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| <b>Tessler Devs. LLC v Gammon Enters., LLC</b>                                                                                                                                                                                 |
| 2023 NY Slip Op 32027(U)                                                                                                                                                                                                       |
| June 17, 2023                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 151685/2021                                                                                                                                                                                           |
| Judge: Debra A. James                                                                                                                                                                                                          |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

*Justice*

-----X

TESSLER DEVELOPMENTS LLC,

Plaintiff,

- v -

GAMMON ENTERPRISES, LLC,

Defendant/Counterclaim Plaintiff,

-and-

YITZCHAK TESSLER,

Counterclaim Defendant.

INDEX NO. 151685/2021MOTION DATE 01/10/2023MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 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, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 65, 66, 67, 71

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent it seeks summary judgment in defendant's favor dismissing the first and second causes of action of plaintiff's complaint that seek declaratory judgments with respect to the subject matter of such causes of action, the motion of defendant is granted, and such causes of action of plaintiff's complaint are dismissed; and it is further

ORDERED that to the extent that it seeks summary judgment in defendant's favor dismissing the third cause of action for breach

of contract of plaintiff's complaint, the motion of defendant is denied; and it is further

ORDERED that to the extent of its first counterclaim for liquidated damages, the motion of counterclaimant (Gammon Enterprises, LLC) for summary judgment against counterclaim defendant Yitzchak Tessler is GRANTED; and it is further

ORDERED and ADJUDGED that counterclaimant's motion is granted and the issue of hold-over rent, or liquidated damages, for the Premises from May 1, 2020 to December 31, 2020 and reasonable attorneys' fees and legal expenses incurred by counterclaimant to be assessed against counterclaim defendant Yitzchak Tessler is referred for determination pursuant CPLR § 4317(b) to a Special Referee and that within sixty (60) days from the date of this Order the counterclaimant shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee Clerk (Room 119M, 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) to arrange a date for a reference to determine pursuant to CPLR 4217(b); and it is further

ORDERED and ADJUDGED that pursuant to CPLR § 4319 the Clerk is directed to enter judgment in favor of counterclaimant Gammon Enterprises, Inc. and against counterclaim defendant Yitzchak Tessler, in accordance with the report of the

aforementioned Special Referee without any further without any further application; and it is further

ORDERED that the third cause of action for breach of contract of plaintiff's complaint is severed, and shall continue; and it is further

ORDERED that counsel shall post on NYSCEF a proposed preliminary discovery conference order or competing preliminary discovery conference orders at least two days before August 22, 2023, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

#### DECISION

Plaintiff tenant's causes of action for declaratory judgment fail as plaintiff has an adequate, alternative remedy in another form of action, i.e., an action for breach of contract, which is its third cause of action. See Ithilien Realty Corp v 180 Ludlow Development LLC, 140 AD3d 621 (1<sup>st</sup> Dept 2016).

Upon the expiration of the Lease on April 30, 2020, there is no dispute that plaintiff tenant failed to tender rent from May 1, 2020 through September 30, 2022. In addition, by rent statement captioned "Transaction activity through 07/01/2020", defendant landlord assessed rent at the rate stated under the Fifth Amendment to the Lease. Nonetheless, no month-to-month tenancy was created, as defendant landlord never accepted rent

from plaintiff, as set forth in Real Property Law § 232-c. Thus, under the Lease, defendant landlord is entitled to holdover rent for the Premises. Moreover, this court determines that contrary to plaintiff's argument, the liquidated damages clause, i.e., ¶ 63(b), of the Lease dated September 1, 2010 (the Lease), which assesses hold-over rent at the rate of "two times the average rent and additional rent which was payable per month under the Lease", is enforceable. See Seymour v Hovnanian, 211 AD3d 549, 554 (1<sup>st</sup> Dept 2022).

On the question of whether plaintiff tenant surrendered possession on September 30, 2022, the court need not consider defendant landlord's representations with respect to what is depicted on the videotapes. Unlike in University Sq San Antonio, Tx LLC v Mega Furniture Dezavala, LLC, 198 AD3d 1284, 1285 (4<sup>th</sup> Dept 2021), counterclaim defendant herein fails to assert facts that tend to show that "the parties to the lease both did some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem [their] lease terminated". Certainly, as to the defendant landlord, plaintiff raises no issue of fact with respect to the defendant landlord's intent in that regard. Thus, defendant landlord is entitled to use and occupancy through December 31, 2020.

With respect to plaintiff's breach of contract claim, although the Lease provides for no diminution of rent for the

breaches plaintiff asserts, landlord may be liable for damages arising from its breach of the lease. There are questions of fact with respect to such alleged breaches by defendant. For example, plaintiff asserts that there was a failure of electrical capacity from 2018, rendering the Heating Ventilation and Air Conditioning (HVAC) system inoperable. Lease ¶ 30 provides in pertinent part

“Landlord reserves the right to stop service of the heating, elevator, plumbing and electric systems, when necessary, by reason of accident, or emergency, or for repairs, alterations, replacements or improvements. . . . And Landlord shall have no responsibility or liability for failure to supply heat, elevator, plumbing and electric service, during said period or when prevented from so doing by strikes, accidents or any other cause beyond Landlord’s control”.

This court concurs with plaintiff that defendant landlord does not contend that it stopped services under the circumstances set forth in Lease ¶ 30. Thus, as argued by plaintiff, defendant can therefore be cast in damages for breach of contract. Plaintiff’s affidavit presents prima facie evidence that raise issues of fact as to whether landlord breached the Lease with respect to its obligations to provide HVAC and electrical services. See VBH Luxury, Inc v 940 Madison Associates, LLC, 100 AD3d 563 (1<sup>st</sup> Dept 2012).

Plaintiff’s contentions concerning its inability to use the Premises during the global pandemic as a defense to payment of

rent under the Lease are devoid of merit. See Gap, Inc v 170 Broadway Retail Owner, LLC, 195 AD3d 575 (1<sup>st</sup> Dept 2021).

*Debra A. James*

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6/17/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

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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