

Howard 25, LLC v New York Pilates NYC, LLC
2022 NY Slip Op 30348(U)
February 7, 2022
Supreme Court, New York County
Docket Number: Index No. 154131/2021
Judge: David Benjamin Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN **PART** **58**

Justice

-----X

INDEX NO. 154131/2021

HOWARD 25, LLC,

Plaintiff,

MOTION SEQ. NO. 001 and 002

- v -

NEW YORK PILATES NYC, LLC, HEATHER ANDERSEN,
and BRION ISAACS,

**DECISION, ORDER AND
JUDGMENT**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 28, 29
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15,
16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35
were read on this motion to/for SUMMARY JUDGMENT.

This is an action by plaintiff/landlord Howard 25, LLC (Howard or plaintiff) seeking various forms of relief under two commercial leases and the accompanying personal guarantees. Defendants New York Pilates NYC LLC (Pilates), Heather Andersen (Andersen) and Brion Isaacs (Isaacs) move, pursuant to CPLR 3211(a)(7) (mot. seq. 001), to dismiss the second, third, sixth, seventh and ninth causes of action for failure to state a claim. Howard moves, pursuant to CPLR 3211(c) and, in effect, pursuant to CPLR 3212, for summary judgment (mot. seq. 002), seeking a declaration that defendants defaulted on their obligations under the leases, and moves to amend the complaint to conform to the evidence regarding the amount of accrued fixed and additional

rent owed by defendants.¹ It also seeks to amend its complaint to conform to the proof and for injunctive relief.

Pilates is the commercial tenant of the second and third floors of the building owned by Howard 25 at 25 Howard Street in New York City. The second floor lease was executed in April 2019 and the third floor lease was executed as of August 18, 2015. Simultaneously with the execution of each lease, Andersen and Isaacs (together, the guarantors) executed personal guarantees. The leases provided that, if Pilates remained in possession after the termination or expiration of the agreements, then it “shall become a holdover tenant” and would be required to pay use and occupancy “two (2) times the last monthly installment of Fixed Rent due”.

Pilates stopped paying rent under the leases in March 2020, although it still remains in possession of both spaces. On January 15, 2021, Howard issued a Five Day Notice with Opportunity to Cure to Pilates with respect to each lease, demanding the payment of all arrears with respect to each by January 26, 2021. Howard followed up with Five Day Notices of Termination with respect to each lease on March 31, 2021, demanding that Pilates vacate and surrender the second and third floors by April 14, 2021. After Pilates failed to vacate by the April 14, 2021 deadline, Howard commenced this action on April 28, 2021. The complaint sets forth nine causes of action as follows:

- (1) Declaratory judgment that the two leases were terminated as of April 14, 2021 and Pilates has no right to continue to occupy the premises;
- (2) Ejectment as against Pilates with respect to the second floor space;
- (3) Ejectment as against Pilates with respect to the third floor space;
- (4) Unpaid rent and use and occupancy with respect to the second floor space;

¹ Defendants incorrectly refer to plaintiff’s motion as a “cross motion”.

- (5) Unpaid rent and use and occupancy with respect to the third floor space;
- (6) Permanent injunction prohibiting Pilates from interfering with Howard's access to the premises;
- (7) Breach of the guarantees with respect to both leases;
- (8) Costs and legal fees as against Pilates; and
- (9) Costs and legal fees as against the guarantors.

Defendants' Motion to Dismiss

In moving to dismiss, defendants rely upon the Covid-19 Emergency Protect Our Small Businesses Act of 2021 (EPOSBA) (2021 Senate Bill 471, as amended by Senate Bill 6362A) and Local Law 98 of 2020 (22 NYC Admin. Code Section 22-1005). They argue that, because Pilates submitted a hardship declaration on April 14, 2021, section 5 of EPOSBA prohibited the initiation of any eviction or ejectment proceeding against Pilates. They also assert that the claims pursuant to the guarantees are unenforceable pursuant to Local Law 98 since Pilates was required to close during the pandemic. Further, defendants maintain that the guarantors should be awarded \$50,000 for commercial tenant harassment pursuant to NYC Admin. Code Section 22-903.

The motion is denied. Plaintiff is entitled to eject defendant Pilates from the premises. It is unnecessary to address the parties' factual contentions regarding the merits of the hardship declaration because the moratorium on both residential and commercial evictions expired on January 15, 2022. Nor did the submission of the hardship declaration render this proceeding void *ab initio* requiring it to be re-filed. The commencement of this action was indeed prohibited by EPOSBA when filed in April 2021. However, in August 2021, the United States Supreme Court found the Covid-19 Emergency Eviction and Foreclosure Prevention Act, which contains language

virtually identical to EPOSBA, to be unconstitutional (*See Chrysafis v Marks*, 141 S Ct 2482 [2021]; *see also Locon Realty Corp. v Safisas Corp.*, 73 Misc 3d 997 [Civ Ct Kings County 2021] [“there is no merit to the respondents’ argument that the court lacks subject matter jurisdiction because the action was unlawfully commenced . . . to hold otherwise would deprive the landlord of its due process rights to pursue remedies against tenants who are financially able to pay their rent but, without legal justification, fail to honor their contractual obligations under the lease”]).

Plaintiff may also recover under the guarantees. As relevant here, Local Law 98 provides:

A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):

* * *

(c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive.

The guarantors contend that Pilates operated a studio which was required to close to members of the public under section 1(c), and that section 2 also applies because the default occurred between March 7, 2020 and June 30, 2021. Although plaintiff does not dispute the timing of the default, it correctly contends that subsection 1(c) is inapplicable herein. Specifically, plaintiff notes that the executive order cited in that section, number 202.7, required that only barbershops,

hair salons, tattoo or piercing parlors, nail technicians, cosmetologists, aestheticians and related personal care services be closed the public.

Howard further argues that Pilates was not permitted to use either floor as a studio open to the public. In this regard, the second floor lease restricts its use to that of an office, with an ancillary use for training instructors so long as its principal use was for an office. Although the third floor lease permits “any legal use”, the parties executed a letter agreement amending the same, dated April 12, 2019, which provided that “[t]he use of any of the premises leased pursuant to the third floor lease for showers, lockers, or as a gym is strictly prohibited, and all such uses shall constitute Prohibited Uses.” The certificate of occupancy describes the permissible use of the second floor as “jewelry manufacture” and the permissible use of the third floor as an “office.” Although this Court finds that there may be some ambiguity as to whether the prohibition against a gym would extend to a pilates studio, it is unnecessary to resolve this question since such studios were not among the types of establishments required to close under executive order 202.7. The guarantors’ demand for damages for harassment is similarly moot but nevertheless would have been denied for lack of standing since section 22-903 “grants a right of action only to a ‘commercial tenant,’ not to a commercial tenant's guarantor” (*45-47-49 Eighth Ave. LLC v Conti*, 149 NYS3d 891 [Sup Ct New York County 2021]).

Howard’s Motion for Summary Judgment

This Court agrees with plaintiff that the parties have charted a summary judgment course in a manner which permits resolution of this matter without the notice otherwise required under CPLR 3211(c) (*see Hunter v New York City Dep’t of Educ.*, 95 AD3d 719, 720 [1st Dept], *aff’d sub nom. Summer H. v New York City Dep’t of Educ.*, 19 NY3d 1030 [2012]; *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]). Upon a review of the record, and in accordance with

the discussion above, this Court grants plaintiff's motion and awards a warrant of ejectment and summary judgment as to liability pursuant to CPLR 3212 on its claims for all rent, additional rent and other sums currently due, including reasonable attorneys' fees, pursuant to the two leases and the corresponding guarantees.² Defendants have not contested plaintiff's claims for rent, or raised any other defenses under the leases. The branch of plaintiff's motion seeking to amend the complaint to conform it to the evidence, i.e., the damages alleged by its principal, is thus granted pursuant to CPLR 3025 (c) since defendants have failed to establish that this would cause prejudice or surprise (*See W. 45 APF LLC v Take Time to Travel, Inc.*, 2012 NY Slip Op 30657[U], *6 [Sup Ct, NY County 2012] citing *Rodriguez v Panjo*, 81 A.D.3d 805 [2d Dept. 2011]).

Accordingly, it is hereby:

ORDERED that the motion by defendants seeking to dismiss the second, third, sixth, seventh and ninth causes of action for failure to state a claim (mot. seq. 001) is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment (mot. seq. 002) is granted as to liability as against all defendants, jointly and severally, and it is further

ORDERED that the branch of plaintiff's motion seeking to amend the complaint to conform it to the evidence is granted; and it is further

² Howard's principal represents in his affidavit in support of its motion that Pilates has not paid rent and additional rent from March 2020 through April 14, 2021, the date on which the lease was terminated, totaling \$135,446.23 for the second floor space and \$107,292.51 for the third floor space. However, the rent ledgers annexed to the said affidavit reflect that defendants owed \$135,446.23 for the second floor space through the end of June 2021 and \$107,292.51 for the third floor space through the end of May 2021. Therefore, although the defendants technically owe use and occupancy from April 14, 2021, this Court will direct the payment of use and occupancy at the monthly rate of \$12,360.00 x 2 (\$24,720) commencing July 1, 2021 for the second floor space and the monthly rate of \$11,283.02 x 2 (\$22,566.04) commencing June 1, 2021 for the third floor space in order to prevent plaintiff from obtaining a double recovery. The foregoing calculations take into account the liquidated damages provisions of the leases requiring Pilates to pay twice the monthly fixed rent (as of the date the leases were terminated) for use and occupancy during the holdover period.

ORDERED that the branch of plaintiff's motion seeking injunctive relief is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking declaratory relief is granted; and it is further

ORDERED AND ADJUDGED that the leases between plaintiff Howard 25 LLC and defendant New York Pilates NYC LLC dated August 18, 2015 and April 12, 2019 were terminated as of April 14, 2021; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment on the first cause of action for ejectment is granted; and it is further

ORDERED AND ADJUDGED that plaintiff Howard 25 LLC is entitled to possession of the second and third floor space in the building located at 25 Howard Street, New York, New York (Block 209, Lot 12), New York, New York 10013 as against defendant New York Pilates NYC LLC, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place plaintiff in possession accordingly; and it is further

ORDERED and ADJUDGED that immediately upon entry of this Order and Judgment, plaintiff may exercise all acts of ownership and possession of the second and third floor space in the building located at 25 Howard Street, New York, New York (Block 209, Lot 12), New York, New York 10013, including entry thereto, as against defendant New York Pilates NYC LLC; and it is further

ORDERED AND ADJUDGED that plaintiff 25 Howard LLC is awarded a judgment against defendant New York Pilates NYC LLC in the total amount of \$643,593.10, representing:

- 1) unpaid monthly rent and use and occupancy for the second floor space from March 2020 until

June 30, 2021 (\$135,446.23), as well as use and occupancy for the said space from July 1, 2021 until the present at the monthly rate of \$24,720 (\$197,760.00); and 2) unpaid monthly rent and use and occupancy for the third floor space from March 2020 until May 31, 2021 (\$107,292.51), as well as use and occupancy for the said space from June 1, 2021 until the present at the monthly rate of \$22,566.04 (\$203,094.36), plus pre-judgment interest from April 14, 2021 and costs and disbursements as calculated by the Clerk; and it is further

ORDERED that defendants must pay plaintiff the sum of \$643,593.10 by March 15, 2022, and, commencing March 1, 2022, defendants shall pay use and occupancy to plaintiff in the amount of \$24,720 per month for the second floor space and \$22,566.04 for the third floor space, on a foregoing basis, *pendente lite*, and such payments shall be due by the 10th of each month; and it is further

ORDERED that all payments to be made by defendants to plaintiff shall be by either certified check, bank check, or wire transfer and, if mailed to plaintiff, must be sent to Howard 25, LLC c/o PEP Real Estate, 51 Wooster Street, 3rd Floor, New York, New York 10013 (the address on the lease), unless defendant has been provided with a more recent address for plaintiff, and shall copy Benjamin F. Kursman, Esq., 316 West 118th Street, 4th Floor, New York, New York 10026 on any such correspondence to plaintiff; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to determine the amount of attorneys' fees due to plaintiff under the leases; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine the amount of the unpaid rent, additional rent, late fees, attorney's fees and costs and any other sums due under the leases; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part.

2/7/2022

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: