

**432 Park S. Realty Co LLC v Gotham Real Estate
Devs. LLC**

2021 NY Slip Op 30736(U)

March 12, 2021

Supreme Court, New York County

Docket Number: 159434/2020

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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INDEX NO. 159434/2020

432 PARK SOUTH REALTY CO LLC,

MOTION DATE 02/26/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

GOTHAM REAL ESTATE DEVELOPERS LLC, GOTHAM ORGANIZATION INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISSAL.

The motion by plaintiff to dismiss defendants’ counterclaims and affirmative defenses, and for an order directing defendants to pay rent *pendente lite* is granted in part and denied in part.

Background

This commercial landlord tenant case arises out of a building owned by plaintiff. It claims that defendant Gotham Real Estate Developers LLC (the “Tenant”) has not paid rent and now owes nearly \$300,000. Plaintiff alleges that defendant Gotham Organization Inc. (the “Guarantor”) signed a guaranty in connection with the lease.

As an initial matter, plaintiff contends that the lease expressly bars defendants from asserting counterclaims in a lawsuit brought by the landlord for rent and that they should be dismissed for that reason alone. Turning to the merits, plaintiff argues that defendants’

counterclaim for partial constructive eviction must be dismissed because it is based on Local Law 11 (façade) work that plaintiff was required to complete and this work cannot form the basis of a claim for partial constructive eviction. Plaintiff also insists that it has no liability for the alleged acts of independent contractors (defendants complain about various wrongdoing by construction workers at the premises).

Plaintiff also argues that the second counterclaim—which asserts that plaintiff breached the lease by failing to install a new HVAC system—fails to state a claim because defendants never notified plaintiff of a malfunction with the air conditioning unit. Plaintiff points out that defendants only assert that they were *almost* unable to occupy the premises and seek a setoff against the rent. It observes that the lease imposed numerous obligations on the Tenant regarding the HVAC unit before plaintiff would be responsible for repairing the unit and defendants do not make any allegations regarding these requirements (one of which stated that the Tenant had to obtain an HVAC service contract).

Plaintiff states that the third counterclaim should be dismissed because this allegation makes vague and unspecified assertions about unidentified persons and potential theft. It claims that even if the acts occurred, they were outside the scope of these individuals' employment. Similarly, plaintiff maintains that the fourth and fifth counterclaims should be dismissed because plaintiff did not have a contractual duty to safeguard the premises.

Plaintiff also insists that the sixth counterclaim for private nuisance and the affirmative defenses should be dismissed.

In opposition, defendants insist that plaintiff committed multiple breaches of the lease and that entitles them to a rent abatement. They argue that plaintiff's damages for unpaid rent are inextricably intertwined with the Tenant's counterclaims and should not be dismissed despite the

fact that the lease prohibits counterclaims by the Tenant. Defendants insist that plaintiff's disruptive repairs and related activities adversely affected the Tenant's ability to use the premises. Defendants insist that plaintiff is not entitled to recover rent-arrears because the complaint alleges breach of contract.

In reply, plaintiff emphasizes that the lease's provisions prohibit defendants' counterclaims in this action, claim that it is entitled to rent *pendente lite* and that the counterclaims should be dismissed.

Counterclaims

The Court dismisses defendants' counterclaims. The lease at issue provides that "Tenant shall and hereby does waive its right and agrees not to interpose any counterclaim or set off, of whatever nature or description, in any summary proceeding or action which may be instituted by Landlord against Tenant to recover rent, additional rent, other charges, or for damages or in connection with any matters or claims whatsoever arising out of or in any way connected with this Lease, or any renewal extension, holdover, or modification, thereof, relationship of Landlord and Tenant. . . Nothing herein or therein contained, however, shall be construed as a waiver of Tenant's right to commence a separate plenary action on a bona fide claim against Landlord" (NYSCEF Doc. No. 16, ¶ 48.29).

Defendants did not articulate a sufficient reason why the Court should ignore this clear and unambiguous provision. Their claims that the Court should read "summary proceeding or action" to mean that this provision only applies in summary proceedings is misplaced. Defendants contend that the word summary modifies both proceedings and actions. This Court is unaware of what could constitute a "summary action" in New York practice. Rather, the Court

reads the provision to apply to lawsuits commenced by the landlord that are a summary proceedings *or* an action; the instant case is an action and, therefore, the counterclaims are barred.

Moreover, the counterclaims are not “inextricably related to landlord's cause of action for rent” (*Amdar Co. v Hahalis*, 145 Misc 2d 987, 988 [App Term, 1st Dept 1990]). Plaintiff claims the rent was not paid and defendants assert counterclaims about issues such as façade work, actions by construction workers, and a failing HVAC unit. While the remedy for these claims might entitle defendants to damages if they prevail, they have nothing to do with defendants’ responsibility to pay the rent in this commercial lease; there is no warranty of habitability in commercial leases.

The Court also rejects defendants’ claim that the provision barring counterclaims somehow violates public policy. Defendants did not cite any binding case law compelling such a ruling nor do the circumstances of this case support such a holding. Defendants, sophisticated corporate entities, each represented by counsel, signed a decade-long lease and agreed to pay monthly rent starting at \$37,500 per month and increasing to \$46,832.36 by 2025. Even if there was a situation where a prohibition on counterclaims in a lease might implicate public policy concerns, it is not here, where the lease is a multimillion-dollar one negotiated between well-established entities represented by able counsel. Besides, the defendants’ claims are not barred at all – they can assert them, they just have to do it in a separate action and not as counterclaims here.

Affirmative Defenses

Defendants’ affirmative defenses are also severed and dismissed. None of those defenses are sufficient to defeat plaintiff’s prima facie case where, as here, there is no dispute that

defendants are not paying rent. That defeats plaintiff's first (failure to state a cause of action) and second (breach of duty of good faith and fair dealing) affirmative defenses. Plaintiff brought this action in the same year in which the default (the nonpayment of rent) occurred; that forecloses the waiver and estoppel affirmative defense (third affirmative defense).

To the extent that defendants complain about the Local Law 11 (façade) work, the fact is that such work is required and does not, on the facts alleged here, constitute a partial constructive eviction (fourth affirmative defense). Defendants' fifth affirmative defense claims that plaintiff is the proximate cause of its damages due to defendants' failure to pay rent—that assertion has no merit. The remaining affirmative defenses (six through thirteen) are wholly without merit and are dismissed.

Pendente Lite

A “court has broad discretion in awarding use and occupancy pendente lite” (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124, 710 NYS2d 890 (Mem) [1st Dept 2000]). A Court can award interim use and occupancy charges for existing leases (*Andejo Corp. v S. St. Seaport Ltd. Partnership*, 35 AD3d 174, 825 NYS2d 50 [1st Dept 2006]).

While this Court has discretion in awarding use and occupancy, plaintiff failed to specify the amount it seeks. It is not the role of this Court to review the relevant exhibits and come up with an amount that defendants must pay. Moreover, it would be manifestly unfair to award a specific amount without affording defendants the chance to contest that amount if they believed it was calculated incorrectly.

Accordingly, it is hereby

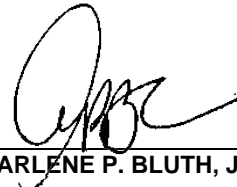
ORDERED that the branch of the motion by plaintiff to dismiss the counterclaims and affirmative defenses asserted by defendants is granted; and it is further

ORDERED that the remaining requests for relief in plaintiff's motion are denied.

Remote Conference: May 24, 2021.

3/12/2021

DATE



ARLENE P. BLUTH, 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