

**John Hancock Life & Health Ins. Co. v NYI-NY, LLC**

2022 NY Slip Op 30697(U)

March 2, 2022

Supreme Court, New York County

Docket Number: Index No. 650793/2021

Judge: Nancy M. Bannon

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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. NANCY BANNON PART 42

Justice

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INDEX NO. 650793/2021

JOHN HANCOCK LIFE AND HEALTH INSURANCE COMPANY and JOHN HANCOCK LIFE INSURANCE COMPANY OF NEW YORK,

MOTION DATE 01/03/2022

MOTION SEQ. NO. 002

Plaintiffs,

- v -

NYI-NY, LLC, XYZ CORP. NOS. 1 - 5, JOHN DOE, and JANE DOE,

DECISION, ORDER + JUDGMENT ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this breach of lease action seeking, inter alia, ejection of the defendant NYI-NY, LLC (the tenant), from Suite 2100 in the building located at 100 William Street in Manhattan (the premises), the plaintiffs, owners of the premises, (together, the landlord) move pursuant to CPLR 3212 for summary judgment on the complaint and pursuant to CPLR 3212 and/or 3211(b) to dismiss the tenant's affirmative defenses. The tenant opposes the motion. The motion is granted to the extent provided herein.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of the instant motion, the landlord submits, inter alia, the pleadings, an attorney's affirmation, the affidavit of the landlord's Assistant Vice President, Jeffery Spruill, the deed to the premises, the subject lease agreement between the parties dated October 31, 2017, a lease amendment dated April 29, 2019, a notice to cure directed to the tenant dated January 11, 2021, and a notice of termination directed to the tenant dated January 21, 2021.

The landlord's submissions establish, *prima facie*, the landlord's entitlement to judgment on the first cause of action sounding in ejectment against the tenant, insofar as they establish that the landlord was either ousted or deprived of possession of real property, and that it has a right to re-enter and take possession. See GMMM Westover, LLC v New York State Elec. & Gas Corp., 155 AD3d 1176 (3<sup>rd</sup> Dept. 2017); RPAI Pelham Manor, LLC v Two Twenty Four Enters., LLC, 144 AD3d 1125 (2<sup>nd</sup> Dept. 2016). Specifically, the parties' lease was terminated as of January 21, 2021, but the tenant did not vacate the premises and have continued to hold over without the landlord's permission. See NY RP Act & Pro § 601.

The submissions further establish that the landlord is entitled to judgment on the issue of liability on the second cause of action, seeking holdover rent at the rates described in Section 23 of the subject lease. Specifically, the landlord is entitled to recover (a) 150% of the rent payable for the last full month of the lease term for the two month period beginning January 28, 2021, the date the tenant began to hold over, through March 27, 2021, and (b) 200% of such rent amount thereafter through the date the tenant vacates the premises. It is well-settled that commercial lease provisions providing for holdover rent at multiples of the monthly rent due under a lease are enforceable and recoverable as damages in an action to recover possession of real property where, as here, there is no showing that the amount fixed is plainly or grossly disproportionate to the probable loss. See Tenber Assocs. v Bloomberg, 51 AD3d 573, 574 (1<sup>st</sup> Dept. 2008); Fed. Realty Ltd. Partnership v Choices Women's Med. Ctr., Inc., 289 AD2d 439, 441-442 (2<sup>nd</sup> Dept. 2001).

The court notes that, by decision and order dated March 12, 2021, it granted the landlord's prior motion seeking interim use and occupancy at the rate of \$163,293.26 beginning in February 2021. Any award of damages under the second cause of action must take into account, *inter alia*, any use and occupancy payments the tenant has made pursuant to the court's order *pendente lite*. Thus, the court refers the matter of the total sum to which the landlord is entitled under the second cause of action to a Court Referee or Judicial Hearing Officer (JHO) to hear and report.

Finally, the landlord is entitled to judgment on the issue of liability on the third and fourth causes of action. As to the third cause of action, which sounds in breach of contract, the landlord demonstrates (1) the existence of a contract, (2) the landlord's performance under the contract, (3) the tenant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1<sup>st</sup> Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1<sup>st</sup> Dept. 2009). It is well-settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1<sup>st</sup> Dept. 1995), *aff'd* 88 NY2d 716 (1996). Here, the landlord establishes that the tenant ceased paying rent due under the lease beginning in July 2020. As to the fourth cause of action, which seeks attorney's fees, the landlord is entitled to such fees pursuant to Section

34(g) of the lease. The issue of damages under the third and fourth causes of action is referred to a Court Referee or JHO to hear and report.

The tenant fails to raise a triable issue as to any cause of action in its opposition, which is limited to assertions that the landlord's motion should be denied because the landlord would not consent to its proposed settlement terms, which included assignment of the subject lease. The tenant's argument lacks legal support and is unpersuasive. Moreover, for the reasons described in the landlord's moving papers, the tenant's affirmative defenses are unavailing and subject to dismissal.

The court notes that there is no showing of any efforts by the plaintiffs to identify the fictitious defendants. Since they were never identified, the plaintiff is precluded from relying on CPLR 1024 to maintain this action against those parties (see generally Fountain v Ocean View II Assocs., L.P., 266 AD2d 339 [2<sup>nd</sup> Dept. 1999]), and the complaint must be dismissed against them.

Accordingly, it is

ORDERED that the plaintiffs' motion pursuant to CPLR 3212 for summary judgment against defendant NYI-NY, LLC, is granted to the extent of awarding summary judgment on the first cause of action sounding in ejectment, awarding summary judgment on the issue of liability on the second, third, and fourth causes of action, referring the issue of damages, on the second, third, and fourth causes of action to a Judicial Hearing Officer (JHO) or Special Referee to hear and report, and dismissing the affirmative defenses asserted by defendant NYI-NY, LLC; and it is further

ORDERED, ADJUDGED, and DECLARED that the plaintiffs are entitled to possession of the real property located at Block 68, Lot 36 in the New York County Tax Map, known as 100 William Street, Suite 2100, New York, New York, 10038, and the Sheriff or Marshall 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 plaintiffs in possession accordingly; and it is further

ORDERED and ADJUDGED that immediately upon entry of this Order and Judgment, the plaintiffs may exercise all acts of ownership and possession of the real property located at Block 68, Lot 36 in the New York County Tax Map, known as 100 William Street, Suite 2100, New York, New York, 10038, including entry thereto, as against the defendant NYI-NY, LLC, except that the right to re-entry shall be stayed for a period of 30 days after service of a copy of this Decision, Order, and Judgment with notice of entry by regular first class mail upon the defendant NYI-NY, LLC; and it is further,

ORDERED and ADJUDGED that the Sheriff of the City of New York, County of New York, or any duly appointed City Marshal, is hereby directed and authorized, upon receipt of a certified copy of this Decision, Order, and Judgment, to take all necessary steps, including but

not limited to the entry into the premises at Block 68, Lot 36 in the New York County Tax Map, known as 100 William Street, Suite 2100, New York, New York, 10038, to effect the removal and ejection of the defendant NYI-NY, LLC, and every person holding possession or the same or any part thereof under the defendant NYI-NY, LLC and adversely to the plaintiffs, as the current owners of the premises, and the plaintiffs shall be let into possession of said premises at Block 68, Lot 36 in the New York County Tax Map, known as 100 William Street, Suite 2100, New York, New York, 10038, and this Decision, Order, and Judgment be executed by the Sheriff of the City of New York, County of New York, or any duly appointed City Marshal, as though it were an execution for the delivery of possession of said premises, with the eviction and delivery of possession of the premises to be stayed for a period of 30 days after service upon the defendant NYI-NY, LLC, by regular first class mail, of a copy of this Decision, Order, and Judgment with notice of entry; and it is further

ORDERED AND ADJUDGED that the complaint is dismissed as against the fictitious defendants XYZ Corp. Nos. 1-5, John Doe, and Jane Doe; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the amount of damages, if any, to which the plaintiff is entitled from defendant NYI-NY, LLC, under the second, third, and fourth causes of action;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; 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](mailto: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](http://www.nycourts.gov/supctmanh) at the "References" link ), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for the plaintiffs 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; and it is further

ORDERED that the plaintiffs shall serve a proposed pre-hearing memorandum within 24 days from the date of this order and the defendant NYI-NY, LLC, shall serve a pre-hearing

memorandum within 20 days from service of plaintiffs' papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further


ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the plaintiffs shall serve a copy of this Decision, Order, and Judgment with notice of entry upon the defendant NYI-NY, LLC, by regular first-class mail, within 15 days of its entry.

This constitutes the Decision, Order, and Judgment of the court.

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

3/2/2022  
DATE

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