

<b>Timston Corp. v Blue Spa Inc.</b>
2023 NY Slip Op 30181(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 656691/2022
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 14

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TIMSTON CORPORATION,  
  
Plaintiff,  
  
- v -  
  
BLUE SPA INC., SHAO TONG CHEN  
  
Defendant.

INDEX NO. 656691/2022  
  
MOTION DATE 01/03/2023  
  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27  
were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment is granted.

**Background**

This action arises out of unpaid rent on a commercial property. Defendant Blue Spa Inc. and plaintiff entered into a lease on February 6, 2013 for a term of five years. Defendant Chen signed a guaranty in connection with the lease. In 2017, the same parties entered into a lease extension and modification agreement with a lease term until January 31, 2023. Again, defendant Chen extended his guaranty in connection with the lease extension. The rental amount started at \$9,853.76 and increased each year until the expiration of the lease.

When the pandemic caused a mandatory shutdown of the business in March 2020, Blue Spa closed its business and reopened in July 2020. Blue Spa contends its business never recovered. According to Blue Spa, the parties discussed rent waivers and rent reductions beginning in April 2020, though Blue Spa does not provide any documentation to prove that these conversations occurred. From July 2020 to March 2022, Blue Spa made sporadic and

inconsistent rental payments that were less than the required monthly rent under the lease. On May 7, 2022, Blue Spa vacated the premises.

Plaintiff moves for summary judgment contending that defendants owe \$587,297.53 in unpaid rent and interest as defendants abandoned the premises before the expiration of the lease.

In response, defendants allege that there was an oral agreement to modify the rental amounts. Defendants further contend that the 14 Day Notice notifying defendants of overdue rent that was provided by plaintiff was defective and that defendants never received such notice. Defendants contend summary judgment is premature as defendants are entitled to discoverable information.

In reply, plaintiff contends that defendants offer no evidence of an oral agreement. Furthermore, an oral agreement is precluded by the lease, which expressly disqualifies all oral modifications. Plaintiff also contends that defendants failed to detail how the 14 Day Notice was defective, but maintain that plaintiff was not required to issue a 14 Day Notice as such a notice is only required for a summary nonpayment eviction proceeding.

Defendants asserted fourteen affirmative defenses but failed to preserve any affirmative defenses in their opposition papers. Thus, defendants' affirmative defenses are stricken.

### **Discussion**

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“It is long settled under New York's Statute of Frauds that an oral agreement to convey an estate or interest in real property, other than a lease for a term not exceeding one year, is nugatory and unenforceable, and [a] party to the agreement may legally and rightfully refuse to recognize or perform it” (*Messner Vetere Berger McNamee, Schmetterer Euro Rscg v Aegis Group Plc*, 93 NY2d 229, 235, 689 NYS2d 674 [1999] [internal citations and quotations omitted]). However, “a party can overcome such a clause and enforce an oral modification to a written agreement by demonstrating either that the oral modification has in fact been acted upon to completion; or, where there is only partial performance, that the partial performance is unequivocally referable to the alleged oral modification,” (*Eujoy Realty Corp v Van Wagner Communications, LLC*, 22 NY3d 413, 425, 981 NYS2d 326 [2013][internal citations and quotations omitted]).

The Court grants plaintiff's summary judgment motion. Defendants contend there was an oral agreement between the parties but provide no proof of one nor do they adequately explain how the Court can ignore the provision of the lease that specifically forbids oral modifications of the lease. Instead of providing a written copy of the alleged lease modification, defendants supplied a chart detailing rental payments from July 2020 to March 2022. They insist that these checks constitute the amounts owed in full up to the date they vacated the premises. Despite listing the check numbers, defendants did not submit copies of the checks. Of course, submitting a chart of alleged checks sent to plaintiff is not proof that there was a lease modification and does not raise an issue of fact with respect to plaintiff's motion. Moreover, plaintiff points out that the fluctuating amounts indicate there was no agreement to modify the rent.

Here, the facts are clear. Plaintiff and defendants entered a lease agreement. The rental term ended in January 2023, but defendants vacated the premises in May 2022, at least eight months before the end of the lease term. Even before that, defendants failed to pay the full rent under the terms of the lease. If such an oral agreement took place, now was the time, in opposition to a motion for summary judgment, for defendants to present more than conclusory statements to demonstrate such an agreement. Defendants do not even offer the date of the agreement or the alleged terms, such as how much they were supposed to pay under the purported modification. Of course, conclusory statements without any evidentiary support are not enough to raise an issue of fact.

Accordingly, it is hereby


ORDERED that the plaintiff's motion for summary judgment is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against the defendants, jointly and

severally, in the amount of \$528,172.12 plus interest from May 27, 2022, along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that plaintiff's request for reasonable legal fees is denied as it did not demand a specific amount or attach invoices supporting this request; and it is further

ORDERED that defendants' affirmative defenses are severed and dismissed.

1/9/2023  
DATE

  
ARLENE P. BLUTH, 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