

270 Madison Ave. Assoc. LLC v Citizens Icon Holdings LLC

2022 NY Slip Op 32603(U)

July 15, 2022

Supreme Court, New York County

Docket Number: Index No. 654295/2020

Judge: Verna L. Saunders

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

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

-----X
 270 MADISON AVENUE ASSOCIATES LLC and
 INDEPENDENCE 270 MADISON LLC,
 Plaintiffs,
 - v -
 CITIZENS ICON HOLDINGS LLC d/b/a ICON PARKING
 SYSTEMS n/k/a ICON PARKING HOLDINGS LLC,
 Defendant.

INDEX NO. 654295/2020
 MOTION SEQ. NO. 001; 002

**DECISION + ORDER ON
MOTION**

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 The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 42, 43, 44, 45, 46, 47, 48, 49, 50
 were read on this motion to/for SUMMARY JUDGMENT.

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
 were read on this motion to/for SUMMARY JUDGMENT.

In September 2020, plaintiffs, the owners of the building located at 270 Madison Avenue, New York, New York 10016 (“premises”), commenced this action against defendant seeking, *inter alia*, rent and additional rent relating to a 2015 lease for the commercial space located on the second floor of the premises. In the complaint, plaintiffs assert the following causes of action: breach of the lease, seeking to recover rent arrears due and owing under the lease (first cause of action); use and occupancy (“U&O”) (second cause of action); rent and additional rent due under the lease through the original expiration date of the lease (third cause of action); ejectment (fourth cause of action); and attorney’s fees (fifth cause of action) (NYSCEF Doc. No. 1, *summons and complaint*).

Defendant interposed an answer in this action, asserting several affirmative defenses, as well as, a counterclaim for attorney’s fees. (NYSCEF Doc. No. 4, *answer*).

Plaintiffs initially moved, by order to show cause (“OSC”), pursuant to CPLR 3212, for an order awarding them summary judgment on their five causes of action; entering a judgment of possession in their favor and against defendant; and “[e]ntering a money judgment in favor of plaintiffs and against defendant in the undisputed amount of \$1,744,209.53 through April 2021, plus use and occupancy at the monthly holdover rate in the amount of \$163,418.40 for May 2021 and thereafter in the amount of \$175,396.76, less any interim payments made, all plus pre-judgment interest at the statutory rate.” Plaintiffs also sought dismissal of each of defendant’s affirmative defenses and its counterclaim, as well as, a hearing for determination of all other damages, including attorney’s fees. Additionally, the application sought U&O *pendente lite*. This court declined to sign the OSC and directed plaintiffs to renew their application by notice of motion (Mot. Seq. 001) (NYSCEF Doc. No. 21, *OSC*). Plaintiffs then moved pursuant to CPLR 5704(a) for an order requiring defendant to (a) pay rent/U&O in the amount of \$163,418.40 on the first day of each month, starting on May 1, 2021, and thereafter *pendente lite*, and (b) deposit with plaintiffs’

attorneys, to be held in escrow, or with the Clerk of the Court, the arrears for rent/U&O through April 2021 in the amount of \$1,090,535.93, until further order of the court. By decision and order dated November 4, 2021, the Appellate Division ordered that “pending the hearing and determination of said motion by Supreme Court, defendant-tenant is directed to pay use and occupancy *pendente lite* at the base rent established in the lease.” (NYSCEF Doc. No. 41, *Appellate Division’s Order*).

Thereafter, plaintiffs moved this court, seeking nearly identical relief as outlined in their prior OSC (NYSCEF Doc. No. 22, *notice of motion*). Defendant cross-moves, pursuant to CPLR 3211(a) and 3212, dismissing the complaint in this action (NYSCEF Doc. No. 34, *notice of cross-motion*).

The motions are hereby consolidated for disposition.

Turning first to the application brought by notice of motion, plaintiffs argue, *inter alia*, that they are entitled to summary judgment on their first and third causes of action because they have established the existence of a binding commercial lease, plaintiffs’ performance thereunder, tenant’s breach and damages. As for the first cause of action, plaintiffs seek all rent arrears due through the termination of the lease. Specifically, plaintiffs argue that they are entitled to fixed rent and additional rent from April 1, 2020, through and including the month of August 2020, which was the month that the lease was terminated, in the total amount of \$436,862.33. The third cause of action, according to plaintiffs, seeks all other damages that have accrued and will continue to thereafter, including, without limitation, holdover and liquidated damages. Plaintiffs also claim that they are entitled to “rent” for the remaining balance of the lease term, including additional rent, and that the court should have a hearing to determine same, except certain holdover damages as set forth below.

As it relates to its request for U&O, plaintiffs cite to article 73 of the lease, which provides, in relevant part that, in the event of a holdover, tenant is required to pay two times U&O at the highest rate of fixed rent (which is \$94,927.55), corresponding to \$189,859.10, per month until the tenant vacates. However, plaintiff argues that “[t]o avoid any claim that two times the highest rate of rent due under the Lease at the end of the term, which is years from now, may be a penalty, [l]andlord is seeking two times the last rate of [f]ixed [r]ent when the [l]ease was terminated (\$81,709.20), or \$163,418.40, as interim U&O on this motion, without prejudice to its right to seek a higher rate of Fixed Rent and to seek Additional Rent and other amounts pursuant to Lease Article 73(b), (c).” Therefore, plaintiffs argue that they are entitled to U&O in the amount of \$1,470,765.60, for September 2020 through and including May 2021, at the monthly rate of \$163,418.40 per month, plus U&O at the monthly rate of \$163,418.40 for June 2021 and thereafter in the amount of \$175,396.76 until tenant vacates the premises. They further contend that all remaining damages, i.e., additional rent, late charges, attorney’s fees, and liquidated damages, should be determined at a hearing.

Plaintiffs also submit the affidavit of their agent, Gregg Schenker, who, among other things, affirms the amounts set forth in the memorandum of law (NYSCEF Doc. No. 23, *Schenker’s affidavit*).

In opposition to the motion, counsel for defendant argues that plaintiffs’ claims for “rent” and “ejection” constitute an impermissible “end run” around the eviction moratorium embodied in Executive Order (“EO”) 202.28 and, thus, should be dismissed as procedurally defective. Moreover, defendant maintains that material issues of fact preclude summary judgment on plaintiffs’ claims. Specifically, defendant argues that it has raised substantive arguments that the COVID-19 pandemic

has, among other things, frustrated the purpose of the parties' lease, and that the parties never contemplated or otherwise anticipated a public-health crisis nor the related governmental shut-down orders. Furthermore, defendant argues that plaintiffs have failed to produce any evidence to establish damages because, although they seek "additional rent" as part of the relief in their application, in the form of real estate tax payments, costs of maintaining the lobby attendant service in the passenger lobby of the building, electricity, and fuel delivered to the building, they fail to submit any proof to support such charges (NYSCEF Doc. No. 35, *Kassenoff's affidavit*).

Spencer Stiefel, general counsel and officer of defendant, submits an affidavit wherein he avers that defendant shut down operations at the premises following the "New York State on PAUSE" program which shut down non-essential businesses in the state, resulting in defendant's inability to perform under the lease. Stiefel also avows that defendant was constructively evicted from the premises. To this point, he maintains that there have been "serious issues with the cooling and heating" of the premises; that, on some of the hottest days, air conditioning ceased functioning in the premises and that, on extremely cold days, heating ceased operations for several days in a row more than once; that plaintiff failed to take reasonable care to ensure that construction and/or renovation work in the building, to wit, lobby construction, would be done with minimal impact to tenant's operations. He further avers that the construction work forced tenant's employees to enter the building through a side, unheated, freight entrance and take a freight elevator to the office; the temperatures were "freezing," and tenant's employees had to wait in these conditions for the single elevator; the time to enter and exit the building was significantly increased, which impacted tenant's ability to operate. Stiefel also argues that the amount of damages plaintiffs now seek is completely unsupported by any proof; that, pursuant to the lease, tenant's obligation to remit certain "additional rent" is conditioned upon plaintiffs' service of a demand and/or documentary support; that tenant is not able to adequately verify or dispute the amounts alleged by plaintiffs; and that plaintiffs seek 200% use and occupancy, which is punitive and unrelated to any purported actual damages sustained (NYSCEF Doc. No. 36, *Stiefel's affidavit*).

In further support of their motion and in opposition to the cross-motion, plaintiffs submit records of defendant's employees using identification cards to access the premises, which they maintain belies defendant's constructive eviction claims (NYSCEF Doc. No. 39, *access records*).

Upon remand of the order to show cause, defendant opposed the same, arguing that the motion is identical to Mot. Seq. 002 but for the fact that the OSC seeks to immediately obtain the entirety of the monetary relief by way of temporary injunctive relief. Defendant argues, *inter alia*, that plaintiffs' request for ongoing U&O has been rendered moot by defendant's departure from the premises; that past U&O is duplicative of the relief sought in the application brought by notice of motion; that plaintiffs are not entitled to injunctive relief; that plaintiff should be sanctioned for the filing of this frivolous application; and that, in the event the court grants the injunction, plaintiffs should be required to post an undertaking (NYSCEF Doc. No. 46, *Kassenoff's affidavit*). Moreover, Stiefel, in support of his assertion that defendant was constructively evicted and had to vacate the premises, submits photographs purportedly taken on November 30, 2021, showing that all persons and virtually all property were removed from the premises (NYSCEF Doc. Nos. 47, *Stiefel's affidavit*; 48, *photographs*).

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].)

The court shall first address the application brought by notice of motion. Here, although Gregg Schenker, agent for plaintiffs, affirms that defendant owes \$436,862.33 in fixed rent and additional rent (NYSCEF Doc. No. 23 ¶ 41), plaintiffs fail to submit any proof to this court regarding the amount of additional rent that is due. While this court acknowledges Schenker’s representation that “[t]he [l]ease also states that [t]enant is required to pay different components of additional rent, including, without limitation, real estate taxes, lobby attendant services, water meter charges, sprinkler charges, electricity charges and fuel charges (collectively, ‘[a]dditional [r]ent’) lease, articles 47, 48, 75, 84, 93, 94; Complaint, ¶¶ 7-11, 13”, absent from plaintiffs’ motion are any statements or computation justifying the total amount of \$436,862.33. Furthermore, pursuant to the lease, certain of these additional charges are not triggered until plaintiffs have furnished a demand thereof, which is not established by movant in this application. Therefore, that branch of the motion seeking additional rent shall be referred to a special referee to hear and determine. Notwithstanding the foregoing, insofar as Schenker affirms that defendant failed to pay rent from April 2020 through August 2020, the amounts of which are set forth in the lease, plaintiffs have established their *prima facie* entitlement to summary judgment as to the fixed rent due from April 2020 through August 2020, for the amount of \$403,739.55.

As it relates to U&O, Article 73 of the lease provides that,

“[i]f [t]enant holds over in possession after the expiration or sooner termination of the original [t]erm or of any extended term of this [l]ease, such holding over shall not be deemed to extend the [t]erm of or constitute a renewal of this [l]ease, but such holding shall be upon the covenants and conditions herein set forth, except that the charge for use and occupancy of the demised premises for each calendar month or part thereof (even if such part shall be a small fraction of a calendar month) that [t]enant so holds over shall be equal to the sum of . . . 1/12 of the highest annual rent rate set forth in this Lease, times 2.0, plus.”

Upon this court’s reading of the relevant lease provision, it finds that plaintiffs have established their *prima facie* entitlement to U&O from the termination of the lease, September 2020, through defendant’s purported vacatur of the premises, November 2021. Thus, plaintiffs have demonstrated their *prima facie* entitlement to the judgment herein requested, to wit, \$2,511,167.80: \$1,634,418.40, for September 2020 through and including June 2021, at the monthly rate of \$163,418.40 per month; plus \$876,983.80, for July 2021 through the month of defendant’s purported vacatur of the premises in November 2021, at a monthly rate of \$175,396.76.¹

The burden shifts to defendant to raise an issue of fact sufficient to warrant denial of the motion. Notably, defendant does not claim to have paid any rent from April 2020 through August 2020, nor does it directly challenge the amount of fixed rent that is due. Rather, it takes issue with plaintiffs’ computation of additional rent. Although defendant raises additional arguments premised on frustration of purpose/impracticability, these arguments have been rejected by the courts as

¹ Although the Appellate Division, First Department directed defendant to pay U&O *pendente lite* at the base rent established in the lease, there is no indication on this motion whether defendant has made any such payments.

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]; *N.Y. Park N. Salem Inc. v Vogrug llc*, 2021 NY Slip Op 32395[U], *6 [Sup Ct, NY County 2021, Love, J.].) Also, while defendant contends that the holdover clause constitutes an unenforceable penalty insofar as plaintiffs seek approximately 200% increase in rent, defendant nevertheless fails to show that the holdover provision is unenforceable (see *Thirty-Third Equities Co. LLC v Americo Group, Inc.*, 294 AD2d 222, 222 [1st Dept 2002]; *Teri-Nichols Inst. Food Merchants, LLC v Elk Horn Holding Corp.*, 64 AD3d 424 [1st Dept 2009].) Defendant's argument regarding the eviction moratorium, which was lifted on January 15, 2022, is also rendered moot. Thus, defendant fails to raise an issue of fact sufficient to defeat those branches of the motion seeking fixed rent and U&O.

Defendant's constructive eviction defense also fails. "A commercial tenant may be relieved of its obligation to pay the full amount of rent due where it has been actually or constructively evicted from either the whole or a part of the leasehold." (*Great Am. Realty of E. Indus. Ct., LLC v Guzu, Inc.*, 187 AD3d 719 [2d Dept 2020] [internal quotation marks, brackets and citations omitted].) A party relying on constructive eviction must demonstrate that "the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises." (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970].) Here, defendant's allegations in support of constructive eviction fail to raise a genuine issue of material fact so as to obviate its obligation under the lease. Moreover, defendant waived its claim for constructive eviction insofar as it agreed, pursuant to Article 43 of the lease, that:

"Notwithstanding anything to the contrary contained in this Lease, none of the Landlord Parties (defined below) shall be liable to Tenant...for any loss, injury or damage to Tenant...for any inconvenience, annoyance, interruption or injury to business arising from (i) Landlord performing any maintenance, repairs, alterations, additions or improvements in or to any portion of the Building or the demises premises or in or to the fixtures, equipment or appurtenances of the building or the demised premises (nor shall Tenant or any other person or entity be entitled to any abatement or suspension of its obligations to pay fixed annual rent or any additional rent or any other obligations hereunder or be construed to be constructively or otherwise evicted on account of the foregoing), irrespective of the cause of such loss, injury, damage, inconvenience, annoyance, interruption or injury."

Based on the foregoing, plaintiff is entitled to rent from April 2020 through August 2020, in the amount of \$403,739.55, plus past use and occupancy in the amount of \$2,511,167.80: \$1,634,418.40, for September 2020 through and including June 2021, at the monthly rate of \$163,418.40 per month; plus \$876,983.80, for July 2021 through the month of defendant's purported vacatur of the premises in November 2021 at a monthly rate of \$175,396.76. To the extent plaintiffs seek a hearing to determine the remaining amounts due under the lease, including late charges, attorney's fees, and liquidated damages, said request is granted to the extent that it shall be referred to a special referee to hear and determine. Moreover, that branch of the motion seeking ejectment is denied given defendant's representation that it has since vacated the premises. Any other relief sought in the order to show cause, as well as, the cross-motion seeking dismissal of the action, are also denied as moot. All remaining arguments and requests have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiffs' motion (Mot. Seq. 002) is granted to the extent that plaintiffs are entitled to \$403,739.55 in fixed rent, as well as, \$2,511,167.80 in past use and occupancy, plus interest and costs as calculated by the Clerk of the Court; and it is further

ORDERED that that branch of the motion (Mot. Seq. 002) seeking additional rent, interest, attorney's fees, and liquidated damages shall be referred to a special referee to hear and determine; and it is further

ORDERED that plaintiffs' motion (Mot. Seq. 001) is denied as moot; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this order, with notice of entry, on defendant, as well as, on the Clerk of the Court (60 Centre Street, Room 141 B), who shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiffs 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).

July 15, 2022



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER