

**Anhui Garments Imp. & Exp. Co., Ltd. v New Waves
Apparel Group, Ltd.**

2022 NY Slip Op 31437(U)

May 2, 2022

Supreme Court, New York County

Docket Number: Index No. 159904/2018

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR

Justice

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ANHUI GARMENTS IMP. & EXP. CO., LTD.,

Plaintiff,

- v -

NEW WAVES APPAREL GROUP, LTD.,

Defendant.

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INDEX NO. 159904/2018

MOTION DATE May 2, 2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiff commenced this action seeking damages for an alleged illegal lock out of a space it subleased from defendant. Defendant counterclaimed for rent alleged due on the sublease.

PROCEDURAL HISTORY

The summons and complaint were filed on October 25, 2018. Originally, there were two plaintiffs Fairview Fashion Inc. (Fairview) and Anhui Garments Imp. & Exp. Co. Ltd. (plaintiff). The named defendants were New Waves Apparel Group, Ltd. (defendant) Armond Wang (AW) and Winona Wang (WW). The complaint asserted five causes of action including claims for: unlawful eviction; return of security deposit; fraudulent inducement; and breach of contract.

On December 29, 2018, defendants appeared by counsel and stipulated to personal jurisdiction.

On January 25, 2019, defendants moved for dismissal of the complaint pursuant to CPLR §3211(a)(7). On December 23, 2019, the court (D'Auguste, J) issued an order denying the motion based on defendants' failure to appear for oral argument.

On December 17, 2019, defendants moved to vacate the default and restore the motion to dismiss. The court (D'Auguste, J) granted that motion pursuant to a decision and order dated April 27, 2020.

On May 18, 2020, the court (D'Auguste, J) granted the motion to dismiss to the extent of dismissing: the action against the individual defendants; the claim for punitive damages; the fraud claim; finding that Fairview lacked standing to maintain the action; and directing that the caption be changed to reflect the parties that had been removed.

PENDING MOTION

On June 21, 2021, plaintiff moved for summary judgment. Due to deficiencies found by the court (D'Auguste, J) in the initial moving and opposition papers, the motion was further adjourned, after its initial submission, to afford both parties to submit additional papers. The court's interim order held in pertinent part:

Defendant New Waves Apparel Group, Ltd. is granted leave to provide further opposition to the plaintiff's motion for summary judgment. 22 NYCRR § 202.8-g requires the moving party in a motion for summary judgment to provide a statement of material facts that the moving party contends are uncontested. The plaintiff failed to provide such a statement of material facts with its notice of motion; instead, the plaintiff provided a statement of material facts with its reply. The Court notes that, currently, the defendant has provided insufficient opposition to defeat summary judgment. Therefore, the Court will grant the defendant an opportunity to provide further opposition, including a defendant's statement of material fact, due to the plaintiff's procedural defect.

On May 2, 2022, this court heard oral argument and reserved decision. For the reasons stated below, the motion is granted as to liability and a trial is ordered as to damages.

ALLEGED FACTS

In 2016, plaintiff signed a sublease with defendant for a portion of their office space at 525 Seventh Avenue, New York, New York. In connection with the sublease, a security deposit of \$36,000.00 was given to defendant. The receipt for the security deposit does not reference plaintiff, but does reference Fairview, which plaintiff asserts is a wholly owned subsidiary of plaintiff.

Plaintiff took possession of the premises and dutifully paid rent in full every month, initially \$6000 per month and then \$6300 per month in the second year of the term.

Plaintiff alleges that on February 18, 2018, without notice or just cause, defendant locked plaintiff out of the space. The self-help eviction was not authorized by the sublease, and was not carried out by the City Marshal of the City of New York.

Plaintiff further alleges that at all subsequent times, defendant refused to allow plaintiff back into the premises, forcibly keeping them out, and they therefore were forced to find new office space.

Defendant has failed and refused to return plaintiff's security deposit totaling \$36,000.00. Plaintiff alleges defendant's withholding of said money is unjustified since it timely paid all rent due prior to the lockout, and that no items of additional rent are owed. Plaintiff further alleges it had not caused any damage to the premises or otherwise done anything to justify any deductions from the security deposit.

Plaintiff alleges defendant has been unjustly enriched in the sum of \$36,000.00 and that plaintiff is entitled to summary judgment in that amount on the Second Cause of Action set forth in the verified complaint.

Plaintiff also seeks summary judgment on its first and third causes of action because defendant's breach of the sublease caused Anhui to lose the value of that sublease, and it was forced to pay more for replacement space. Pursuant to the sublease between the parties, plaintiff was paying rent of \$6300 per month at the time of the lockout. Rent for the third year of the term was \$6615. After the lockout, Fairview signed a sublease for new space at 530 Seventh Avenue, for a term commencing March 1, 2018, which it alleges was for a higher rent. Plaintiff alleges actual damages of \$8387.78, in addition to the security deposit and further asserts it is entitled to treble damages under the statute.

Defendant submits no affidavit in opposition to the motion, but argues insufficient proof is provided by plaintiff as to payment of the security deposit and that the new lease was entered into by Fairview not plaintiff, so plaintiff has not established its claim for damages.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]).

“On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact” (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] [“The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues”], *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

In this action, plaintiff has established summary judgment as to liability since the sworn testimony of Helen Wang that plaintiff was unlawfully evicted by defendant is not rebutted by any affidavit from defendants denying that claim.

However, as to damages there are some gaps in plaintiff's proof that require denial of the motion. There is no proof of the payment of the security deposit. Was it paid by check? Was it paid by cash? The record does not specify. There is a receipt annexed but the receipt does not indicate the name of the plaintiff. Additionally, the new sublease is not annexed to the moving papers. While the moving papers suggest that it is annexed as Exhibit C, Exhibit C is actually the landlord's consent to the new sublease, not the sublease itself, and the terms of the new rent are not recited in the document provided.

Finally, Ms. Wang's affidavit stating that Fairview is a wholly owned subsidiary of defendant is insufficient to establish that fact, which must be demonstrated by documentary evidence, particularly considering Judge D'Auguste's 5/18/2020 order finding Fairview did not legally exist until after the unlawful eviction.

CONCLUSION

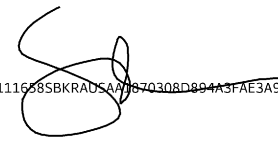
It appearing to the court that plaintiff is entitled to judgment on liability and that the only triable issues of fact arising on plaintiff’s motion for summary judgment relate to the amount of damages to which plaintiff is entitled, it is

ORDERED that the motion is granted with regard to liability; and it is further

ORDERED that an immediate trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon 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).



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5/2/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: