's motion, Pure Green argues that the counterclaim-waiver provision should not be enforced because its counterclaims are "inextricably intertwined" with the main claims (Doc. 23 at 4-6). Moreover, Pure Green maintains that it states valid counterclaims based on Third Avenue's breach of the lease (*id.* at 6-9). Specifically, it argues, *inter alia*, that Third Avenue misconstrues its pleadings because its actual allegation is that Third Avenue deliberately interfered with its right to make the "Request for Transfer" and, thus, that any reference to prior approval and the provision limiting its remedy to declaratory judgment and injunctive relief was not triggered and is therefore inapplicable (*id.* at 6-7). Pure Green contends

that, even if the limitation provision with respect to its damages applies, said provision cannot protect Third Avenue from its willful interference with Pure Green's rights under the lease (*id.* at 8). Moreover, it argues that damages are not speculative because they would be equal to the difference in the monthly rent under the subject lease and the new lease with Fanzco (*id.* at 7-8).

Pure Green urges this Court to disregard Third Avenue's argument that the lease bars its third counterclaim based on alleged misrepresentations because Third Avenue misled it on several aspects of the installation at the beginning of the lease term which, in effect, prevented Pure Green from performing under the lease (Doc. 22 ¶ 14).

Pure Green also claims that it has pleaded a valid claim for tortious interference with prospective business relations because it alleged that "[Third Avenue] deliberately undertook to harm [it] by effectively compelling Pure Green to assume alleged liability for the rent differential between Pure Green's [l]ease and the [n]ew [l]ease with Fanzco," which is sufficient to establish a malicious intent or wrongful means necessary for this claim (Doc. 23 at 9-10).

## LEGAL CONCLUSIONS:

CPLR 3211 (a) (7) governs motions to dismiss for the failure to state a cause of action.

"In determining a motion to dismiss pursuant to CPLR 3211(a) (7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Ursino v 21/23 Ave. B Realty LLC*, 2020 NY Slip Op 30474[U], 2020 NY Misc LEXIS 797, \*8 [Sup Ct, NY County 2020] [internal quotation marks and citations omitted])

A party may also move, pursuant to CPLR 3211 (a) (1), to dismiss a complaint asserted against it on the grounds that "a defense is founded upon documentary evidence." "A motion to dismiss founded upon documentary evidence may be granted 'only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense

as a matter of law" (*Siem v Farney Daniels, P.C.*, 2018 NY Slip Op 32768[U], 2018 NY Misc LEXIS 4955, \*13 [Sup Ct, NY County 2018], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

### **Contractual Waiver**

"Courts have held that the waiver of the right to assert defenses, counterclaims or setoffs is enforceable and thus not violative as against public policy" (*Weiss v Phillips*, 157 AD3d 1, 10 [1st Dept 2017]; see *Parasram v DeCambre*, 247 AD2d 283, 284 [1st Dept 1998]). However, the Court may, under certain circumstances and in an exercise of its discretion, disregard the no-counterclaim waiver (see *All 4 Sports & Fitness, Inc. v Hamilton, Kane, Martin Enterprises, Inc.*, 22 AD3d 512, 513-515 [2d Dept 2005]). Although said provisions are generally not enforced where the counterclaims are so "inextricably intertwined" with the main claims such that a joint resolution of all claims will "expedite disposition of the entire controversy, avoid multiplicity of other lawsuits between the parties to accomplish the same result, do speedy justice for all and eliminate greater delay and expense" (*Danyluk v Glashow*, 2003 NY Slip Op 51441[U], 2003 NY Misc LEXIS 1488, \*14 [Civ Ct, NY County 2003] [internal quotation marks and citation omitted]; see *Bomze v Jaybee Photo Suppliers, Inc.*, 117 Misc 2d 957, 958 [App Term, 1st Dept 1983]), this Court finds that Pure Green has failed to establish that its counterclaims are so "inextricably intertwined" with Third Avenue's claims such that the agreed-upon contractual waiver should not be enforced (see *Amdar v Hahalis*, 145 Misc 2d 987, 987-988 [App Term, 1st Dept 1990]; compare *Empiure State Bldg. Co., L.L.C. v EAI Consulting & Trading, Inc.*, 16 Misc 3d 1108[A], 2007 NY Misc LEXIS 4842, \*8-9 [Civ Ct, NY County 2007]).

Assuming, *arguendo*, that this Court were to disregard the lease provision waiving all counterclaims, the counterclaims must be dismissed for the reasons articulated below.

### **Breach of the Lease**

"The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965 [2d Dept 2019] [internal quotation marks and citations omitted]; *see Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Pure Green's failure to allege its own compliance under the lease warrants dismissal of its counterclaims for breach of the lease. In fact, Pure Green cannot establish its own performance pursuant to the lease because it is undisputed that the Civil Court found that it had breached the lease for failure to pay rent (*see Dorfman v American Student Assistance*, 104 AD3d 474, 474 [1st Dept 2013]; *1604-1610 Broadway Owners, LLC v U.S. Bank, N.A.*, 2018 NY Slip Op 31039[U], 2018 NY Misc LEXIS 2059, \*10 [1st Dept 2018]). To the extent that Pure Green argues that Third Avenue's alleged interference with its rights under the lease precludes it from pleading its own performance, this argument is unsupported by any legal authority and is thus rejected.

### **Tortious Interference with a Prospective Advantage.**

To establish a claim for tortious interference with a prospective advantage, plaintiff must establish "(1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of

malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party" (*see Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]). In this context, malice requires a showing "that the conduct by defendant that allegedly interfered with plaintiff's prospects was undertaken for the sole purpose of harming plaintiff" (*Wolberg v IAI N. Am., Inc.*, 2017 NY Slip Op 32465[U], 2017 NY Misc LEXIS 4528, \*25-26 [Sup Ct, NY County 2017] [internal quotation marks, brackets and citations omitted]). Further, the Court of Appeals has held that:

"where a suit is based on interference with a nonbinding relationship, the plaintiff must show that defendant's conduct was not "lawful" but "more culpable." The implication is that, as a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be "lawful" and thus insufficiently "culpable" to create liability for interference with prospective contracts or other nonbinding economic relations" (*Carvel Corp. v Noonanm*, 3 NY3d 182, 190 [2004]; *see also Truetox Labs., LLC v Healthfirst PHSP, Inc.*, 2020 NY Slip Op 50900[U], 2020 NY Misc LEXIS 4058, \*13-14 (Sup Ct, NY County 2020)).

Since Pure Green alleges that Third Avenue's lease with Fanzco was motivated, in part, by "[its] determin[ation] that it could obtain more advantageous terms under the [n]ew [l]ease than it would have if [Pure Green] assigned the [l]ease to Fanzco while recovering any rent differential and other amounts from [Pure Green]" (Doc. 14 at 6 ¶ 10), Pure Green has failed to establish that Third Avenue acted solely out of malice (*see Gettinger Assoc., L.P. v Abraham Kamber Co. LLC*, 83 AD3d 412, 414 [1st Dept 2011]; *Jacobs Private Equity, LLC v 450 Park LLC*, 2005 NY Slip Op 30004[U], 2005 Misc LEXIS 8535, \*13-14 [Sup Ct, NY County 2005]). Moreover, Pure Green has failed to allege that such conduct was criminal or tortious. Therefore, said counterclaim is dismissed.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

**ORDERED** that the motion by plaintiff 1035 Third Avenue LLC seeking dismissal of all counterclaims asserted against it by Pure Green NYC 62<sup>nd</sup> Street Corp. is granted; and it is further

**ORDERED** that, within 30 days after this order is uploaded to NYSCEF, plaintiff 1035 Third Avenue LLC shall serve a copy of this order, with notice of entry, upon Pure Green NYC 62<sup>nd</sup> Street Corp.; and it is further

**ORDERED** that the parties are to participate in a discovery conference by telephone on October 26, 2020 at 10:30 am (the parties are to provide a dial-in number and access code for the call or are to have all parties on the line and then patch in the Court at 646-386-3895); and it is further

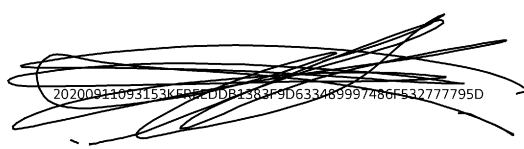
**ORDERED** that, in lieu of the telephone conference, the parties may confer and enter into a discovery stipulation and then email it to the Court at [ipeguero@nycourts.gov](mailto:ipeguero@nycourts.gov) to be so-ordered by Justice Freed on or before December 16, 2020; and it is further

**ORDERED** that, if the parties choose the latter, the stipulation must leave blank spaces for the note of issue deadline and next compliance conference date, which will be determined by the Court; and it is further

**ORDERED** that this constitutes the decision and order of the Court.

9/11/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE