

Jacob's First, LLC v Olivia Miller Inc.

2022 NY Slip Op 30298(U)

January 5, 2022

Supreme Court, New York County

Docket Number: Index No. 657141/2020

Judge: Laurence L. Love

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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. LAURENCE LOVE PART 63M

Justice

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JACOB'S FIRST, LLC

Plaintiff,

- v -

OLIVIA MILLER INC.,

Defendant.

-----X

INDEX NO. 657141/2020
MOTION DATE 10/29/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is

The following read on Plaintiff's Motion for Summary Judgment, CPLR 3212, in relation to a lease agreement for office space of Suite 600, Tenth (10th) Floor, and Eleventh (11th Floor) at 1 West 34th Street, New York, New York 10001. Causes of action include i) Breach of Lease, ii) "continue to fail to pay ... rent due and owing under the lease," and iii) Attorney's Fees.

Issue was joined by Defendant's submission of a Verified Answer by Officer Manager of Olivia Miller, Inc., with thirty-two (32) affirmative defenses and Counterclaims for i) Rescission, ii) Breach of Contract, and iii) Attorney's Fees.

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

“The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact.” *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

The affidavit for Plaintiff, from Alan Starkman Vice President of Commercial Management of BLDG CO., Inc., managing agent for Jacob’s First, LLC affirms.

“The Initial Lease, First Lease Modification, Second Lease Modification, Third Lease Modification, and Fourth Lease Modification are collectively referred to as the ‘Lease.’ The 10th Floor, 11th Floor, and Suite 600 are collectively referred to as the ‘Premises.’ To date, Tenant has failed to make the requisite payment of Monthly Fixed Rent and Additional Rent, fees, and charges ..., and is in breach of the Lease. Specifically, Tenant is liable to Plaintiff in the amount of \$1,309,548.96, representing the rental arrears due and owing under the Lease through August 1, 2021. Even before the occurrence of the COVID-19 pandemic and its associated restrictions and the occurrence of the alleged ‘extensive water leak’ on the 11th floor the Premises, ... Defendant had already accumulated substantial arrears in Rent of over \$113,576.24 as of November 1, 2019 (before the alleged ‘extensive water leak’) and \$201,391.25 as of March 1, 2020 (before the COVID-19 pandemic and its restrictions were imposed). Moreover, with regard to the alleged ‘extensive water leak’ in the Premises, as set forth in the Singal Affidavit, such ‘extensive water leak was (a) limited to only Suite 1101 – a single suite of three that comprise the 11th floor of the Building and Premises; and (b) was repaired and remediated almost immediately once Plaintiff was made aware of it. Notably, Plaintiff was notified by another tenant in the Building and then notified Defendant.” (see NYSCEF Doc. No. 20 Pars. 10, 28, 31, 33).

Plaintiff provides the Initial Lease, Modifications, Ledgers, and Floor Ledgers (see NYSCEF Doc. Nos. 21 – 27).

Plaintiff further submits the affidavit of Vijay Singal, commercial property manager of 1 West 34th Street, New York, New York 10001.

“On Saturday, November 16, 2019, ..., I was notified by a tenant on the 8th floor ... that there had been water infiltration. My inspection of the 11th Floor revealed that the water was only limited to suite

1101 ... , and that the water had stopped leaking entirely into 1101. I contemporaneously took photographs of 1101 as proof that the Water Infiltration had ceased. My inspection revealed very minimal damage to suite 1101 was caused by the Water Infiltration. On Monday, November 18, 2019, the Building staff shampooed the carpet of the affected area on the 11th floor. I personally appeared in 1101 again on Monday, November 18, 2019, and observed Defendant operating its business from the 11th floor, including but not limited to 1101, without apparent limitations. Specifically, I observed at least 10 – 12 individuals that I believed to be employees of Defendant working without apparent limitation in 1101 at such time, with no apparent change to the furniture and other appurtenances therein. I returned within a week of the Water Infiltration and observed the same. It appeared that Defendant was conducting business as usual. (see NYSCEF Doc. No. 28 Pars. 4, 13, 18 – 21).

Plaintiff provides November and April photos (see NYSCEF Doc. Nos. 29, 31).

“Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact.” *Zuckerman v City of New York*, 49 NY2d 557 (1980).

An affirmation in opposition affirms, “(I) plaintiff’s failure to adequately repair the intolerable conditions caused by the leak constitutes constructive eviction, breach of contract and breach of warranty were extremely detrimental to Defendant’s business, causing, *inter alia*, a loss of business, loss of sales, damages to Defendant’s property, II) [t]he Unforeseen Consequences of the COVID Crisis Devastated Defendant’s Business and Made It Impossible to Perform Under the Lease, III) [d]efendant’s affirmative defenses and counterclaims are valid and require discovery to develop” (see NYSCEF Doc. No. 45 P. 2 - 4).

Defendant submits the joint affidavit in opposition from Joseph Kbabieh and Isaac Chalouh, “employed by Defendant Olivia Miller Inc. during December 2019, and worked in Defendant’s offices.” Said employees affirm that:

“When we walked into the Premises on December 2, 2019, the Premises was a total mess caused by the water tank leak. The leak caused extensive damage to the drop ceilings which fell onto the floors. The office furniture was wet and dirty from the leak and all the carpets were wet and emitted a strong repulsive odor. The leak forced the office to pack up our operations and most of the employees had moved out of the office by December 3, 2019. Employees refused to work in the office due to the extensive damage and unhealthy odors. It was impossible to work in the Premises. To our knowledge, the landlord did not adequately repair the damage, nor eliminate the odors, to wear it would be possible to work in the Premises” (see NYSCEF Doc. No. 46 Pars. 2 – 7).

Further, an affidavit for Defendant from Mayer Saadia, Office Manager of Olivia Miller Inc. affirms, “[t]he leak forced the office to pack up our operations and most of the employees had moved out of the office by December 3, 2019. Employees refused to work in the office due to the extensive damage and unhealthy odors. It was impossible to work in the Premises” (see NYSCEF Doc. No. 47 Pars. 5 – 6).

Plaintiff’s Reply states that in a previous Exhibit A, “[t]enant has never surrendered the Premises” (see NYSCEF Doc. No. 48 P. 4).

“To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented.” *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968).

“Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable.” *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004). On summary judgment, “facts must be viewed in the light most favorable to the non-moving party.” *Vega v Restani Constr Corp*, 18 NY3d 499, 503 (2012).

Through the affidavits submitted there remain questions of fact about breach of contract, constructive eviction, and breach of warranty. This Court is aware of the Covid-19 pandemic.

Further inquiry is required to determine if defendant actually left the premises and if the alleged water leak was so severe to warrant rescission.

ORDERED that plaintiff's motion for summary judgment, CPLR 3212, is DENIED.

1/5/2022
DATE


LAURENCE LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	<input type="checkbox"/> REFERENCE