

<b>475 Bldg. Co., LLC v Landmark Ventures (USA) Inc.</b>
2022 NY Slip Op 30307(U)
January 27, 2022
Supreme Court, New York County
Docket Number: Index No. 159657/2020
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. WILLIAM PERRY** PART **23**

*Justice*

-----X

475 BUILDING COMPANY, LLC  
  
Plaintiff,

INDEX NO. 159657/2020  
MOTION DATE 08/19/2021  
MOTION SEQ. NO. 002

- v -

LANDMARK VENTURES (USA) INC.,  
  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISS.

Plaintiff 475 Building Company brings this action against its commercial tenant, Defendant Landmark Ventures Inc., seeking an order of ejectment and a money judgment for unpaid rent. In motion sequence 002, Defendant moves to dismiss the cause of action for ejectment. Plaintiff cross-moves for use and occupancy fees. The motions are fully submitted.

**Background**

The parties entered into a lease for the twenty-fifth floor of the building located at 475 Park Avenue South, New York, NY 10016. (NYSCEF Doc No. 2, Lease.) The lease commenced on June 27, 2014 and is set to expire on December 31, 2025.

Plaintiff alleges that Defendant has defaulted in payment since March 2016, leading Plaintiff to serve a demand for rent on September 11, 2020 for the \$441,735.26 owed at the time. (NYSCEF Doc No. 3, Rent Demand.) The demand provided that Defendant had two weeks to either pay the amount owed in full or surrender the premises; otherwise, Plaintiff would “commence summary proceedings under the statute or an action for ejectment to recover possession of the Premises and to obtain such other relief as permitted by law.” Thereafter,

Plaintiff commenced this action on November 10, 2020 and filed the amended complaint on April 6, 2021, setting forth causes of action for ejectment and breach of contract/money damages. (NYSCEF Doc No. 13, Am. Cmplt.)

Defendant moves to dismiss the cause of action for ejectment only, arguing that Plaintiff fails to set forth a cause of action for ejectment because Plaintiff did not serve a notice of termination of the lease. (NYSCEF Doc No. 22, Def.'s Memo, at 6.) As such, Defendant argues that the lease was never “terminated,” which is a “predicate to commencing an ejectment action[.]” (*Id.* at 7, quoting *Graves v Hasan*, 46 Misc 3d 731, 735 [Civ Ct, Kings County 2014].) Defendant also cites to § 16.04 of the lease, which states that Plaintiff “may terminate this Lease on five (5) days’ written notice” if Defendant failed to cure a default in the payment of rent.

In opposition, Plaintiff cites to § 16.05 of the lease, which provides that “... if Tenant shall be in default in the payment of minimum rent or additional rent ... for a period of five (5) days after notice by Landlord to Tenant, (a) Landlord may re-enter and resume possession of the Demised Premises and remove all persons and property therefrom either by summary dispossession proceedings or by a suitable action or proceeding, at law or in equity[.]” (NYSCEF Doc No. 28, Opposition, at 5.) Plaintiff argues that the current ejectment proceeding may be maintained without service of a notice of termination pursuant to the terms of the lease.

Additionally, Plaintiff cross-moves for use and occupancy fees, seeking an order from the court directing Defendant to pay the monthly minimum rent of \$56,403.32 per month during the pendency of this action. (*Id.* at 11.) Plaintiff also notes that the total amount due and owing from Defendant now amounts to \$754,129.12.

In reply, Defendant argues that Plaintiff was required to serve a Hardship Declaration pursuant to the COVID-19 Emergency Protect Our Small Businesses Act of 2021, and that Plaintiff's failure to do so renders it unable to maintain the cause of action for ejectment or collect use and occupancy fees. (NYSCEF Doc No. 29, Def.'s Reply, at 2-5.)

### Discussion

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

"In order to maintain a cause of action to recover possession of real property, the plaintiff must (1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or disseised by the defendant or his predecessors, and of which the defendant is in present possession." (*The Bd. of Managers of the Five Nine John Lofts v Imranova*, 2021 WL 345237, at \*1 [Sup Ct, NY County 2021], quoting *Jannace v Nelson, L.P.*, 256 AD2d 385, 385-386 [2d Dept 1998].)

The motion to dismiss the cause of action for ejectment is denied. The cases relied upon by Defendant in support of its argument that service of a notice of termination is a necessary element for a cause of action for ejectment are inapposite. (*See Garcia v D. Camilleri LLC*, 2011

WL 128125 [Sup Ct, NY County 2011] [notice of termination required pursuant to 9 NYCRR § 2524.2 where premises was a rent stabilized apartment]; *Kosa v Legg*, 12 Misc 3d 369 [Sup Ct, Kings County 2006] [notice of termination was required pursuant to RPAPL § 232-a for termination of month-to-month tenancy]; *Hsiu v Trujillo*, 192 Misc 2d 147 [Sup Ct, Bronx County 2002] [same].) In any event, the lease between the parties expressly provides that Plaintiff may commence an action to recover possession of the premises upon Defendant's failing to cure its nonpayment default after 5 days of notice.

Likewise, Plaintiff's alleged failure to serve a hardship declaration does not require that the court grant the motion, as the "CEPOSBA [COVID-19 Emergency Protect Our Small Businesses Act] does not mandate dismissal for non-compliance." (*Acres Loan Origination, LLC v 170 East 80th Street Mansion, LLC*, 2021 WL 5449598, at \*3 [Sup Ct, NY County 2021]; see also *VNO 100 West 33rd Street LLC v Exp. Fashion Operations, LLC*, 2021 WL 4724257, at \*1 [Sup Ct, NY County] ["neither the Executive Orders nor the Act contain a provision mandating dismissal of such actions, as they exclusively operate to temporarily stay eviction or foreclosure proceedings"].) Further, the Act "does not stay, or otherwise limit, the award of money judgments for unpaid rent or [use and occupancy]." (*Lai v Muamba*, 2021 WL 5014495, at \*5 [Sup Ct, NY County 2021].) Regardless, the protections of CEPOSBA expired on January 15, 2022. (NY LEGIS 417 [2021], 2021 Sess. Law News of NY Ch. 417 [S. 50001] [McKinney's].)

Pursuant to Real Property Law § 220, "[a] landlord may recover a reasonable compensation for the use and occupation of real property" per an agreement other than a deed. "Further, [a] court has broad discretion in awarding use and occupancy pendente lite. In determining the reasonable value of use and occupancy, the rent reserved under the lease, while not necessarily conclusive, is

probative.” (*Uniway Partners, L.P. v Buttercup Blackberry, Inc.*, 2022 WL 228029, at \*4 [Sup Ct, NY County, Jan 14, 2022] [internal citations omitted].)

Accordingly, upon consideration of the lease terms and Defendant’s continued occupancy of the premises, the court grants Plaintiff’s cross-motion and directs the Defendant to pay \$56,403.32 per month in use and occupancy fees commencing February 1, 2022 and continuing until this matter is disposed. Thus, it is hereby

ORDERED that Defendant’s motion sequence 001 to dismiss the cause of action for ejectment is denied; and it is further

ORDERED that Plaintiff’s cross-motion is granted and Defendant is directed to pay use and occupancy fees for the subject premises in the sum of \$56,403.32 per month, commencing on February 1, 2022, and continuing until the matter is disposed or until a further order of this court is issued in that regard.

1/27/2022  
DATE

  
WILLIAM PERRY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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