

**N.Y. Park N. Salem Inc. v ADBH 22nd Floor Inc.**

2022 NY Slip Op 33681(U)

October 25, 2022

Supreme Court, New York County

Docket Number: Index No. 656616/2020

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M**

*Justice*

-----X

N.Y. PARK N. SALEM INC.,

Plaintiff,

- v -

ADBH 22ND FLOOR INC.,

Defendant.

-----X

INDEX NO. 656616/2020

MOTION DATE 12/09/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, and 45

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, plaintiff’s motion for summary judgment is granted in part, in accordance with the following memorandum decision.

In this commercial landlord-tenant action, plaintiff N.Y. Park N. Salem Inc. (“landlord”) leased the 22nd floor of the building located at 30 East 60th Street, New York, New York, to defendant ADBH 22nd Floor Inc. (“tenant”), for a term of twenty years, running from August 31, 2017, through September 30, 2037 (Lease, NYSCEF Doc. No. 26). Pursuant to the rent ledger submitted by landlord, tenant ceased paying rent in April 2020 and made no payments through November 2021, causing landlord to apply the security deposit to the arrears (Tenant Ledger, NYSCEF Doc. No. 27). Landlord, therefore, established *prima facie* entitlement to partial summary judgment on the Lease for unpaid base rent and the replenishment of the security deposit, by submission of “the lease . . . the tenant’s failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease” (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498 [1st Dept 2016]).

As an initial matter, tenant's opposition is silent as to tenant's first, fifth, eighth, and ninth affirmative defenses, and tenant's first and second counterclaims, rendering them subject to dismissal (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017] ["By his silence in his opposition brief, defendant concedes, as plaintiff argues, that the second, third, and sixth affirmative defenses should be dismissed"]). The action pending between the parties in Housing Court concerns cooling tower fees that are not a subject of this action or the motion, disposing of the second affirmative defense. Tenant's third affirmative defense – unclean hands – is an equitable doctrine that is not available in an action exclusively for money damages, such as the instant action (*Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005]).

Tenant's remaining defenses are unjust enrichment (fourth cause of action), failure to credit amounts paid (sixth affirmative defense), and failure to state a cause of action (seventh affirmative defense). All three defenses revolve around paragraph 43(A)(2) of the lease, which provides, in part, that

Tenant acknowledges that no use or occupancy of the demised premises as contemplated in Article 42 hereof shall take place until such time as owner has delivered the temporary certificate of occupancy authorizing such use and occupancy. So long as tenant has delivered the sign-offs before the end of the six month period, if owner has failed to deliver the temporary certificate of occupancy within thirty (30) days of delivery of the sign-offs, tenant shall receive a rent abatement equal to one day of fixed rent for each day of delay until the temporary certificate of occupancy is received.

(NYSCEF Doc. No. 26, ¶ 43[A][2].)

Article 42 defines the prescribed use and occupancy of the demised premises as

consistent with the condition, level of operation and prudent business and management practices applicable to high quality spa engaged in providing Nano color Infusion, high quality spa services, beauty, health and wellness related services and office administrative use in mid-town Manhattan and for no other purpose.

(*Id.*, ¶ 42[A].)

In opposition to the motion, tenant argues that it delivered the sign-offs on its alterations to the demised premises within the six-month period set forth above, but landlord has failed to deliver a temporary certificate of occupancy for four years (Bossavy Aff. dated December 22, 2021, NYSCEF Doc. No. 33, ¶¶ 13-34), and, therefore, is entitled to a rent abatement, which landlord refuses to credit. Moreover, tenant argues that the delivery of a temporary certificate of occupancy is a condition precedent to tenant's obligation to pay rent. In reply, landlord concedes that the Department of Buildings has not yet issued a certificate of occupancy for the demised premises, but argues that tenant is using the premises anyway and has failed to obtain all necessary sign-offs, precluding reliance on the rent abatement provision (Nichols Reply Aff. dated January 4, 2022, NYSCEF Doc. No. 42, ¶¶ 7-10). During oral argument, the parties heavily disputed whether tenant is presently able to use the demised premises to the full extent contemplated by the use and occupancy provision of the lease, whether tenant provided all sign-offs related to its work to renovate and remodel the demised premises, and whether any missing sign-offs are attributable to the whole building and, therefore, not tenant's responsibility (Transcript of Proceedings, NYSCEF Doc. No. 45 at 5:22-8:12).

“A contract is ambiguous if it is susceptible to more than one reasonable interpretation” (*Discovision Assoc. v Fuji Photo Film Co., Ltd.*, 71 AD3d 488, 489 [1st Dept 2010] [internal quotation marks and citations omitted]). Here, the rent abatement provision is ambiguous as to whether it forbids all use of the demised premises prior to obtaining a temporary certificate of occupancy, or simply the use of the entire demised premises in a manner consistent with the use and occupancy provision. Conversely, the lease language is not ambiguous with respect to tenant's obligations to provide sign-offs on all of tenant's work, rather than for the building

(NYSCEF Doc. No. 26, ¶ 43[A]). The record before the court on the motion, therefore, does not resolve the issues of fact related to the permitted use of the demised premises absent a certificate of occupancy, nor whether any missing sign-offs are related to the building as a whole rather than to the tenant’s work on the demised premises.

Accordingly, it is hereby

ORDERED that so much of landlord’s motion seeking partial summary judgment on the complaint is denied; and it is further

ORDERED that so much of landlord’s motion seeking to dismiss tenant’s affirmative defenses is granted to the extent of dismissing the first through third, fifth, eighth, and ninth affirmative defenses and is otherwise denied; and it is further

ORDERED that the first through third, fifth, eighth, and ninth affirmative defenses are severed and dismissed; and it is further

ORDERED that counsel shall appear for a status conference in Room 1166, 111 Centre Street on November 30, 2022 at 2:00 PM.

This constitutes the decision and order of the court.



<u>10/25/2022</u>			
<b>DATE</b>		<b>LOUIS L. NOCK, J.S.C.</b>	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE