

**Silk & Halpern Realty Assoc., Inc. v Balanced Health  
Mgt., LLC**

2022 NY Slip Op 31295(U)

April 14, 2022

Supreme Court, New York County

Docket Number: Index No. 651201/2021

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36

*Justice*

-----X INDEX NO. 651201/2021

SILK & HALPERN REALTY ASSOCIATES, INC.,  
Plaintiff,

MOTION SEQ. NO. 001

- v -

BALANCED HEALTH MANAGEMENT, LLC,  
DOUGLAS ALLEN, KEITH BERKOWITZ and  
JAMIE BASSEL,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for

SUMMARY JUDGMENT

On March 16, 2011, plaintiff, the landlord of the premises located at 425 Madison Avenue, New York, New York 10017 (“the premises”), entered into a fifteen (15) year lease with defendant BALANCED HEALTH MANAGEMENT, LLC (“Balanced Health LLC”), relating to the premises. In March 2011, defendants DOUGLAS ALLEN (“Allen”), KEITH BERKOWITZ (“Berkowitz”) and JAMIE BASSEL (“Bassel”) (collectively “individual defendants”) each executed guaranties guaranteeing the tenant’s monetary obligations under and in accordance with the lease.

In February 2021, plaintiff commenced this action seeking damages for breach of the lease and the guaranties, claiming that, as of February 28, 2021, \$179,103.26 remained outstanding in rent and additional rent. Plaintiff asserted claims for breach of contract against Balanced Health, LLC (first cause of action); rent and additional rent after February 28, 2021 and until the expiration date of the lease, March 31, 2026 (second cause of action); attorney’s fees against Balanced Health (third cause of action); breach of the personal guaranties against the individual defendants (fourth cause of action); rent and additional rent against the individual defendants accrued after February 28, 2021 until the expiration date or until all of the contingencies in the guarantees have been satisfied (fifth cause of action) and; attorney’s fees, costs and disbursements against the individual defendants (sixth cause of action). (NYSCEF Doc. No. 1, *summons and complaint*).

In April 2021, Balanced Health, LLC, Berkowitz and Bassel (“Balanced Health defendants”) interposed a joint answer, raising several affirmative defenses and a cross-claim against Allen. In their affirmative defenses, the Balanced Health defendants asserted that plaintiff failed to state a claim upon which relief could be granted (first affirmative defense); that their performance under the lease was prevented, delayed, retarded or hindered due to a cause not within their control (second affirmative defense); that plaintiff breached the covenant of quiet

enjoyment by violating defendant's right to possess, occupy, or use every portion of the leased premises pursuant to the lease (third affirmative defense); that the purpose of the lease was frustrated by events outside of its control (fourth affirmative defense); that their performance was rendered impracticable or impossible due to the COVID-19 pandemic (fifth affirmative defense); and that plaintiff breached the lease by failing to provide services set forth in the lease, including the provision of a 24-hour lobby attendant and by converting the defendants' security deposit without providing required notice (sixth affirmative defense). In its counterclaim, the Balanced Health defendants alleged that Allen, a member of Balanced Health, LLC until December 2020, was required to contribute \$9,829.10 per month as his share of his monthly rent obligations but that, despite collecting \$5,000.00 per month from a subtenant, Alicia Carter, he failed to pay his share of rent. Additionally, they asserted a counterclaim against plaintiff akin to the allegations in their sixth affirmative defense (NYSCEF Doc. No. 6, *answer with affirmative defenses and counterclaim*).

Allen interposed a separate answer with several affirmative defenses. Allen also asserted cross-claims against the Balanced Health defendants based on contribution and indemnification. (NYSCEF Doc. No. 8, *Allen's answer*).

In this application, plaintiff moves the court, pursuant to CPLR 3212, for summary judgment on its first, second, fourth and fifth causes of action in the amount of \$250,429.35, on the ground that there are no triable issues of fact as to defendants' failure to pay fixed annual rent and additional rent due through May 31, 2021; summary judgment on its third and sixth causes of action for attorneys' fees; an order striking and dismissing defendants' affirmative defenses as having no basis in law or fact; and such other, further and different relief as may be just, proper and equitable. (NYSCEF Doc. No. 11, *notice of motion*).

Plaintiff annexes, among other things, the subject lease (NYSCEF Doc. No. 13); the guaranties (NYSCEF Doc. No. 14); the affidavit of merit of Richard Halpern, president of plaintiff, who, attaching a rent ledger reflecting an outstanding balance of \$250,429.35 as of May 2021, confirms that debt outstanding (NYSCEF Doc. Nos. 12, 15). Based on the foregoing, plaintiff maintains that it is entitled to summary judgment against Balanced Health LLC and as against the individual defendants for fixed annual rent and additional rent owed under the lease, in addition to attorney's fees. Moreover, according to plaintiff, defendants' affirmative defenses and counterclaim are no bar to summary judgment and should be stricken. (NYSCEF Doc. No. 25, *memorandum of law*).

The Balanced Health defendants submit joint opposition to the motion seeking summary judgment. In their memorandum of law in opposition to the motion, defendants contend that the lease precludes a finding that Balanced Health has defaulted on its obligations under the lease. Specifically, defendants rely on Article 41 of the lease, which states:

"Neither party shall be deemed in default in performing any obligations hereunder whose performance is prevented or delayed, retarded or hindered by Act of God, fire, earthquake, floods, explosion, action of the elements, war, hostilities, invasion, insurrection, riot, mob violence, sabotage, inability to procure or general shortage of labor equipment, facilities, materials or supplies in the open market, failure of

transportation, strikes, lockouts, action of labor unions, condemnation, requisition, laws, orders of government or civil or military or naval authorities, terrorism or any other cause whether similar or dissimilar to the foregoing not within the reasonable control of such party. In the event that during the Term, either party shall be prevented from performing any act under the terms, covenants and conditions of this Lease by reason of any such event, then the period set forth in this Lease for the performance of such act shall be extended for five (5) business days after such party is no longer so prevented.”

By affidavit dated July 2, 2021, Bassel affirms that, “Balanced Health’s failure to meet its financial obligations under the lease from March 2020 to the present is due to the crippling economic effects of the COVID-19 pandemic. While the medical practices of Balanced Health’s member and licensees were not ordered closed, the ordered closure of businesses in Manhattan, and the subsequent relocation, failing, or conversion of businesses to remote work has drastically reduced the number of patients seeking treatment from providers in Balanced Health’s suite. One of the primary values provided by Silk & Halpern — location — was no longer an asset as people fled midtown Manhattan due to the pandemic. The pandemic also made patients unwilling to travel to midtown Manhattan from other parts of the city or metropolitan area.” (NYSCEF Doc. No. 31 ¶ 6, *Bassel’s affidavit*).

Allen opposes the motion separately, arguing that plaintiff made oral representations to him that he would be relieved of any responsibilities under the guaranty of the subject premises if Allen agreed to enter into a new lease for a different suite, Suite 302, which is enforceable and requires denial of the motion. Specifically, Allen argues, *inter alia*, that the guaranty does not prohibit oral modification, nor does it contain a merger clause; that the guaranty, by its terms, is not “absolute and unconditional” and, thus, does not prevent Allen from asserting an oral modification in defense to plaintiff’s claims; that the oral agreement to relieve Allen from his guaranty obligations is enforceable based on Allen’s performance; that plaintiff is equitably estopped from enforcing the guaranty against Allen; that the doctrine of promissory estoppel bars plaintiff’s claims against Allen; that plaintiff’s claims against Allen are barred by the merger clause in the lease for Suite 302; and, lastly, that plaintiff’s motion is premature insofar as issues of fact exist. Allen also argues that that branch of the motion seeking dismissal of his affirmative defenses should be denied and that he should be allowed to amend his affirmative defenses. (NYSCEF Doc. No. 35, *memorandum of law in opposition*).

After the filing of his opposition papers, Allen filed a notice of cross-motion to amend his affirmative defenses (NYSCEF Doc. No. 49, *notice of cross motion*).

In reply, plaintiff contends that the Balanced Health defendants’ reliance on Article 41 of the lease should be rejected because Balanced Health was not required to close at any time during the pandemic; Article 41 made no mention of a pandemic or epidemic; and that its reliance on a long chain of events that allegedly led to its inability to pay its rent is too attenuated to fall under Article 41. Plaintiff further avows that Allen’s argument regarding an oral agreement is meritless and belied by e-mails between Richard Halpern, president of plaintiff, Allen, and their attorneys. The cross-motion, argues plaintiff, is procedurally defective insofar as it was filed long after Allen filed his opposition papers and, in any event, is meritless and

palpably insufficient. (NYSCEF Doc. No. 54, *Halpern's affidavit*; 58, *reply memorandum of law*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

Here, this court finds that plaintiff has established its *prima facie* entitlement to summary judgment against the Balanced Health defendants as to liability. Notably, in opposition to the motion, said defendants do not challenge the debt owed nor their obligation under the lease and the guaranties. It is undisputed that Balanced Health, LLC was not subject to the mandatory shutdown by the governor's executive orders. Their sole contention is that Balance Health LCC's nonpayment of rent and additional rent did not constitute a default under Article 41 of the lease because the pandemic led people to leave midtown Manhattan, affecting Balance Health LLC's ability to perform its obligations. While certainly cognizant of the debilitating economic effects of the COVID-19 pandemic on businesses throughout the City of New York, this court notes that similar arguments relating to frustration of purpose/impossibility, premised on the loss or decrease of revenue, have been rejected by courts and found to be insufficient to obviate a tenant's obligation to pay rent. (See *Gap, Inc. v 170 Broadway Retail Owner*, 195 AD3d 575 [1st Dept 2021]; *Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020]; *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561 [1st Dept 2021] [finding that reduced revenues did not frustrate the purpose of the lease]; *N.Y. Park N. Salem Inc. v Vogrug llc*, 2021 NY Slip Op 32395[U], \*6 [Sup Ct, NY County 2021, Love, J.].) Thus, this court grants that branch of the motion seeking summary judgment on liability as against defendants BALANCED HEALTH MANAGEMENT, LLC, KEITH BERKOWITZ and JAMIE BASSEL. Furthermore, all affirmative defenses and counterclaims not raised in opposition to the motion and not addressed herein are deemed abandoned.

However, that branch of the motion seeking summary judgment as against Allen is denied. Although plaintiff maintains that it never promised Allen that it was waiving liability under the subject guaranty in exchange of execution of a new lease, Allen challenges this claim in his affidavit in opposition to the motion. The e-mails submitted by plaintiff fail to conclusively provide otherwise. Since it is well-settled that “[i]t is not the court's function on a motion for summary judgment to assess credibility” (*Asabor v Archdiocese of NY*, 102 AD3d 524, 527 [1st Dept 2013]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]), the motion is denied as to Allen. Moreover, while this court notes that his cross-motion is defective insofar as it was filed several days after the filing of the opposition papers, this court disregards the defect (CPLR 2001) and, after considering the arguments and the flexible standard that leave to amend pleadings should be freely given, the cross-motion is granted. As such, that branch of plaintiff's motion seeking dismissal of Allen's affirmative defenses is denied as moot. All

remaining arguments are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

**ORDERED** that plaintiff's motion seeking summary judgment against defendants BALANCED HEALTH MANAGEMENT, LLC, KEITH BERKOWITZ and JAMIE BASSEL is granted and all affirmative defenses are either dismissed or deemed abandoned; and it is further

**ORDERED** that the Clerk of the Court shall enter judgment against BALANCED HEALTH MANAGEMENT, LLC, KEITH BERKOWITZ and JAMIE BASSEL, as to liability, and that the matter shall be referred to a special referee for computation of damages and attorney's fees; and it is further

**ORDERED** that that branch of the motion seeking summary judgment against defendant DOUGLAS ALLEN is denied; and it is further

**ORDERED** that, within fifteen (15) days after this decision and order is uploaded to NYSCEF, defendant DOUGLAS ALLEN is granted leave to amend its answer in the form annexed to its cross-motion (NYSCEF Doc. No. 51); and it is further

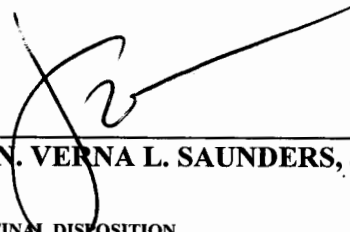
**ORDERED** that counsel for plaintiff shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

**ORDERED** that service upon the Clerk of the Court and the Special Referee Clerk 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](http://www.nycourts.gov/supctmanh)); and it is further

**ORDERED** that the parties are directed to participate in a previously scheduled remote conference on May 11, 2022, details which shall be provided no later than May 9, 2022.

This constitutes the decision and order of this court.

April 14, 2022

  
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HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER