

589 LGA LLC v Joseph Gad Inc.
2022 NY Slip Op 30867(U)
March 7, 2022
Supreme Court, New York County
Docket Number: Index No. 650991/2021
Judge: Nancy M. Bannon
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. NANCY BANNON

PART 42

42

Justice

-----X

589 LGA LLC

Plaintiff,

- v -

JOSEPH GAD INCORPORATED a/k/a JOSEPH GAD INC.,

Defendant.

-----X

INDEX NO. 650991/2021MOTION DATE 11/03/2021MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for

SUMMARY JUDGMENT

In this breach of contract action to recover unpaid rent, additional rent, late fees and attorney's fees due under commercial leases, the plaintiff landlord, owner of property at 589 Fifth Avenue in Manhattan, moves pursuant to CPLR 3212 for summary judgment on the complaint and pursuant to CPLR 3211(b) dismissal of the affirmative defenses asserted by the defendant tenant. The defendant, a wholesale emerald dealer which operated out of two suites in the building, opposes the motion arguing that it is premature since discovery is ongoing, and the plaintiff's calculation of damages is inaccurate since the plaintiff had orally agreed to defer or reduce the sums owed. For the following reasons, the motion is granted in part.

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 its motion, the plaintiff submits the pleadings, the subject lease agreements, lease modifications and deferment agreements, rent ledger, utility and real estate tax invoices sent to the defendant. The plaintiff also submits the affidavit of Meng-Lun A. Lee,

Page | 1

Senior Asset Property Manager for GLL Real Estate Partners, Inc., managing agent for the plaintiff and an affirmation of Karen S. Friedman, Esq. counsel for the plaintiff.

The plaintiff's proof establishes, *prima facie*, its entitlement to relief on the first cause of action, seeking unpaid rent and other sums due from April 1, 2020 through August 1, 2021. Specifically, the plaintiff's proof with respect to the lease and lease extension agreements demonstrates (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st 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 (1st Dept. 1995), aff'd 88 NY2d 716 (1996).

The plaintiff further establishes its entitlement to judgment on the issue of liability on the third cause of action seeking attorneys' fees pursuant to Article 19 of the leases.

The branch of the plaintiff's motion seeking to strike the defendants' affirmative defenses is also granted. Pursuant to CPLR 3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011). For the reasons discussed in the plaintiff's moving papers, the plaintiff meets this burden.

The defendant has not raised any material issue of fact to defeat the motion. In opposition, it does not deny that it defaulted on the lease since April 2020 but argues only that the plaintiff incorrectly computed the sums owed, and that the motion is premature. The defendant concedes that its defenses based on frustration of purpose and impossibility of performance are not currently legally viable.

There is no merit to the defendant's argument that the motion is premature due to outstanding discovery. While discovery is ongoing, the defendant "fails to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421 423 (1st Dept. 2015). It is well settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Alcaron v Ucan White Plains

Housing Dev. Fund Corp., 100 AD3d 431 (1st Dept. 2012); Kent v 534 East 11th Street, supra; Flores v City of New York, 66 AD3d 599 (1st Dept. 2009).

The defendant's remaining contentions have been considered and rejected as without merit.

The court does not reach the second cause of the complaint, alleging account stated.

Therefore, the plaintiff's motion is granted to the extent that (1) it is granted summary judgment on the issue of liability on the first cause of action of the complaint, breach of contract, and the third cause of action, for contractual attorney's fees, damages to be determined by a Referee, and (2) the defendant's affirmative defenses are dismissed.

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that (1) it is granted summary judgment on the issue of liability on the first and third causes of action of the complaint, breach of contract and contractual attorney's fees, damages to be determined by a Referee, and (2) the defendant's affirmative defenses are dismissed, and the motion is otherwise denied, 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 issue of the amount due to the plaintiff from the defendant as and for unpaid rent, additional rent, late fees and reasonable contractual attorney's fees under the subject lease agreements,

and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which 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 under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above, and it is further

ORDERED that 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 email, an Information Sheet (which can be accessed 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 plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day 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, on the date first fixed by the Special Referee Clerk 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 the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion, 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 (22 NYCRR 202.44), and it is further

ORDERED that the plaintiff shall serve a copy of this Decision and Order upon the defendants within 15 days.

This constitutes the Decision and Order of the court.


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

<u>3/7/2022</u>			
DATE			
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE