

451-453 Park Ave. S. Corp. v Lifelab, LLC

2023 NY Slip Op 31956(U)

June 6, 2023

Supreme Court, New York County

Docket Number: Index No. 654845/2020

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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451-453 PARK AVENUE SOUTH CORP.,

Plaintiff,

- v -

LIFELAB, LLC, and SPARTAN BRANDS, INC.

Defendants.

INDEX NO. 654845/2020

MOTION DATE 12-19-22

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

I. INTRODUCTION

In this action, wherein the plaintiff landlord seeks, *inter alia*, to recover damages for breach of commercial lease agreements by the defendants, a pair of former tenants, the plaintiff moves pursuant to CPLR 3212 for partial summary judgment in its favor with respect to the defendants' liability for breach of their respective lease agreements (first and second causes of action), as well as for contractual attorneys' fees (third and fourth causes of action), and to dismiss the defendants' counterclaims and affirmative defenses. The defendants oppose the motion and cross-move for summary judgment on their first counterclaim. The plaintiff's motion is granted in part and denied in part, and the defendants' cross-motion is granted in accordance with the discussion below.

II. BACKGROUND

Defendant Spartan Brands, Inc. (“Spartan Brands”) entered into a commercial lease agreement with the plaintiff on March 22, 2012 (the “Spartan Brands Lease”) with respect to the fifth floor of the premises located at 451-453 Park Avenue South (the “Building”) in Manhattan. The Spartan Brands Lease was amended on October 7, 2014, expanding Spartan Brands’ footprint in the Building to include the sixth floor of the premises in addition to the fifth floor. A second amendment to the Spartan Brands Lease was executed on September 7, 2018. The same day, defendant Lifelab, LLC (“Lifelab”), an affiliate of Spartan Brands, entered into its own commercial lease agreement with the plaintiff with respect to the sixth floor premises in the Building (the “Lifelab Lease,” and, together with the Spartan Brands Lease, the “Leases”). Pursuant to the Lifelab Lease and the contemporaneous second amendment to the Spartan Brands Lease, the right of possession to the sixth floor of the Building was effectively transferred from Spartan Brands to Lifelab. The term of each of the Leases extended until March 31, 2024.

The defendants are jointly in the business of developing, marketing and distributing hair products and other personal care products. According to the defendants, an integral component of their business is the in-house development of chemical formulas and fragrances used in their various products. To that end, prior to the outbreak of the COVID-19 pandemic, the defendants operated a laboratory in their premises on the fifth and sixth floors of the Building (the “Leased Premises”) where their chemist could experiment with, test and sample such formulas and fragrances. In the Leases, both Spartan Brands and Lifelab secured identical provisions granting them the right to terminate their Leases should their operation of the laboratory in the Leased Premises be prohibited due to any governmental order or decree. Specifically, Article 44 in each of the Leases, titled “USE,” stated in pertinent part:

Notwithstanding anything to the contrary contained herein, Tenant shall be permitted to use the Demised Premises for its laboratory use, which consists of Tenant's products being developed and tested by their chemist for both quality control and development purposes...

If at any time Tenant is advised by any applicable governmental authority that Tenant cannot use the Premises for its operation of its lab, then Tenant shall have the right to terminate this Lease on not less than ninety (90) days' notice to Landlord....

Article 44 of the Leases further provided that, "[i]f any of the Base Rent abatements contemplated in Section 41 have been applied prior to Tenant's termination notice, then Tenant shall reimburse Landlord for the amount so abated on or before the early termination date."

The Leases also required the plaintiff to make certain improvements and repairs to the Leased Premises, including, as relevant here: painting the common corridors on both the fifth and sixth floors, installing new flooring and wall covering in the elevator lobby areas of both floors, and installing new carpet tiles in the common areas of the fifth floor. It is undisputed that the plaintiff did not perform any of these improvements and repairs.

On March 20, 2020, with the onset of the COVID-19 pandemic, then Governor Cuomo issued Executive Order No. 202.8 requiring the complete shutdown of all non-essential in-office business operations in New York State. The shutdown requirements of Executive Order No. 202.8, which were periodically extended during 2020, precluded the defendants from operating their laboratory and conducting other in-person business operations at the Leased Premises. Faced with a mandatory, government-imposed shutdown of indefinite duration, on May 21, 2020, the defendants invoked Article 44 of their respective Leases by sending to the plaintiff Termination Notices giving the requisite ninety days' notice of the defendants' election to terminate their Leases effective August 25, 2020.

The defendants claim that, upon receiving their Termination Notices, the plaintiff embarked on a campaign of tenant harassment with the alleged aim of causing the defendants to waive and abandon their rights to terminate the Leases under Article 44. To that end, the defendants allege the plaintiff: had its building superintendent enter the Leased Premises without their permission and take surreptitious photos of the defendants' sample products and other personal property, as well as of the defendants' chemist; imposed new restrictions upon the defendants' use of the Building's freight elevator that were not imposed upon other Building tenants; and deprived the defendants of various Building services provided to all tenants, including daily waste removal. The plaintiff disputes these contentions.

The defendants vacated the Leased Premises as of September 30, 2020. The defendants did not pay their respective monthly rent of \$18,907.23 (plus utility costs and tax) for the period from April 2020 through September 2020, nor did they reimburse the plaintiff for rent abatements applied prior to May 2020, when they served the Termination Notices on the plaintiff. It is undisputed that, prior to serving their Termination Notices in May 2020, Lifelab received an abatement of \$18,358.21 in base rent for the month of April 2019, while Spartan Brands received abatements of base rent totaling \$103,144.43 for the months of: April 2013 (\$16,033.34); April 2014 (\$16,681.08); April 2015 (\$17,014.70); April 2016 (\$17,355.00); May 2017 (\$17,702.10); and April 2019 (\$18,358.21).

On September 30, 2020, the plaintiff initiated this action seeking to recover unpaid rent owed since April 2020, together with the previously applied rent abatements and contractual attorneys' fees. Defendants answered on October 20, 2020, asserting counterclaims seeking: a declaration that the defendants validly terminated their Leases pursuant to Article 44 and therefore are not liable for any rent, additional rent, or other charges or fees for the period

subsequent to September 30, 2020, the date on which they vacated the Premises (first counterclaim)¹; as well as money damages in connection with the plaintiff's alleged acts of tenant harassment (second counterclaim) and failure to perform repairs and improvements required under the terms of the Leases (third counterclaim). The instant motions ensued.

III. LEGAL STANDARD

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

Pursuant to CPLR 3211(b), a “party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street

¹ As stated in the Answer, the first counterclaim seeks a declaration that the defendants are not liable for any rent, additional rent, or other charges or fees for the period subsequent to August 25, 2020, the early termination date originally stated in the defendants' May 21, 2020 Termination Notices. However, in their submissions on the present motions, the defendants clarify their position, stating that, by virtue of their valid invocation of Article 44, their liability, if any, for unpaid rent, additional rent, or other charges and fees that otherwise allegedly would have been due should be cut off as of September 30, 2020, the date they vacated the Leased Premises.

Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011). In reviewing such a motion, “the allegations set forth in the answer must be viewed in the light most favorable to the defendant.” Granite State Ins. Co. v Transatlantic Reinsurance Co., supra at 481; see 182 Fifth Avenue LLC v Design Development Concepts, Inc., 300 AD2d 198 (1st Dept. 2002).

IV. DISCUSSION

A. Plaintiff’s Breach of Contract Claims and Defendants’ First Counterclaim

The plaintiff seeks summary judgment finding the defendants liable for breach of the Leases based on their failure to pay all rent due thereunder. The defendants oppose the motion and cross-move for summary judgment on their first counterclaim, which seeks a declaratory judgment stating that they validly terminated the Leases pursuant to Article 44 as of September 30, 2020 (the “Early Termination Date”), and therefore are not liable to the plaintiff for any rent, additional rent, or other charges or fees for the period subsequent to that date. That is, the defendants seek a declaration that their non-payment of rent subsequent to the Early Termination Date did not breach the Leases. This is effectively just an opposition to the plaintiff’s breach of contract claims, at least insofar as those claims are premised on the defendants’ non-payment of rent subsequent to the Early Termination Date. Accordingly, though the request for declaratory relief is procedurally improper, the Court deems the defendants’ cross-motion as one seeking partial summary judgment dismissing the plaintiff’s breach of contract claims with respect to the period subsequent to the Early Termination Date. So construed, and for the reasons that follow, the plaintiff’s motion with respect to its breach of contract claims is granted in part and denied in part, and the defendants’ cross-motion is granted.

- a. Article 44 Entitled the Defendants to Terminate the Leases in Response to COVID-19 Shutdown Orders

Under Article 44 of the Leases, the defendants had the contractual right to terminate the Leases on at least ninety days' notice "[i]f at any time" they were "advised by any applicable governmental authority" that they could not "use the [Leased] Premises for the operation of [their] lab[.]" Governor Cuomo's Executive Order 202.8, and the subsequent extensions thereof, mandated all non-essential businesses to cease all in-person operations. This mandate encompassed the entirety of the defendants' business operations at the Leased Premises, including the operation of their laboratory therein. Accordingly, the defendants were within their rights to invoke Article 44's early termination provision in response to Executive Order 202.8. The plaintiff's arguments to the contrary are unavailing.

The plaintiff argues that the defendants' early termination rights under Article 44 were limited to governmental restrictions that were permanent in nature, and that either specifically targeted the defendants themselves or singled out laboratory uses for restriction, as opposed to a more general use restriction that just happened to encompass the defendants' use of the Leased Premises for their lab. However, none of the plaintiff's proposed limitations on the scope of the defendants' early termination rights actually appear in the text of Article 44.

"[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.'" MHR Capital Partners LP v. Presstek, Inc., 12 N.Y.3d 640, 645 (2009), quoting Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002). This rule has special import "in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled businesspeople negotiating at arm's length." Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d

470, 475 (2004) (internal quotation marks omitted). “In such circumstances, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.” *Id.* (internal quotation marks omitted). “Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.” *Id.* (internal quotation marks omitted).

Here, the parties are sophisticated entities that negotiated the Leases at arm’s length. Moreover, Article 44 is clear and unambiguous, and contains no term or condition that limits the application of the early termination provision to permanent restrictions or prohibitions that specifically single out either the defendants themselves or their use of the lab at the Leased Premises. See Hylan Ross, LLC v. 2582 Hylan Boulevard Fitness Group, LLC, 206 A.D.3d 893, 895 (2d Dept. 2022) (holding that the landlord plaintiff’s “proffered limitation of ‘Approvals’ to only those necessary to commence construction improperly adds a term and distorts the meaning of the Approvals provision”). To the contrary, Article 44 is broadly drafted to allow the defendants to terminate the Leases “at any time” should “any applicable governmental authority” impose restrictions that result in the defendants being unable to “use the Premises for the operation of [their] lab[.]” The Court may not, under the guise of interpreting the Leases, add terms to the parties’ contracts nor distort their plain meaning.

The plaintiff’s additional argument, that the right to early termination under Article 44 could be triggered only by governmental orders expressly related to zoning, is similarly without merit. The argument hinges on a single reference to zoning in a separate provision of Article 44, wherein “Landlord represents that the zoning for the Building permits Tenant’s use.” Based on this single line of text, drawn from an unrelated provision of Article 44, the plaintiff asks the

Court to interpret every instance of the term “use” in Article 44 as referring exclusively to compliant zoning uses as defined in the New York City Zoning Resolution. Such an interpretation, however, is at odds with the plain meaning of the early termination provision, which not only makes no reference to zoning, but affirmatively refers to use restrictions imposed by “any applicable governmental authority,” suggesting that the scope of the provision encompasses restrictions emanating from *any* relevant governmental source, and not solely from the zoning code.

Moreover, as the defendants rightly point out, adopting the plaintiff’s zoning interpretation would produce unreasonable results. For example, the plaintiff’s proposed zoning interpretation would preclude the defendants from terminating the Leases even in response to permanent restrictions that specifically targeted their use of the Leased Premises for the operation of their lab, so long as said restrictions did not relate to zoning. See 1523 Real Est., Inc. v. E. Atl. Properties, LLC, 901 N.Y.S.2d 901, 2009 WL 2340668, at *12 (Sup. Ct. Kings Cty. 2009) (“[A] construction of a contract which produces unreasonable results should be avoided, if possible, and . . . a more reasonable construction should be sought.”) quoting Hsieh v. Pudge Corp., 122 A.D.2d 198, 199 (2d Dept. 1986). Such a cramped construction is plainly at odds with Article 44’s broad language and any reasonable understanding of the parties’ intent.

Nor are any of the plaintiff’s proposed limitations on the scope of the early termination provision necessary to reconcile Article 44 with the other provisions of the Leases cited by the plaintiff, specifically Article 6, Article 27, and Article 66. Articles 6 and 66 broadly require the defendants to shoulder the cost of complying with all applicable laws, orders, rules and regulations affecting the Leased Premises and arising from the defendants’ particular use thereof, while Article 27 states that the defendants’ obligation to pay rent and otherwise perform under

the Leases shall not be affected or excused because of the plaintiff's inability to fulfill its own contractual obligations. Relying on Articles 6 and 66 in particular, the plaintiff appears to argue that the early termination provision of Article 44 must be understood as limited to permanent prohibitions on the defendants' use of the Leased Premises, because it would otherwise allow the defendants to circumvent their obligations under Articles 6 and 66 by simply terminating the Leases rather than pay any compliance costs necessary to continue their previous use of the Leased Premises. This tortured reading of the relevant provisions of the Leases is meritless, as Articles 6 and 66 relate to compliance costs associated with government-imposed conditions to operation, whereas Article 44 is triggered by non-conditional use restrictions.

b. Defendants Did Not Operate an Essential Business

Similarly meritless is the plaintiff's argument that, even if Executive Order 202.8 fell within the scope of Article 44, the defendants were nevertheless not entitled to exercise their early termination rights because theirs was actually an essential business exempt from the requirement to cease all in-person operations. The plaintiff's contention that the defendants' operations were encompassed by the phrase "essential health care operations including research and laboratory services" in a guidance document issued by the Empire State Development Corporation is unconvincing. Indeed, the argument is belied by a cursory review of the other examples of "health care operations" listed in the cited guidance—e.g., hospitals, health care clinics, doctors' offices, medical supply providers, chiropractic services—which make clear that the category of "essential health care operations" referred to businesses in the medical care industry, not to businesses, such as the defendants', selling hair and other personal care products.

Likewise, the plaintiff's assertion, relying on the same guidance document, that the defendants' operations constituted "essential manufacturing" of "chemicals" and "sanitary

products including personal care products regulated by the Food and Drug Administration” is unavailing. The defendants have submitted evidence in the form of an affidavit by Gary Grey (the “Grey Affidavit”), the President of Spartan Brands and principal of Lifelab, stating that no manufacturing of any of the defendants’ products was performed at the Leased Premises. The plaintiff proffers no countervailing evidence demonstrating that the defendants engaged in any manufacturing, “essential” or otherwise, at the Leased Premises.

The plaintiff attempts to evade this evidentiary gap by arguing that, even if all manufacturing was done elsewhere, the research and laboratory work performed at the Leased Premises was integral to the production of the defendants’ products, including the production of hand soap and other personal care products for distribution to essential pharmacies and retailers. However, the Grey Affidavit makes plain that the research and laboratory work done at the Leased Premises was to support the development of new product lines and was thus not essential to the continued manufacturing of the defendants’ existing products.

The plaintiff also argues that, even if their operations at the Leased Premises did not constitute an essential business, the defendants still could not avail themselves of their early termination rights under Article 44 because, despite the prohibition on in-person business operations, the defendants’ chemist, Shawn Meng (“Meng”), allegedly continued to use the laboratory in the Leased Premises on a regular basis after Executive Order 202.8 was issued, and up to the defendants’ vacating of the Leased Premises on September 30, 2020. However, the plaintiff’s contention in this regard severely stretches the reasonable meaning of the testimony on which it is based, and, in any event, the defendants point to other evidence in the record that tends to show they did not continue their in-person operations, and that Meng, in particular, was working from home during the relevant period, as required by the Governor’s shutdown order.

In sum, the defendants validly exercised their rights under Article 44 to terminate the Leases in response to Executive Order 202.8, effective as of their vacating of the Leased Premises on September 30, 2020. Accordingly, the plaintiff's motion for summary judgment on its breach of contract claims is denied insofar as it seeks to recover unpaid rent and associated costs and fees for the period subsequent to September 30, 2020; and the defendants' cross-motion for summary judgment dismissing the breach of contract claims with respect to that period is granted.²

However, the plaintiff's motion for summary judgment on its breach of contract claims is granted insofar as it seeks to hold the defendants liable for their failure to pay rent for the period from April 2020 through September 2020, as well as for their failure to reimburse the plaintiff for previously applied rent abatements. The defendants do not dispute either their contractual obligation to make these payments or their failure to do so. Instead, they argue that any obligation they may have to the plaintiff for unpaid and abated rent is more than offset by the damages they incurred as a result of the plaintiff's alleged conduct as set forth in the second and third counterclaims. The defendants thus do not raise a triable issue of fact with respect to their liability for unpaid and abated rent prior to September 30, 2020, but merely contend that their damages on the second and third counterclaims will ultimately outweigh any recovery the

² The parties' motions were previously denied as untimely by Order dated November 9, 2022. The plaintiff moved for leave to reargue. By Order dated December 19, 2022, the Court deemed the plaintiff's motion as one seeking leave to file a late summary judgment motion and granted the motion on that basis, noting, in doing so, that the plaintiff's motion appeared to seek relief on behalf of all parties. Accordingly, contrary to the plaintiff's contention, the defendants' cross-motion for partial summary judgment is not untimely, as it was expressly restored to the calendar and submitted for decision pursuant to the Court's December 19, 2022 Order. Moreover, it is well-established that an untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made concerning the same issues. See Kershaw v. Hosp. for Special Surgery, 114 A.D.3d 75, 87 (1st Dept. 2013).

plaintiff may have against them for breach of contract. Accordingly, the plaintiff is entitled to summary judgment with respect to the defendants' liability for unpaid rent and unreimbursed rent abatements prior to September 30, 2020.

B. Defendants' Second and Third Counterclaims and Affirmative Defenses

The plaintiff's motion is denied insofar as it seeks the dismissal of the defendants' second counterclaim. The second counterclaim asserts that the plaintiff engaged in a series of vindictive actions following receipt of the defendants' Termination Notices, and that such actions constituted violations of the New York City commercial tenant harassment law embodied in New York City Administrative Code § 22-902, for which the plaintiff should be liable for damages. The crux of the plaintiff's argument for dismissal of this counterclaim is that none of its purported acts of harassment actually caused the defendants to vacate the Leased Premises or surrender or waive any of their rights under the Leases. However, this argument misstates the standard applicable to the defendants' claim.

To state a claim of commercial tenant harassment under § 22-902, the defendants need not allege that they actually vacated the Leased Premises or waived their contractual rights because of the plaintiff's purported harassment. Rather, they need only allege that the plaintiff's alleged conduct "would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease." See NYC Admin. Code § 22-902(a); see also Westbury Flats, LLC v. Backer, 68 Misc. 3d 1219(A) (N.Y. Civ. Ct. 2020) ("Where lessor engages in any repeated or enduring acts or omissions that substantially interfere with the operation of a . . . commercial tenant's business, as in failure to repair, statutory protection is provided."). The defendants contend that the conduct they allege could reasonably be construed as an effort by the plaintiff to cause them to waive and abandon their right to terminate the

Leases pursuant to Article 44, lest they continue to suffer the withholding of various Building services. These allegations, assuming their truth, are sufficient to state a claim for commercial tenant harassment under § 22-902.

The plaintiff's motion is likewise denied insofar as it seeks the dismissal of the defendants' third counterclaim. The third counterclaim seeks damages for the plaintiff's undisputed failure to perform certain improvements and repairs at the Leased Premises specifically required of it under the Leases. The plaintiff argues that this counterclaim should be dismissed because the evidence demonstrates that the defendants never responded to emails seeking approvals of materials and finishes necessary to commence the relevant work. However, the last message in the email thread on which the plaintiff relies was sent by one of the defendants' employees and posed questions to the plaintiff's managing agent regarding the finishes in question. The plaintiff presents no evidence that it responded to these questions or otherwise diligently followed up with the defendants to secure the necessary approvals. Accordingly, there are triable issues of fact that preclude summary judgment with respect to the defendants' third counterclaim.

The plaintiff's motion is also denied insofar as it seeks the dismissal of the defendants' first and third affirmative defenses.³ The first affirmative defense asserts that by virtue of the plaintiff's acts and omissions, as set forth in the second and third counterclaims, the plaintiff is not entitled to any monetary recovery or other relief in this action. The third affirmative defense, echoing the first counterclaim, asserts the propriety of the defendants' termination of the Leases pursuant to Article 44 thereof, and the defendants' resulting lack of liability for any rent,

³ The defendants have withdrawn their second affirmative defense.

additional rent or other charges for any period subsequent to their vacating of the Leased Premises. For the reasons already discussed above with respect to the defendants' three counterclaims, the plaintiff's motion seeking the dismissal of these affirmative defenses is denied.

However, the plaintiff's motion is granted insofar as it seeks dismissal of the defendants' fourth affirmative defense, which asserts the plaintiff is not entitled to any of the relief it seeks by virtue of its unclean hands. "[U]nclean hands is an equitable defense that is unavailable in an action exclusively for damages." Manshion Joho Ctr. Co., Ltd. v. Manshion Joho Ctr., Inc., 24 A.D.3d 189, 190 (1st Dept. 2005).

Finally, the plaintiff's motion is denied without prejudice to renewal insofar as it seeks partial summary judgment on the third and fourth causes of action with respect to the defendants' liability for contractual attorneys' fees. Article 71 of the Leases provides that, in any action to enforce the Leases or to recover damages thereunder, "the prevailing party shall be entitled to receive from the losing party . . . such amount as the court may adjudge to be reasonable as attorneys' fees" Here, there has not yet been a determination as to who is the prevailing party. Indeed, no party has addressed the issue on these motions.

V. CONCLUSION

Accordingly, it is,

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for partial summary judgment is granted as to the first and second causes of action for breach of contract insofar as those causes of action concern the defendants' liability for nonpayment of rent, additional rent, or other charges during the period preceding September 30, 2020, and to the extent that the defendants' fourth affirmative defense is dismissed, and is otherwise denied; and it is further,

ORDERED that the defendants' cross-motion pursuant to CPLR 3212 for summary judgment on the first counterclaim is deemed a motion for partial summary judgment dismissing the plaintiff's first and second causes of action insofar as those causes of action seek to hold the defendants liable for breach of contract based on their nonpayment of rent, additional rent, or other charges during any period subsequent to September 30, 2020, and, so construed, the motion is granted, and it is further

ORDERED that counsel shall appear in Part 40 for jury selection on October 25, 2023, as previously scheduled.

This constitutes the Decision and Order of the Court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

6/6/2023
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE