

693 Fifth Owner LLC v 111 W. 57th Partners LLC

2022 NY Slip Op 30772(U)

March 9, 2022

Supreme Court, New York County

Docket Number: Index No. 155493/2020

Judge: William Perry

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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. WILLIAM PERRY PART **23**

Justice

-----X

693 FIFTH OWNER LLC,

Plaintiff,

- v -

111 WEST 57TH PARTNERS LLC, 111 WEST 57TH
PROPERTY OWNER LLC, JDS DEVELOPMENT LLC F/K/A
JDS DEVELOPMENT GROUP LLC, MICHAEL STERN

Defendant.

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INDEX NO. 155493/2020

MOTION DATE 08/05/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff 693 Fifth Owner LLC brings this action for breach of contract against its former commercial tenant, 111 West 57th Partners LLC, assignee 111 West 57th Property Owner LLC, Michael Stern, an employee/principle thereof, and JDS Development LLC f/k/a JDS Development Group LLC. In motion sequence 001, Plaintiff moves for summary judgment on its first and sixth causes of action against 111 West 57th Partners LLC ("Defendant"), seeking damages arising from Defendant's failure to pay rent and failure to remove a specialty alteration, and dismissal of Defendant's affirmative defenses. The motion has been fully submitted.

Background

Plaintiff is the owner of the building located at 693 Fifth Avenue, New York, NY. Pursuant to a January 28, 2015 lease agreement, Plaintiff's predecessor, Thor 693 LLC, leased the fourth and fifth floors of the building to Defendant for the period of February 3, 2015 through April 30, 2020.

Plaintiff alleges that Defendant owed \$646,739.75 when it vacated the premises on April 30, 2020, but after Plaintiff applied the security deposit of \$197,824.00, the current balance due and owing is \$448,915.75. (NYSCEF Doc No. 26, Pl.'s Memo, at 6.) Plaintiff moves for summary judgment for this amount. In support, Plaintiff submits the affidavit of Frank Lynch, a managing director of Colliers International, the managing agent employed by Plaintiff (NYSCEF Doc No. 11), in addition to a rent ledger (NYSCEF Doc No. 21) and correspondence to Defendant advising of the amounts owed. (NYSCEF Doc Nos. 21-24.)

Plaintiff also moves for partial summary judgment on its sixth cause of action on liability only, with damages to be determined at an inquest or by a referee. In support, Plaintiff submits the affidavit of John Baranello, a professional engineer who, after review of site plans, records, and photos of the premises, avers that the concrete slab between the fourth and fifth floors was cut to make room for two metal staircases. (NYSCEF Doc No. 12.) Mr. Baranello avers that he understands that there is “no possible way to lease out just the Fifth Floor or Fourth Floor separately from one another” and that restorative work is needed. (*Id.*) In addition, Plaintiff submits the affidavit of Joseph Pollaci, the president of Nucor Construction Corp. who inspected the premises, and Nucor’s proposal for restorative work on the premises for a total cost of \$272,500.00. (NYSCEF Doc No. 13, Pollaci Affidavit; NYSCEF Doc No. 25, Proposal.)

In opposition, Defendant argues that the motion must be denied as premature because further discovery “may lead to the discovery of triable issues of fact.” (NYSCEF Doc No. 29, Opposition, at ¶ 13.) Defendant also attaches two letters from Michael Stern, a principle of Defendant, stating that Defendant “disputes the contents of the [default] notice” and that Defendant has “removed all alterations”. (NYSCEF Doc Nos. 30, 31.)

Discussion

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The court must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012].)

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012].) Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977].)

Plaintiff has met its initial burden in demonstrating its entitlement to summary judgment for its first cause of action for rental arrears. (*Esrt 10 Union Square, L.L.C. v James Hill, Inc.*, 2022 WL 103409, at *2 [Sup Ct, NY County, Jan 11, 2022] [granting summary judgment for rental arrears where plaintiff submitted commercial lease documents, affidavit of plaintiff's employee, and rent ledger demonstrating amounts owed].)

In addition, Plaintiff meets its burden for partial summary judgment on its sixth cause of action on liability only, with damages associated with Defendant's failure to remove the specialty

alterations to be determined at an inquest. The lease defines “specialty alteration” to be “internal staircases” and “other alterations of a similar character that are above and beyond standard or typical office installations in general office space in New York City and are more costly and difficult to remove than standard office installations.” (NYSCEF Doc No. 19, Lease, at ¶ 8A [“Alterations”].) Plaintiff submits two affidavits of engineers who aver that the concrete slab between the fourth and fifth floors of the building was altered to allow for the installation of internal staircases. (NYSCEF Doc Nos. 12-13.) Plaintiff also submits an April 15, 2020 letter in which it directs Defendant to remove the specialty alterations (NYSCEF Doc No. 24), consistent with the terms of the lease which state that “Landlord may only require Tenant to remove Specialty Alterations ... at the end of the Lease term.”

In opposition, Defendant fails to produce sufficient evidence to raise a triable issue of material fact. “A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence” (*Bailey v New York City Transit Authority*, 270 AD2d 156, 157 [1st Dept.2000].) Defendant’s statement that further discovery “*may* lead to the discovery of triable issues of fact” (Opposition at ¶ 13 [emphasis added]), “only expresses a mere hope or speculation that discovery might turn up some evidence giving rise to a triable issue of fact.” (*DaSilva v Haks Engineers, Architects & Land Surveyors, P.C.*, 125 AD3d 480, 482 [1st Dept 2015].)

Plaintiff has also demonstrated its entitlement to recover reasonable attorneys’ fees pursuant to Article 29 of the lease. (NYSCEF Doc No. 19, Lease, at 35.) However, because Plaintiff has not submitted a bill of costs or attorney’s affidavit, the issue of reasonable attorneys’ fees will also be determined at an inquest.

Finally, and in light of the above, Defendant's thirteen affirmative defenses (NYSCEF Doc No. 6, Answer, at 8-9) are without merit and are hereby dismissed. Thus, it is hereby

ORDERED that Plaintiff's motion sequence 001 for summary judgment is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiff and against Defendant 111 West 57th Partners LLC on the first cause of action in the amount of \$448,915.75, together with interest at the rate of 9% per annum from the date of April 30, 2020 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion for partial summary judgment on the sixth cause of action is granted with regard to liability; and it is further

ORDERED that an assessment of damages against Defendant 111 West 57th Partners LLC on Plaintiff's sixth cause of action is directed, and it is further


ORDERED that the issue of reasonable attorneys' fees to be recovered by Plaintiff shall also be determined at the inquest; and it is further

ORDERED that the merits of Defendants' counterclaim (NYSCEF Doc No. 6 at 11-13) shall also be determined at the inquest; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment of damages hereinabove directed; and it is further

ORDERED that such service upon 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).

3/9/2022
DATE


WILLIAM PERRY, J.S.C.

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