

**Brixmor Sunshine Sq. LLC v Vision Ctr. of
Medford, Inc.**

2022 NY Slip Op 31243(U)

April 11, 2022

Supreme Court, New York County

Docket Number: Index No. 656507/2019

Judge: Laurence Love

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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. LAURENCE LOVE PART 63M

Justice

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BRIXMOR SUNSHINE SQUARE LLC,

Plaintiff,

INDEX NO. 656507/2019

MOTION DATE 04/08/2022

MOTION SEQ. NO. 002

- v -

VISION CENTER OF MEDFORD, INC. D/B/A VISION
WORLD OF MEDFORD, JOSEPH GRAFFEO, BRADLEY
POLAN

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

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

Upon the foregoing documents, the decision on plaintiff’s motion for summary judgment and defendant, VISION CENTER OF MEDFORD INC. d/b/a VISION WORLD OF MEDFORD cross-motion seeking leave to serve and file a Late Answer is as follows:

In an Order dated November 13, 2020, this Court denied plaintiff’s initial motion, seeking summary judgment in lieu of complaint, which this Court converted to a regular summary judgment motion as the Court “could not ascertain based upon plaintiff’s rent ledger how the total amount of rent due was calculated and plaintiff’s affidavit is silent on the day that defendants actually vacated the premises.” Plaintiff having corrected said deficiencies seeks an order: (i) pursuant to CPLR 3215, granting Plaintiff default judgment against defendant Vision Center of Medford, Inc. d/b/a Vision World of Medford (“Tenant”) for not less than \$39,717.57 based upon Tenant’s failure to appear in this action; (ii) pursuant to CPLR 3212, granting Plaintiff summary judgment against defendants Joseph Graffeo, and Bradley Polan (collectively, “Guarantors”) and

awarding Plaintiff a money judgment for not less than \$39,717.57 and (iii) dismissing Guarantors' affirmative defenses.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, plaintiff submits the affidavit of David Mickelburg, Director of Collections for Brixmor Property Group, an affiliate of plaintiff Brixmor Sunshine Square LLC, the relevant lease agreement, a personal guarantee signed by defendants Joseph Graffeo and Bradley Pollan, the stipulation of settlement in the underlying commercial landlord and tenant holdover action and the rent ledger. Plaintiff leased a premises located at 700 Patchogue Yaphank Road, Building Unit 165001, Store No. 15, Medford, NY 11763 to defendant, Vision Center of

Medford, Inc. pursuant to a written commercial lease agreement, dated February 19, 2014 for a term ending April 30, 2019. Said lease was personally guaranteed by defendants Joseph Graffeo and Bradley Pollan such that each were responsible for fifty percent of the guaranteed amounts. Following the expiration of the lease, defendants remained in possession of the demised premises resulting in a summary holdover proceeding against Tenant in Suffolk County District Court, Sixth District, entitled Brixmor Sunshine Square LLC v. Vision Center of Medford, Inc. d/b/a/ Vision World of Medford (L&T Index No. LT-001585-19). Said proceeding was resolved by a stipulation of settlement which provided that Tenant "owes \$42,910.25 in rent and additional rent through April 30, 2019 and use and occupancy through May 31, 2019," and that Landlord's claim for rent and use and occupancy would be severed without prejudice through the date Landlord obtained vacant possession of the Premises. On June 15, 2019, Tenant vacated the Premises by delivering the keys to the Landlord. After application of Tenant's \$7,325.92 security deposit and a credit adjustment of \$5,400.00, Tenant is liable for \$39,717.57 in total rent. As such, plaintiff has established a *prima facie* entitlement to summary judgment.

In opposition to plaintiff's motion and in support of defendants' cross-motion, defendants submit the affidavit of Joseph Graffeo, the principal shareholder of defendant, which contends that "At the time of the discussions with the Defendant and its attorneys, we were advised that if we vacated the premises by June 15, 2019, there would be no claim for rent or otherwise. Moreover, I would not have to go to Court if I just signed the Stipulation of Settlement." Defendants' allegation is entirely contradictory to the text of the Stipulation of Settlement, which specifically severs the subject of this action from the Commercial Landlord and Tenant action and is insufficient to create an issue of fact. Defendants further contend that the personal guaranty is ambiguous and that defendants' obligations as guarantor ceased obligation when the lease expired

rather than continuing into any holdover period. See *Lo-Ho LLC v. Batista*, 62 A.D. 3d 558 [1stDept. 2009]. As discussed in *Seabring, LLC v. Elegance Rest. Furniture Corp.*, 188 A.D.3d 744, 747 (2d. Dept. 2020), Guarantors are liable for holdover rent since the limited personal guaranty provided that the guaranty would remain in effect after the expiration of the lease if, among other things, Visions Center of Medford remained in possession of the leased premises (see *Stephen LLC v. Zazula*, 171 A.D.3d 488, 95 N.Y.S.3d 819). Further, there is no ambiguity in the Guaranty, which specifically states “Notwithstanding anything to the contrary, Guarantor #1 and Guarantor #2 shall each be obligated for fifty percent of any amounts owed under this Guaranty. By way of example, if the amount owed to the Landlord under this Guaranty is \$50,000.00 Guarantor #1 shall be obligated to pay Landlord \$25,000.00 and Guarantor #2 shall be obligated to pay Landlord \$25,000.00.” Defendants’ objections as to the service of this action are unsupported as plaintiff has submitted valid affidavits of service upon all defendants as NYSCEF Document Nos. 11, 12, and 13. Further, defendants are not entitled to an extension of time to serve their pleadings as they have not shown a reasonable excuse for delay or default. As such, defendants’ cross-motion must be denied in its entirety.

ORDERED that plaintiff’s motion is GRANTED in its entirety and defendants’ cross-motion is DENIED in its entirety; and it is further

ORDERED that defendants’ affirmative defenses are dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant, Vision Center of Medford, Inc. d/b/a Vision World of Medford in the sum of \$39,717.57 jointly and severally with defendants Joseph Graffeo and Bradley Pollan, each of whom is responsible for \$19,858.79 of said judgment, with interest at the rate of 9% per annum from the date of June 15, 2019, until the date of the decision on this motion, and thereafter at the

statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

4/11/2022
DATE



LAURENCE LOVE, J.S.C.

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