

**284 Prospect Park W. LLC v 92 Fitness Crew NY5,
LLC**

2022 NY Slip Op 33487(U)

October 6, 2022

Supreme Court, Kings County

Docket Number: Index No. 503966/21

Judge: Leon Ruchelsman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM; COMMERCIAL PART 8

-----X
284 PROSPECT PARK WEST LLC,

Plaintiff,

Decision and order

- against -

Index No. 503966/21

92 FITNESS CREW NY5, LLC, LARS O. SCOFIELD,
CHARLES JESSE MEDRANO, AND MELISSA BOTT
MEDRANO,

Defendants,

October 6, 2022

-----X
PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3212 seeking summary judgment dismissing all the claims contained in the complaint. The plaintiff opposes the motion. Papers were submitted by the parties and arguments were held and after reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, the plaintiff, 284 Prospect Park West LLC, is the landlord of a retail space located at 284 Prospect Park West in Kings County. On or about December 28, 2018, 92 Fitness Crew NY5 LLC entered into a lease with the plaintiff. Pursuant to the lease and rider the landlord was required to perform certain work on the premises before delivering possession and the landlord was afforded nine months to substantially finish the work. Thus, pursuant to a rider to the lease, the lease commencement date was "the date that the Landlord shall deliver possession of the Leased Premises to the Tenant with Landlord's Work . . . substantially completed" (see,

Rider to Lease, ¶(b) [NYSCEF Doc. #8]). Delays ensued and the premises were not delivered on time. Defendant and plaintiff were in contact regarding landlord's failure to meet deadlines. On October 9, 2020, defendants provided email notice to plaintiff saying, "we are notifying you of our intention to have the lease rescinded" (Exhibit I, NYSCEF Doc. #23). Plaintiff rejected the request and instituted the within action.

On August 25, 2022 this court issued a decision denying the plaintiff summary judgement holding there were questions of fact whether that email constituted an intent to rescind the lease or a notice to landlord to cure the delay in construction. The court further held there were questions of fact whether the landlord materially misrepresented the pace of construction and consequently breached the lease before the tenant. The court noted that "there are questions of material fact whether the plaintiff knowingly misrepresented the progress of the work, thereby breaching ¶ 77(b) of the lease rider. Moreover, the plaintiff's alleged misrepresentation purportedly violates Paragraph ¶ 77(b), thus the lack of a notice to cure would not preclude finding plaintiff in breach" (see, Prior Decision, [NYSCEF Doc. #130]).

The defendant now moves seeking summary judgement arguing there are no questions of fact the landlord breached the lease by failing to construct the premises within the time frame allowed

pursuant to the lease. However, as noted in the prior decision, the only way the landlord can be in breach of the lease by failing to construct the premises within the requisite time frame is if the landlord is provided with written notice thirty days prior to declaring the landlord in breach (see, Lease Rider, ¶ 77(a)). The tenant argues that whether "the October 9, 2020 email was a notice of rescission or notice to cure is entirely irrelevant to whether Tenant anticipatorily repudiated the Lease" (see, Memorandum in Reply, page 3 [NYSCEF Doc. #141]). This is true because "this Court has already determined that Tenant's October 9, 2020 email was not an anticipatory repudiation of the Lease; therefore, Landlord had no legal right to cease performance and sue for total breach" (*id.*). However, the court never held the tenant did not breach the lease at all. Rather, the court specifically held "there are significant questions of fact whether the email sent on October 9, 2020 was an intention to rescind the lease or a notice to the landlord to cure its default" and that "the precise nature of the email cannot be summarily decided and consequently, further discovery is necessary to determine whether the email was a rescission or a notice" (*id.*). To be sure, if the email is deemed an intent to rescind then there was no required thirty day opportunity to cure. It is difficult to discern the tenant's argument that they had the right to rescind the lease without providing the landlord

with the contractual ability to cure the delay in construction. The tenant does argue that there is no difference between a notice to cure and notice to rescind. The 1913 case in support of that proposition, Taylor v. Goelet, 208 NY 253 [1913] does not support that notion at all. In that case the defendant agreed to erect a building and then rent it to the plaintiff. The contract required the plaintiff to pay rent during the construction as well. The contract in that case did not have a time in which the building had to be completed. Almost two years later the plaintiff sought to rescind the contract on the grounds the defendant had delayed the construction and sought the return of its rent paid to date. The court explained that "this court has held that where an executory contract fixes the time within which it is to be performed and performance within that time is waived by the parties to the agreement, neither party can thereafter rescind the contract on account of such delay without notice to the other requiring performance within a reasonable time, to be specified in the notice, or the contract will be abrogated. By the waiver time as an essential element of the contract has been removed therefrom, but it can be restored by a reasonable notice demanding performance and stating that the contract will be rescinded if the notice is not complied with" (id). Thus, the court did not hold that "a notice of rescission includes a notice to cure" (see, Memorandum in Reply, page 3 [NYSCEF Doc. #141]).

To the contrary, that case held that "the date for the completion of the building was not fixed and time was not of the essence of the contract. It had not been proved that notice was given by the plaintiffs to the defendant to complete the building within a reasonable specified time or the contract would be rescinded; therefore, the complaint was properly dismissed" (id). Thus, clearly, a notice to cure and a notice to rescind are entirely different and where the lease specifically required the tenant to provide a notice to cure the landlord cannot be in breach until the notice to cure has been served and the time allowed for the cure, thirty days in this case, has passed. As noted, there are questions of fact concerning the nature of the email sent and whether it constituted a notice to cure or a breach. The tenant has not raised any issue foreclosing those questions as a matter of law.

Thus, there are questions of fact whether the lease was breached by the tenant or the landlord. To the extent no further discovery will prove helpful then a jury will determine the nature of the email sent and which party, if any, has breached. There is no basis to conclude there are no questions of fact the tenant did not breach the lease.

Next, the tenant argues the landlord cannot sustain its claims of damages against the tenant because it never delivered the premises so had no right to collect any rent and cannot now


seek any rent. This argument is merely a rephrasing of the previous argument that no questions of fact exist. As noted, questions which party breached the lease remain and likewise questions of any damages remain.

Therefore, based on the foregoing the motion seeking summary judgement is denied.

So ordered.

ENTER:

DATED: October 6, 2022
Brooklyn N.Y.



Hon. Leon Buchelsman
JSC