

**605 Fifth Prop. Owner, LLC v Rehab World Physical
Therapy PLLC**

2022 NY Slip Op 31311(U)

April 20, 2022

Supreme Court, New York County

Docket Number: Index No. 158628/2021

Judge: Sabrina Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

-----X

605 FIFTH PROPERTY OWNER, LLC,

Plaintiff,

- v -

REHAB WORLD PHYSICAL THERAPY PLLC, RICARDO
ERLANO, ESTRELLA ERLANO

Defendant.

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INDEX NO. 158628/2021

MOTION DATE 03/29/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for

SUMMARY JUDGMENT

BACKGROUND

Plaintiff commenced this action seeking a judgment against REHAB WORLD PHYSICAL THERAPY PLLC, (Tenant) and RICARDO ERLANO, ESTRELLA ERLANO (collectively Guarantors) based on a lease agreement and personal guaranty executed by the parties for the third floor of 65 Fifth Avenue, New York, New York (Subject Premises).

PENDING MOTION

On March 29, 2022, plaintiff moved for an order:

- (a) Pursuant to CPLR §3212 and CPLR §3211(a)(7), dismissing defendants' counterclaims; and
- (b) Pursuant to CPLR §3025(c), granting plaintiff leave to amend the complaint, to conform to the evidence set forth in the Esses Affidavit, so as to amend the amount sought in the first and second causes of action in the complaint to reflect the total of \$113,262.12, in fixed rent and additional rent that has accrued to date; and

(c) Pursuant to CPLR §3212 granting summary judgment in favor of plaintiff and awarding plaintiff a judgment against defendants, jointly and severally, in the sum of \$113,262.12; and

(d) Scheduling a hearing to determine plaintiff's attorneys' fees incurred in this action.

On that date the motion was fully briefed and submitted to this court for determination.

For the reasons stated below the motion is granted in its entirety.

ALLEGED FACTS

Plaintiff is the owner and landlord of the Subject Premises. Pursuant to a lease dated July 23, 2020 (the "Lease"), between the plaintiff and Tenant, Tenant leased the Subject Premises, for a term commencing on July 23, 2020 and expiring on June 30, 2030.

Pursuant to a guaranty dated July 23, 2020 (the "Guaranty") Guarantors guaranteed Tenant's obligations under the Lease.

Tenant vacated and surrendered possession of the Subject Premises on or about July 2, 2021.

Section 2.02 of the Guaranty governed termination of the Guaranty and provided:

2.02. Termination of Guaranty. On the occurrence of all of the following:

a. the Premises shall be surrendered and vacated by Tenant, any subtenants and any other occupants thereof in the condition required under the Lease at the expiration of the Term;

b. at the time of such surrender, there is no uncured Event of Default or event which with the giving of notice or passage of time, or both, would constitute an Event of Default and there are no outstanding Guaranteed Obligations;

c. all Base Rent and Additional Rent due under the Lease has been paid to Landlord up to the later of (i) the date of surrender; and (ii) the end of the one (1) year period set forth in subsection (g) below;

d. all reductions in, or concessions of, Base Rent granted pursuant to Section 1.04(B) of the Lease have been paid to Landlord;

e. the Premises are surrendered to Landlord by Tenant vacant and in broom clean condition;

f. all keys to the Premises shall have been delivered to Landlord;

g. Tenant has provided Landlord with notice of Tenant's intent to vacate and surrender the Premises on the later of (1) at least one (1) year from Landlord's receipt of such notice; and (2) December 1, 2024, and Tenant has vacated and surrendered the Premises on or before the date for delivery of possession to Landlord specified in such notice; and

h. Tenant and Guarantor shall have executed, acknowledged and delivered to Landlord the certificate in the form attached hereto as Exhibit "A", then Guarantor's obligations under this Guaranty shall be deemed to have ended as of the date of the occurrence of all such events, except to the extent that such obligations have accrued prior to such date.

The terms for the termination of the guaranty were not met at the time of the surrender.

Tenant failed to comply with its obligations to pay base rent and additional rent charges due pursuant to the Lease.

Plaintiff advised Tenant of its defaults in the payment of its monetary obligations under the Lease, by service upon Notice of Event of Default dated July 20, 2021 (the "Default Notice"), which demanded that Tenant cure such defaults by paying Plaintiff the sum of \$41,955.93 (the rental arrears owed through the date of the Default Notice).

Tenant failed to cure the defaults in the Default Notice. To date, Tenant currently owes base rent and additional rent to plaintiff in the total sum of \$113,262.12 (the "Arrears"), pursuant to the terms of the Lease

The Arrears are comprised of the following charges: (i) Base Rent for the months of January 2021 through the March 2022 in the total amount of \$130,560.00, (ii) real estate tax charge in the total amount of \$6,406.37, (iii) FDNY AC charges in the total amount of \$210.00 (iv) water charges in the total amount of \$358.90, (v) free rent clawback charge in the total amount of \$36,566.45, (vi) Administrative service charges in the total amount of \$4,882.97, plus (vii) late interest charge in the amount of \$10,719.86, minus payments made on account in the amount of \$25,442.42, and application of the security deposit in the amount of \$51,000.00.

Pursuant to Section 2.02 of the Lease, any alterations to the Subject Premises that Tenant desired to make were required to be made at Tenant's sole cost and expense and without liability to plaintiff. Pursuant to Section 2.02 of the Lease, Tenant was required to obtain plaintiff's approval before making any alterations at the Subject Premises. Tenant never on any occasion obtained plaintiff's approval for any alterations.

Pursuant to section 2.03(B) of the Lease any improvements at the Subject Premises by Tenant would be deemed to be property of plaintiff and plaintiff is not required to compensate Tenant for such improvements that were already deemed to be plaintiff's property. Pursuant to Section 2.03(A) of the Lease any improvements that are not considered to be plaintiff's property pursuant to Section 2.03(B) of the Lease, were deemed to be abandoned by Tenant and may be retained or disposed of by Landlord, without any accountability to Tenant.

DISCUSSION

Defendants Counterclaims Are Dismissed as Without Basis in Law Or Fact

CPLR §3211(a)(7) provides for dismissal of a counterclaim on the ground that the pleading fails to state a cause of action. On a motion to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true and determine only whether the facts as alleged fit within any cognizable legal theory. *See Mazzei v. Kyriacou*, 98 A.D.3d 1088 (2d. Dept. 2012); *Cerciello v. Admiral Ins. Brokerage Corp.*, 90 AD3d 967 (2d. Dept. 2011).

Additionally, it is well-settled that a motion for summary judgment will be granted where there are no triable issues of fact. CPLR § 3212 provides, in relevant part:

The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.

Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). To prevail on a summary judgment motion, the movant 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.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985).

Once the moving party tenders evidentiary proof sufficient to demonstrate entitlement to summary judgment as a matter of law, the burden shifts to the party opposing the motion to either demonstrate by admissible evidence the existence of a factual issue requiring a trial, or tender an acceptable excuse for his or her failure to do so. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). To succeed in defense of a motion for summary judgment, the adversary must lay bare and reveal affirmative proof of evidentiary facts sufficient to show that the defense is real and capable of establishment at trial. *Tobron Office Furniture Corp. v. King World Productions, Inc.*, 161 A.D.2d 355 (1st Dept. 1990).

If the opposing party does not controvert the facts appearing in the movant’s papers, those facts are deemed admitted; there is, in effect, a concession that no question of fact exists. *John William Costello Assoc., Inc. v. Standard Metals Corp.*, 99 A.D.2d 227 (1st Dept. 1984). “In opposing a motion for summary judgment, once a prima facie showing has been made, it is incumbent upon a defendant to come forward with matters of an evidentiary nature to demonstrate the presence of triable issues. General averments do not suffice. The defendant is required to assemble, lay bare, and reveal his proofs in order to show that his defense is real and

capable of being established upon a trial.” *Steingart Assoc., Inc. v. Sandler*, 28 A.D.2d 801 (1st Dept. 1967). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions based on suspicion, conjecture, or surmise are insufficient; a shadowy semblance of an issue, even if believable, is not enough to defeat the motion. *Shapiro v. Heath Insur. Plan of Greater N.Y.*, 7 N.Y.2d 56 (1959).

Plaintiff has met its burden in establishing the right to summary judgment and defendants have failed to meet their burden to raise an issue requiring trial.

Defendants counterclaims must be dismissed because they fail to state a cause of action and are in contravention to the terms of the parties’ lease agreement. Defendants counterclaims seek a refund of their security deposit and reimbursement for an alleged \$200,000.00 in improvements they made to the Subject Premises.

Section 9.01(A) of the Lease, provides that if the tenant is in default plaintiff may apply the security deposit to sums due. As plaintiff properly applied the Tenant’s security deposit in the amount of \$51,000.00 towards Tenant’s arrears, there is no refund due to Tenant.

Tenant’s request for reimbursement of the monies it spent in proving the Subject Premises is also without a basis under the Lease. The Lease does not require plaintiff to compensate Tenant for Improvements made to the Subject Premises, but instead makes it clear that any alterations to the Subject Premises by Tenant are to be performed at Tenant’s sole cost and expense. Additionally, it is undisputed that Tenant never requested permission to make alterations as require by the Lease and pursuant to Section 2.03(B) of the Lease any improvements would have become the property of plaintiff upon the expiration of the lease, or deemed abandoned pursuant to paragraph 2.03(A) of the Lease because they were left in place when Tenant surrendered possession of the Subject Premises.

Based on the foregoing, plaintiff's motion to dismiss the counterclaims is granted.

Plaintiff's Motion for Leave to Amend Pursuant to CPLR §3025(c) is Granted

CPLR §3025(c) allows for the amendment of pleadings to conform to evidence. While generally this provision is invoked at trial, it is also properly raised on a motion for summary judgment.

An application to amend under CPLR 3025 (c) is addressed to the sound discretion of the trial court and should be determined in the same manner and by weighing the same considerations as upon a motion under CPLR 3025 (b) (*see, Murray v City of New York*, 43 NY2d 400, 405). Pursuant to that subdivision, leave to amend pleadings is freely given in the absence of operative prejudice (*see, Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). Moreover, since a summary judgment motion is the procedural equivalent of a trial (*see, Jehle v Hertz Corp.*, 174 AD2d 812, 813), Supreme Court was free to invoke the provisions of CPLR 3025 (c) (*see, Thailer v LaRocca*, 174 AD2d 731, 732).

Werner v. Katal Country Club, 234 A.D.2d 659, 661 (1996).

Here defendants have shown no prejudice in allowing the amendment of the complaint.

Based on the foregoing, the court deems the complaint amended to reflect that the amount sought in the first and second causes of action in the complaint is \$113,262.12 in fixed rent and additional rent, owed by defendants.

Plaintiff is also awarded summary judgment for the \$113,262.12 due in arrears, because there are no genuine issues of material issues of fact requiring a trial. Defendants asserted no affirmative defenses in their answer, and plaintiff has demonstrated, through admissible evidence, that the arrears are due and owing pursuant to the terms of the Lease from Tenant and that Guarantors unconditionally guaranteed payment of the arrears pursuant to the Guaranty. Defendants did not submit an affidavit from any person with firsthand knowledge in opposition to the motion, nor did defendants submit a response to plaintiff's Statement of Material Facts.

In opposition to plaintiff's motion, defendants assert "[t]he Plaintiffs' property is subject to various defects and it is believed to be rented in contrary to the Certificate of Occupancy."

This defense as noted was not plead by defendants in their answer, and a review of the certificate of occupancy shows that the “Permitted Use” of the Subject Premises as defined in the Lease, which was for use as general and executive offices in connection with Tenant's physical therapy business, is permitted under the certificate of occupancy. The certificate of occupancy states that the permitted use is a “showroom and office, use group 6. Use group 6 specifically permits office use, which is the “Permitted Use” under the Lease. Additionally, assuming *arguendo* the use was not permitted by the certificate of occupancy, lack of a proper certificate of occupancy is not a defense to payment of rent unless the landlord expressly agreed in the lease to obtain the certificate of occupancy. *See Casilia v Webster LLC*, 140 AD3d 530 (1st Dept. 2016)

Furthermore, defendants’ counsel’s conclusory allegation of “various defects” in the Subject Premises is insufficient to raise a triable issue of fact. On summary judgment defendants are required to specify and lay bare their defense, which would mean detailing the “various defects.”

Finally, defendants’ argument that summary judgment is premature because there has been no discovery also fails. To date defendants have served no discovery requests. Furthermore, defendants have failed to demonstrate that discovery might lead to relevant evidence or that facts essential to oppose the motion are exclusively within the knowledge and control of Plaintiff. *See Global Mins. v. Holme*, 35 A.D.3d 93, 824 (1st Dept. 2006); *Northfield Ins. Co. v. Golob*, 164 A.D.3d 682 (2d. Dept. 2018); *Reynolds v. Avon Grove Props.*, 129 A.D.3d 932 (2d. Dept. 2015).

Based on the foregoing, plaintiff’s motion for summary judgment is granted.

Additionally, plaintiff is entitled to attorneys’ fees pursuant to the Lease, and said request was not opposed by defendants. However, plaintiff submits no specific amount of fees requested nor any paperwork detailing the amount of fees sought. Plaintiff may move for a

specific amount of fees by notice of motion. The court will then be able to determine whether a hearing is necessary to determine the amount of fees sought.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that plaintiff's motion to dismiss the counterclaims is granted and the clerk of the court is directed to enter judgment dismissing same; and it is further

ORDERED that plaintiff's motion to amend the complaint to conform to the proof is granted and the complaint is deemed amended to seek a total of \$113,262.12 in arrears; and it is further

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$113,262.12, together with interest at the rate of 9 % per annum from the date of September 20, 2021 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, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the 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); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



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4/20/2022

DATE

SABRINA KRAUS, 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