

**436-438 St. Nicholas Ave. LLC v St. Nicholas Apt.
Corp.**

2022 NY Slip Op 34274(U)

December 15, 2022

Supreme Court, New York County

Docket Number: Index No. 155101/2020

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

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436-438 ST. NICHOLAS AVE. LLC,

Plaintiff,

- v -

ST. NICHOLAS APARTMENT CORP. and KAPLAN,
KAPLAN & DITAPANI, LLP,

Defendants.

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INDEX NO. 155101/2020

MOTION DATE 11/24/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ORDERED that the plaintiff’s motion is granted, and the defendant’s cross-motion is denied, for the reasons set forth in the plaintiff’s papers and the exhibits attached thereto, in which the court concurs. As more specifically set forth therein, plaintiff has established prima facie entitlement to summary judgment on its claim for the return of its security deposit by submission of the contract between the parties,¹ proof of plaintiff’s performance under the contract, proof of defendant’s² failure to comply with its pre-closing obligations, and proof of plaintiff’s damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The contract provides that defendant, prior to the closing, shall represent that it has registered all of the apartments in the buildings to be sold with the New York State Division of Housing & Community Renewal (“DHCR”) and “that the rents set forth on the

¹ The parties agree that the initial prospective purchaser, nonparty Blue Duck LLC, assigned all of its rights and interest in the contract to plaintiff.

² Defendant St. Nicholas Apartment Corp. is the only remaining defendant, as the action was discontinued against defendant Kaplan, Kaplan & Ditapani, LLP (NYSCEF Doc. No. 13).

schedule annexed hereto do not exceed said registered rent and are, in fact, the Legal Regulated Rent (LRR)” (Contract Rider, NYSCEF Doc. No. 31, ¶ 18). Further, defendant “shall remove of record any existing DHCR rent reduction orders prior to closing” (*id.*). Defendant concedes, throughout its opposition to the plaintiff’s motion, that it neither removed several DHCR rent reduction orders nor provided sufficient information to plaintiff to reconcile several discrepancies in the amount of rent being charged and collected at the premises. As plaintiff had grounds to refuse to close the sale, plaintiff had the right to terminate the contract and recover the deposit (Contract, NYSCEF Doc. No. 31, § 13.03). Defendant’s unilateral characterization of the rent discrepancies as de minimus and the DHCR orders as unenforceable does not excuse its obligation to accurately represent the state of the rent on the apartments and to clear the orders from the record. Defendant alleges as well that it was unable to clear the orders with the DHCR as a result of office closures caused by the COVID-19 pandemic, but state offices were not ordered to restrict staffing until after the scheduled closing date of March 5, 2020, had come and gone (9 NYCRR 8.202.4).

In opposition to the motion, defendant primarily argues that plaintiff is unable to rely on the scheduled “time is of the essence” closing of March 5, 2020, because that date came and went without any action by either party, and plaintiff cannot unilaterally extend the time for closing. As an initial matter, defendant’s claim that there is no evidence showing that plaintiff was ready, willing, and able to close on March 5, 2020, is insufficient to raise a triable issue of fact as a party cannot defeat a motion for summary judgment (*see Bryan v 250 Church Assoc., LLC*, 60 AD3d 578 [1st Dept 2009]). Moreover, the contract provision allowing for an extension of the closing date provides that “[defendant] shall be entitled to a reasonable adjournment or adjournments of the Closing for up to 60 days, to remove . . . any other defects or objections

which may be disclosed on or prior to the Closing Date” (Contract, NYSCEF Doc. No. 31, § 13.02). There is no language stating that defendant is the only party who can adjourn the closing date. “It is well settled that a court may not, under the guise of interpretation, fashion a new contract for the parties by adding or excising terms and conditions which would contradict the clearly expressed language of the contract” (*Republic Nat. Bank of New York v Olshin Woolen Co. Inc.*, 304 AD2d 401, 402 [1st Dept 2003]). Moreover, strict compliance with the notice provisions of the contract is not necessary where, as here, defendant fails to allege lack of actual notice or any other prejudice (*Baker v Norman*, 226 AD2d 301, 304 [1st Dept 1996], *lv dismissed* 88 NY2d 1040 [1996]). Defendant does not otherwise raise any triable issues of fact regarding plaintiff’s termination of the contract and entitlement to recover the amount of the deposit; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff 436-438 St. Nicholas Ave LLC and against defendant St. Nicholas Apartment Corp. in the amount of \$385,000, with interest thereon at the statutory rate from June 9, 2020, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ADJUDGED and DECLARED that the contract was properly terminated, and that plaintiff has no further obligations under its terms.

This constitutes the decision and order of the court.

Louis L. Nock

<u>12/15/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE