

**247 W. 38 LLC v Charming Fashion of Kim, Inc.**

2022 NY Slip Op 32282(U)

July 12, 2022

Supreme Court, New York County

Docket Number: Index No. 655297/2021

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*

-----X

247 WEST 38 LLC

Plaintiff,

- v -

CHARMING FASHION OF KIM, INC. D/B/A CHARMING  
FASHIONS OF KIM INC.,

Defendant.

-----X

INDEX NO. 655297/2021

MOTION DATE 07/12/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 were read on this motion to/for DISMISS.

This action arises out of a landlord-tenant relationship between the parties. Defendant was the tenant of Suite 1401 at 247 West 38<sup>th</sup> Street, New York, New York 10018 (Subject Premises). Defendant remained in possession after the expiration of the lease and extensions which expired May 31, 2020. Defendant vacated approximately one year later. Plaintiff commenced this action for rent and additional rent alleged due after the expiration of the last lease extension.

Defendant asserts that the parties came to an agreement, through the payment and acceptance of rent, that the monthly rent after the expiration of the lease was \$5,000.00. Defendant moves for summary judgment on this defense.

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish

the existence of material issues of fact which require a trial of the action. The moving party's failure to make a *prima facie* showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 502 (2012); *citing Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 (2011); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

All of the evidence must be viewed in the light most favorable the party opposing the motion, and all reasonable inferences must be resolved in that party's favor. *Rollins v Fencers Club, Inc.*, 128 A.D.3d 401 (1st Dept. 2015); *Udoh v Inwood Gardens, Inc.* 70 A.D.3d 563 (1st Dept. 2010).

Here defendant's papers fail to make a *prima facie* showing of entitlement to summary judgment.

CPLR § 3212 (b) provides

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.

The affidavit in support by Hyun Hyang Kim is insufficient to support the motion. The affidavit merely makes reference to factual allegations in the attorney affirmation. An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance. *Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455, 456 (2nd Dept. 2006); *Puritan Ins. Co. v. Continental Casualty Co.*, 195 A.D.2d 291 (1st Dept. 1993).

While the answer is verified, the answer in itself is also insufficient to support defendant's motion for summary judgment.

The lease rider between the parties provided for a rate of use and occupancy if defendant remained in possession after the expiration of the lease. It is unclear if that would be controlling or if the parties reached some other agreement as alleged by defendants. There was admittedly no consistent payment and acceptance of rent after the lease expiration.

Plaintiff has however, voluntarily agreed to waive the claim for late fees in the amount of \$2832.23, and thereby consents to summary dismissal of said claim.

The balance of the relief requested is denied for the reasons set forth above.

WHEREFORE it is hereby:

ORDERED that Defendant's motion for summary judgment is granted only to the extent of dismissing plaintiff's claim for late fees in the amount of \$2832.25 and otherwise denied; and it is further


ORDERED that the parties appear for a virtual Preliminary Conference on August 4<sup>th</sup>, 2022 at 2:30 pm; 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](http://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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7/12/2022  
DATE

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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