

**RCPI Landmark Props., L.L.C. v Cooper & Dunham
LLP**

2022 NY Slip Op 30575(U)

February 22, 2022

Supreme Court, New York County

Docket Number: Index No. 159302/2020

Judge: William Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. WILLIAM PERRY PART 23

Justice

-----X
RCPI LANDMARK PROPERTIES, L.L.C.,
Plaintiff,
INDEX NO. 159302/2020
MOTION DATE 04/02/2021
MOTION SEQ. NO. 001 002 003

- v -

COOPER & DUNHAM LLP, ABC CO., XYZ CORP.
Defendant. **DECISION + ORDER ON MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for MISCELLANEOUS.

Plaintiff RCPI Landmark Properties LLC brings this action against its former commercial tenant, Cooper & Dunham LLP, for unpaid rent and other relief. In motion sequence 001, Defendant moves to dismiss the complaint for legal insufficiency and upon documentary evidence. In motion sequence 002, Plaintiff moves for an order directing payment of use and occupancy fees. In motion sequence 003, Plaintiff moves for the court to hold a hearing to determine whether Defendant has experienced a hardship, as provided by the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (“CEPOSBA”). The motions are fully submitted and consolidated for disposition.

Background

Plaintiff is the owner and landlord of 30 Rockefeller Plaza, New York, NY and, via a lease agreement dated February 26, 2014, leased the 20th floor to Defendant for the period of October 1, 2014 through September 30, 2024. (NYSCEF Doc No. 26, Lease.) On July 15, 2020, Plaintiff issued a default notice to Defendant stating that if Defendant failed to pay its rental arrears of \$1,194,054.48 (representing missed rent payments for the months of March 2020 through July 2020) by July 23, 2020, Plaintiff would terminate the lease. (NYSCEF Doc No. 27, Default Notice.) Plaintiff then sent Defendant a notice of termination dated August 3, 2020, notifying Defendant that the lease was to be canceled on August 10, 2020. (NYSCEF Doc No. 28, Termination Notice.)

Plaintiff then commenced this action on November 2, 2020, alleging that Defendant had failed to quit and deliver the premises or pay the balance of the rent due. (NYSCEF Doc No. 1, Complaint.) Plaintiff sets forth causes of action for 1) a declaratory judgment that the lease was terminated; 2) ejectment; 3) lease termination damages in the amount of \$2,885,069.76; 4) alternatively, breach of contract damages if the court finds the lease was not terminated, in the amount of \$2,095,220.61; 5) expense damages, i.e., attorneys' fees and expenses; and 6) use and occupancy fees.

In motion sequence 001, Defendant moves to dismiss the complaint "for legal insufficiency and upon documentary evidence." (NYSCEF Doc No. 9, Ms001 Memo, at 6.) Defendant argues that relief in the form of a judgment declaring that the lease was properly terminated is unavailable because Plaintiff has an alternative available remedy through its breach of contract claim. (*Id.* at 7.) Defendant also argues that the liquidated damages clause in the contract is unenforceable on its face, that Plaintiff's termination of the lease bars recovery of accelerated rent, and that it cannot

be liable for rent accrued during the COVID-19 period due to the lease's casualty clause, public policy concerns, and the doctrines of frustration, impossibility/impracticability, and unjust enrichment. (*Id.* at 8-26.) Finally, Defendant argues that documentary evidence (emails and affidavits) establishes that Plaintiff accepted its surrender of the premises on August 31, 2020, when Plaintiff's property manager performed a "walk-through" of the premises. (*Id.* at 26-29.)

In motion sequence 002, Plaintiff moves by order to show cause for use and occupancy fees based on the allegation that Defendant is still in possession of the premises. Plaintiff seeks an order directing Defendant to pay use and occupancy fees: 1) in the amount of \$4,832,888.40 for the period of March 1, 2020 through March 31, 2021; 2) in the amount of \$486,954.66 per month from April 1, 2021 onward; and 3) granting Plaintiff leave to seek an immediate order of ejectment if Defendant fails to make said payments. (NYSCEF Doc No. 38, Ms002 Memo.)

Motion sequence 003 is denied as moot, as CEPOSBA protections expired on January 15, 2022, as acknowledged in Plaintiff's February 15, 2022 letter. (NYSCEF Doc No. 94.)

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].)

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, “the documents relied upon must definitively dispose of plaintiff’s claim.” (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995].) Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted “utterly refutes plaintiff’s factual allegations” (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]) and “conclusively establishes a defense to the asserted claims as a matter of law.” (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted].)

Defendant’s motion to dismiss is granted in part, to the extent that the court dismisses Plaintiff’s causes of action for ejectment and use and occupancy fees. It is undisputed that Defendant physically vacated the premises on August 30, 2020, as established by Defendant’s submissions of affidavits, emails with Plaintiff’s property management company regarding Defendant’s move out, and photographs. (*See* NYSCEF Doc Nos. 13, 14, 15, 16, 61-67, 82, 83, 84.) Plaintiff, however, argues that it had “no right to re-enter the Premises other than by legal process,” pursuant to Article 15.2(a)(i) of the lease, which provides that if Plaintiff terminates the lease due to Defendant’s default, Plaintiff

and its agents may immediately, or at any time after such termination, re-enter the Premises or any part thereof, without notice, either by summary proceedings, or by any other applicable action or proceeding, or otherwise in accordance with applicable legal proceedings (without being liable to indictment, prosecution or damages therefor), and may repossess the Premises and dispossess Tenant and any other persons or entities from the Premises and remove any and all of their property and effects from the Premises.

(NYSCEF Doc No. 26, Lease, at 41.)

Plaintiff’s allegation that it had “no right to re-enter the Premises” is refuted by the record and, in any event, does not entitle it to recover use and occupancy fees where Defendant did not actually remain in possession by occupying the premises. (*See 44-45 Broadway Leasing Co., LLC*

v 45th St. Hospitality Partners LLC, 198 AD3d 451 [1st Dept 2021] [use and occupancy fees unavailable to landlord where there was no dispute that tenant timely vacated premises, even if it did not comply with all removal obligations in so doing]; *Landmark Holdings NYC, LLC v Bradshaw*, 2022 WL 294127, at *3 [Sup Ct, NY County, Jan 28, 2022] [“Use and occupancy is an obligation imposed on a quantum meruit basis where a tenant remains in possession of real property but pays no rent [and is] meant to compensate the owner/landlord for the loss of its ability to rent the subject property at the prevailing market rate”].) Accordingly, because the portion of Defendant’s motion seeking dismissal of this cause of action is hereby granted, Plaintiff’s motion sequence 002 seeking use and occupancy fees is likewise denied.

Further, as it is undisputed that Defendant did in fact vacate the premises, the portion of Defendant’s motion seeking dismissal of Plaintiff’s cause of action for ejectment is granted. (*See 1641 Parker Ave. Assocs. v Parker*, 2022 WL 489638, at *3 [Sup Ct, NY County, Feb 17, 2022].)

However, the balance of Defendant’s motion seeking dismissal of the remaining causes of action is denied. New York courts have held that the doctrines of frustration, impossibility/impracticability, and unjust enrichment do not excuse a commercial tenant from paying rent due to the COVID-19 pandemic, nor does a casualty clause contained in a commercial lease. (*ESRT 10 Union Square LLC v James Hill, Inc.*, 2022 WL 103409, at *4 [Sup Ct, NY County, Jan 11, 2022]; *274 Madison Co. LLC v Carnegie Nat. Abstract LLC*, 2021 WL 4264007 [Sup Ct, NY County 2021].) Defendant’s remaining arguments are without merit. As such, it is hereby


ORDERED that Defendant’s motion sequence 001 for dismissal is granted in part, to the extent that the second cause of action for ejectment and the sixth cause of action for use and occupancy fees are dismissed; and it is further

ORDERED that the remainder of Defendant’s motion sequence 001 seeking dismissal of the first, third, fourth, and fifth causes of action is denied; and it is further

ORDERED that Plaintiff’s motion sequence 002 is denied for the reasons stated above; and it is further

ORDERED that Plaintiff’s motion sequence 003 is denied as moot; and it is further

ORDERED that Defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

<u>2/22/2022</u>					
DATE			WILLIAM PERRY, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE