

Fifth Partners LLC v Punch House Flatiron LLC

2023 NY Slip Op 31375(U)

April 26, 2023

Supreme Court, New York County

Docket Number: Index No. 161105/2021

Judge: Gerald Lebovits

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
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS **PART** **07**

Justice

-----X

INDEX NO. 161105/2021

FIFTH PARTNERS LLC,

MOTION SEQ. NO. 001

Plaintiff,

- v -

PUNCH HOUSE FLATIRON LLC, JOSEPH W. FOLEY, and
NADA VASILJEVIC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion for

SUMMARY JUDGMENT

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York, NY (David B. Rosenbaum and Joshua Nadelbach of counsel), for plaintiff.

Kevin Kerveng Tung, P.C., Flushing, NY (Kevin K. Tung of counsel), for defendants.

Gerald Lebovits, J.:

In this action to recover damages for breach of a lease and to recover on a guaranty, plaintiff moves for summary judgment on the complaint and to dismiss defendants' affirmative defenses and counterclaim for fraudulent inducement. The motion is granted.

BACKGROUND

Plaintiff Fifth Partners LLC (the landlord) is the owner of a building located at 19 West 21st Street in Manhattan. On June 14, 2021, the landlord entered into a five-year commercial lease agreement with defendant Punch House Flatiron LLC (the tenant), whereby the landlord leased a ground-floor retail space in the building (the Premises) to the tenant for its use as a fitness studio (NYSCEF Doc. No. 29). The lease term commenced on July 1, 2021 and ended on June 30, 2026.

On June 18, 2021, defendants Joseph W. Foley and Nada Vasiljevic (together the guarantors) executed a "good guy" guaranty agreement (the guaranty) (NYSCEF Doc. No. 30). The guaranty provides that the guarantors' personal liability is extinguished when the tenant vacates and surrenders the Premises, obligating the guarantors to all payment obligations of the tenant up to and until the date the Premises is vacated. However, this limitation on the guarantors' liability can only be exercised after the expiration of the thirteenth month of the lease

term, and then only if certain conditions are met, including a requirement that the landlord is notified of the tenant's intent to vacate the Premise a minimum of six months in advance.

On December 13, 2021, the landlord commenced this action against the tenant and the guarantors (together defendants), alleging that the tenant vacated the Premises on December 1, 2021, without permission or authorization from the landlord, thereby breaching the lease (Summons and Complaint, NYSCEF Doc. No. 26). The complaint includes three causes of action. The first cause of action seeks a judgment against the tenant for, inter alia, outstanding rent, additional rent, as well as accelerated and liquidated damages under the terms of the lease. The second cause of action seeks to hold the guarantors liable for all of the tenant's alleged monetary obligations. The third cause of action seeks an award of reasonable attorneys' fees and expenses incurred in this action pursuant to paragraph 19 of the lease.

Defendants interposed an amended answer in which they asserted, inter alia, an affirmative defense and counterclaim for fraudulent inducement (Amended Answer, NYSCEF Doc. No. 20). Defendants allege that they entered into the lease and guaranty based upon oral representations falsely made by the landlord that certain renovations being performed on the Premise's storefront would be completed on or before July 15, 2021, and that the scaffolding surrounding the storefront would be removed by the last week of August 2021. Defendants allege that when this did not happen, the tenant sought rescission of the lease. The landlord refused to rescind the lease and commenced this action against them.

The landlord now moves for summary judgment on the complaint and to dismiss defendants' affirmative defenses and counterclaim for fraudulent inducement.

DISCUSSION

“On a motion for 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. If the moving party proffers the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action” (*Trustees of Columbia Univ. in the City of N.Y. v D 'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks and citations omitted]). “On such a motion, the facts must be viewed in the light most favorable to the [nonmoving party] and every available inference must be drawn in the [nonmoving party's] favor” (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]).

Here, the landlord moves for summary judgment arguing that defendants are liable for \$232,017.95 in damages, representing unpaid rent and additional rent due under the terms of the lease through September 2022, as well as liquidated damages incurred in securing a new tenant. The landlord further contends that pursuant to paragraph 19 of the lease, it is entitled legal fees incurred in enforcing the lease and that the guarantors are liable for all amounts due pursuant to the guaranty.

In support of its motion, the landlord submits the affidavit of Ryan Mehra, a member of the landlord, who oversees all aspects of managing the building, including rent collection,

billing, leasing, and lease compliance (Mehra Affidavit, NYSCEF Doc. No. 25). Mehra annexes a copy of the lease and guaranty to his affidavit and affirms that the tenant failed to pay the landlord rent and the additional rent when due and unilaterally abandoned the Premises as of December 1, 2021. He also affirms that the landlord never gave permission for the tenant to abandon the Premises, and that aside from returning the keys, none of the conditions of the guaranty were met so as to extinguish the guarantors' personal liability.

Mehra explains that the landlord has since relet the Premises to a new tenant as of May 1, 2022, and that the new tenant was given a rent abatement for the first five months of the lease term from May through September 2022. He annexes a copy of the new tenant's lease to his affidavit (New Lease, NYSCEF Doc. No. 33). In his affidavit, Mehra also provides a detailed calculation of the amounts due pursuant to the terms of the lease, including liquidated damages.

The foregoing is sufficient to establish the landlord's prima facie burden on the complaint with respect to the tenant's breach and the amounts due under the lease and guaranty (*see Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016] [plaintiff landlord "established prima facie the existence of the lease and the guaranty, through an affidavit by its CFO, and the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease, through the CFO's affidavit and an affidavit by plaintiff's manager of accounts receivable, which included a table of all payments by the tenant"]; *see also Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015] [to meet its prima facie burden on its summary judgment motion with respect to a guaranty, the plaintiff must prove "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty"] [internal quotation marks and citation omitted]).

As to defendants' affirmative defense and counterclaim that they were fraudulently induced to enter into the lease by representations that the scaffolding would be removed and that the renovations on their storefront would be completed by certain dates, the landlord maintains that such promises were never made. To support this assertion, the landlord relies on Mehra's affidavit, wherein he attests that no such promises were made and that, at most, defendants may have been given an approximation of when such work would be completed. He asserts that "no firm dates were given, and no promises were made as it was outside of [the landlord's] control. It would have been impossible for [the landlord] to predict a date certain for when the pointing [being done on the outside of the building for which the scaffolding was erected] would be completed" and the construction and ordering of materials with respect to the new storefront door were also outside of the landlord's control (Mehra Affidavit at ¶¶ 43-44).

The landlord further argues that the terms of the lease contradict defendants' assertion that defendants entered into the lease in reliance upon these alleged promises. In this regard, the landlord highlights paragraphs 4 and 20 of the lease. Paragraph 4 provides in pertinent part:

"Except as specifically provided in Article 9 or elsewhere in this Lease, there shall be no allowance to the Tenant for the diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business arising from Owner, Tenant or others making or failing to make any repairs,

alterations, additions or improvements in or to any portion of the Building including the erection of any crane, derrick or sidewalk shed, or in or to the Demised Premises or the fixtures, appurtenances or equipment thereof. The provisions of this Article 4 with respect to the making of repairs shall not apply in the case of fire or other casualty which are dealt with in Article 9 hereof”

(Lease at ¶ 4 [emphasis added]). Paragraph 20 states:

“Neither Owner nor Owner’s agents have made any representations or promises with respect to the physical condition of the Building, the land upon which it is erected or the Demised Premises, the rents, leases, expenses of operation or any other matter or thing affecting or related to the premises except as herein expressly set forth and no rights, easements or licenses are acquired by Tenant by implication or otherwise except as expressly set forth in the provisions of this Lease. Tenant has inspected the Building and the Demised Premises and is thoroughly acquainted with their condition, and agrees to take the same ‘as is’ and acknowledges that the taking of possession of the Demised Premises by Tenant shall be conclusive evidence that the said premises and the Building of which the same form a part were in good and satisfactory condition at the time such possession was so taken, except as to latent defects. All understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between Owner and Tenant and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought”

(Lease at ¶ 20 [emphasis added]).

In opposition to the landlord’s motion, defendants do not dispute that they vacated the Premises on December 1, 2021, without permission or authorization from the landlord. They also do not dispute the calculation of damages set forth in the landlord’s motion papers, or that in the event the landlord prevails in establishing the tenant’s default, the guarantors are personally liable under the guaranty and the landlord is entitled to an award of reasonable attorney fees and expenses incurred in this action pursuant to paragraph 19 of the lease.

Defendants argue in opposition to the motion that their allegations, if proven, state a claim for fraudulent inducement which would render the lease void. Therefore, they argue, it would be premature for the court to grant the landlord summary judgment on the complaint at this juncture. Defendants further assert that the affidavit of Ryan Mehra has no probative value with respect to the representations or promises made during the negotiation of the lease, inasmuch as he does not have personal knowledge of the facts because he was not present when the lease negotiations took place. In support of this contention, defendant Joseph Foley submits an affidavit wherein he states that he and defendant Nada Vasiljevic were personally involved in the lease negotiations and that they never spoke to, or communicated with, Ryan Mehra about

the negotiation of the lease, nor was Ryan Mehra present when they executed the lease (Foley Affidavit at ¶ 4, NYSCEF Doc. No. 39).

Foley explains in his affidavit that defendants would not have entered into the lease had they been aware of the fact that renovations to the storefront and the removal of the scaffolding would not be finished by the dates promised. He asserts that they could not run any business whatsoever from the Premises until August 28, 2021, and even then, they experienced issues with the building's HVAC system, which damaged their reputation.

“In order to state a cause of action for fraudulent inducement, the claim must allege a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment” (*Rivera v JRJ Land Prop. Corp.*, 27 AD3d 361, 364 [1st Dept 2006] [internal quotation marks and citations omitted]). “Where a merger clause is general and vague, i.e., merely an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made, the merger does not preclude parol evidence establishing fraudulent inducement to enter into the contract” (*Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 169 [1st Dept 2015] [internal quotation marks and citation omitted]). That said, “[w]hile a general merger clause is ineffective to exclude parol evidence of fraud, a specific disclaimer will defeat any allegation that the contract was executed in reliance upon contrary oral representations” (*DiBuono v Abbey, LLC*, 95 AD3d 1062, 1064 [2d Dept 2012]; see *Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959]).

Here, the merger clause in paragraph 20 of the lease provides that that all understandings and agreements between the parties were merged into the lease, “which alone fully and completely expresses the agreement between Owner and Tenant” and that no representations or promises were made as to the physical condition of the Premises except as expressly set forth in the lease. In addition to this general language, the provision also states that the tenant inspected the Premises, was thoroughly acquainted with its condition, and agreed to accept the Premises “as is.” The same provision states that the tenant’s taking of possession of the Premises would “be conclusive evidence that the said premises and the Building of which the same form a part were in good and satisfactory condition at the time such possession was so taken, except as to latent defects.” Additionally, paragraph 4 of the lease specifically provides “that there shall be no . . . liability on the part of [landlord] by reason of inconvenience, annoyance or injury to business arising from [the landlord], Tenant or others making or failing to make any repairs, alterations, additions or improvements in or to any portion of the Building.” These provisions are sufficiently specific to bar the claim that the tenant was fraudulently induced into entering the lease because of the landlord’s oral representations to the contrary outside of the contract (see *Fabozzi v Coppa*, 5 AD3d at 724). Whether such representations were actually made is not determinative on this motion inasmuch as the foregoing language in the lease defeats any allegation that it was executed in reliance upon contrary oral representations. Therefore, Mehra’s personal knowledge of what was said during the negotiation of the lease is not at issue. As such, the affirmative defense and counterclaim for fraudulent inducement is dismissed.

With respect to the remaining affirmative defenses, tenant opposes dismissal only of some of those defenses. In particular, tenant opposes dismissal of the defenses of (1) the

complaint being barred by the doctrines of estoppel, waiver, and unclean hands, (2) breach of the warranty of habitability, (3) constructive eviction, and (4) violation of the covenant of good faith and fair dealing. Thus, all of the other affirmative defenses are deemed abandoned and dismissed (*see Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 538 [1st Dept 2022]; *Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017]).

In arguing that the complaint is barred by the defense of doctrine of estoppel, defendants appear to be taking the position that the landlord is equitably estopped from bringing this action because of the same alleged oral representations underlying the fraudulent inducement defense and counterclaim. To establish equitable estoppel, defendants must prove that their reliance upon the landlord's words or actions was justifiable, and that they prejudicially changed their position in consequence of such reliance (*see Jing Yu v Allstate Ins. Co.*, 208 AD3d 857, 858 [2d Dept 2022]; *EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 619 [1st Dept 2010]). This affirmative defense is dismissed inasmuch as it has already been determined that the language in the lease defeats any allegation that it was executed in reliance upon contrary oral representations.

The defense that the complaint is barred by the doctrine of waiver is conclusory and unsupported by factual allegations (*U.S. Bank N.A. v Ahmed*, 174 AD3d 661, 665 [2d Dept 2019]; *Bruno v Sant'Elia*, 52 AD3d 556, 557 [2d Dept 2008]). Therefore, it is also dismissed.

As to the affirmative defense of unclean hands, the doctrine "is an equitable defense that is unavailable where, as here, the action is exclusively for damages" (*Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010]). The defense of breach of the implied warranty of habitability is also unavailable because "such a claim applies only to residential lease space, which is not at issue herein" (*Rivera v JRJ Land Prop. Corp.*, 27 AD3d 361, 364 [1st Dept 2006]).

The defense of constructive eviction is also dismissed. In order to constitute an eviction, constructive or actual, "the tenant must have been deprived of something to which he was entitled under or by virtue of the lease" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]). As already discussed, defendants were not entitled to the renovation of the storefront, or to the removal of scaffolding being performed by a specific date "under or by virtue of the lease" (*id.*). As to the affirmative defense that the landlord violated the covenant of good faith and fair dealing, "[t]he implied covenant of good faith and fair dealing . . . will not impose an obligation that would be inconsistent with the terms of the contract" (*Adams v Washington Group, LLC*, 42 AD3d 475, 476 [2d Dept 2007]).

To the extent defendants are relying on problems they allegedly experienced with the building's HVAC system, they fail to make a sufficient showing. In this regard, Joseph Foley briefly mentions in his affidavit that "we never took into consideration that we would be misled by the plaintiff landlord about the HVAC systems" (Foley Affidavit at ¶ 11). He also states that when defendants opened their business in late August 2021, they did not miss the "September rush" but their "reputation was damaged with air circulation issues, finding out that the HVAC system was actually rerouted and did not work at all except re-circulating the same air that was no condition [sic] through air systems and filters" (Foley Affidavit at ¶ 12).

No allegations related to the building’s HVAC system are included in defendants’ amended answer and defendants do not elaborate on these allegations in any other submissions on this motion. They provide no details as to the precise dates or duration of the HVAC issues, whether and/or when they notified the landlord of these issues, or the landlord’s response to such notifications. This is insufficient. This information was within their knowledge and it was incumbent upon them “to assemble, lay bare, and reveal [their] proofs” in order to raise an issue of fact in opposition to the landlord’s motion (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014]; see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Hoot Group, Inc. v Caplan*, 9 AD3d 448, 448 [2d Dept 2004]; *Middle States Leasing Corp. v Manufacturers Hanover Trust Co.*, 62 AD2d 273, 276 [1st Dept 1978]).

Thus, the landlord’s motion for summary judgment on the complaint and to dismiss defendants’ affirmative defenses and counterclaim is granted. As defendants do not dispute or offer any evidence with respect to the calculation of damages set forth in the landlord’s motion papers, the landlord is entitled to judgment for the amount sought against the tenant (see *New York Brooklyn Wholesale Ctr., Inc. v Xiaoli Sun*, 172 AD3d 1389, 1391 [2d Dept 2019]).

Landlord has also established that it is entitled under the lease and guaranty to its reasonable attorney fees.


Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment on the complaint and to dismiss defendants’ affirmative defenses and counterclaim is granted; and it is further

ORDERED that plaintiff is awarded judgment against defendants, jointly and severally, for \$232,017.95, with interest running from the reasonable intermediate date of June 1, 2022, plus costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff may enter a supplemental judgment for the amount of its reasonable attorney fees, with the amount of those fees to be determined by motion brought on notice; and it is further

ORDERED that plaintiff serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which shall enter judgment accordingly.

<p><u>4/26/2023</u> DATE</p>	 HON. GERALD LEBOVITS J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE