

Warrior Fitness Boot Camp, LLC v 37th St. Lot, LLC
2020 NY Slip Op 34135(U)
December 11, 2020
Supreme Court, New York County
Docket Number: 652561/2019
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

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INDEX NO. 652561/2019

WARRIOR FITNESS BOOT CAMP, LLC

MOTION DATE 06/04/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

37TH ST. LOT, LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 101

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Plaintiff/tenant Warrior Fitness Boot Camp, LLC subleased the entire second floor of the building of which defendant 37th St. Lot, LLC is the sublandlord and net lessee. Defendant served a notice to cure on Plaintiff which now moves, by order to show cause, for a *Yellowstone* injunction, and Defendant cross-moves for a preliminary injunction requiring Plaintiff to vacate the premises, to provide Defendant with documentation showing that Plaintiff installed noise-reduction equipment, and to allow Defendant to inspect said equipment.

Significant developments occurred in this case after the parties made their respective motions. By letter dated September 9, 2020, Defendant's attorney wrote the Court that Defendant had surrendered the building to the Overlandlord effective July 31, 2020, that the surrender was made pursuant to section 31.01 of the master lease (the Master Lease), and that the Overlandlord had been informed of this action and the pending motions (Doc. 106).

By letter dated October 12, 2020, Defendant informed this Court that Plaintiff had paid no rent to Defendant since April 2020 and that Defendant, having received no income from plaintiff or the other subtenants in the building, surrendered possession (Doc. 107). The section pursuant to which Defendant surrendered the building is illegible in the copy of the Master Lease annexed as an exhibit in the motion papers (Docs. 2, 8, 62). The Overlandlord has neither submitted any papers in connection with this motion, nor asked this Court for permission to submit any papers, despite the fact that its attorney was notified of these motions by Defendants' attorney in September and October, 2020. Docs. 106-107.

A subtenant's rights are measured by those of its immediate landlord (*Ashton Holding Co., Inc. v Levitt*, 191 App Div 91, 93 [1st Dept 1920]). In general, a voluntary surrender by a sublessor to the overlandlord, which is not made pursuant to any provision of the paramount lease, does not affect the subtenant of the sublessor (1 Robert F. Dolan, *Rasch's Landlord and Tenant - Summary Proceedings* § 9:68 [5th ed 2020]). The subtenant becomes the immediate tenant of the original lessor, that is, the overlandlord, and the interest of the subtenant and the terms of the sublease continue as if no termination had occurred (*NRP LLC I v Elo Mgt. LLC*, 56 Misc 3d 80, 83 [App Term, 1st Dept 2017]; *Ocean Grille v Pell*, 226 AD2d 603, 605 [2d Dept 1996]; *Unionport Shoes v Parkchester S. Condominium*, 205 AD2d 385, 387 [1st Dept 1994]).

However, in the case of an involuntary surrender, when the paramount lease terminates due to the expiration of its term or a breach by the sublessor, the sublease falls as well (*Eten v Luyster*, 60 NY 252, 258 [1875]; *DaCosta's Automotive v Birchwood Plaza Shell*, 106 AD2d 484, 485 [2d Dept 1984]; *Rasch's Landlord and Tenant - Summary Proceedings* § 9:65). The

reason is that the sublease is dependent upon, and limited by the terms of, the initial lease (*NPR*, 56 Misc 3d at 83).

Although Defendant maintains that it surrendered pursuant to a term in the Master Lease, it is not clear whether the surrender was voluntary or involuntary.

The motions are denied. To bring a summary proceeding in a landlord-tenant action, a landlord must first serve a notice to cure on the tenant (*Matter of Salvatore & Catherine Pepe v Miller & Miller Consulting Actuaries*, 221 AD2d 545, 546 [2d Dept 1995]). The notice to cure in this case has ceased to be effective because Defendant may no longer maintain a summary proceeding under Real Property Actions and Proceedings Law § 721. The temporary restraining order which has been in effect as of May 2, 2019 which enjoins Defendant from disturbing Plaintiff's subtenancy in any manner and commencing any summary proceedings against Plaintiff is thus vacated.

Therefore, in light of the foregoing, it is hereby:

ORDERED that Plaintiff's motion and Defendant's cross motion are denied; and
it is further

ORDERED that the temporary restraining order dated May 2, 2019 is hereby vacated; and
it is further

ORDERED that the notice to cure dated October 16, 2018 is hereby declared null and void; and it is further

ORDERED that, due to budget cuts, the undersigned will be leaving the bench as of December 31, 2020, and the parties are directed to contact the Justice to whom this case is reassigned to schedule a preliminary conference; and it is further

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

12/11/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: