# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **14**

***Justice***

----------X

40 BROAD PLGT LLC,

Plaintiff,

- v -

JAY UNITED ELECTRICAL CONTRACTING CORP., JERRY GENE SARABELLA

Defendant.

----------X

**INDEX NO.** 651331/2022

**MOTION DATE** 06/07/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 36, 37, 38, 39, 40, 41, 42, 43, 44

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

Plaintiff's motion for summary judgment and to dismiss defendants' affirmative defenses is granted in part.

**Background**

In this commercial landlord tenant case, plaintiff seeks to recover against Jay United Electrical Contracting Corp. (the "Tenant") and against defendant Jerry Gene Sarabella (the "Guarantor') pursuant to a five-year lease that expired on January 31, 2022. Plaintiff asserts that the Tenant failed to pay the full rent in June 2020 and then stopped paying the rent starting in June 2021 until the end of the lease. It contends that the Tenant owes rent, utilities, real estate taxes and damages under the terms of the lease and that the Guarantor is liable for this amount as well. Plaintiff also seeks reasonable legal fees under this agreement.

It argues that the Guarantor waived his right to assert affirmative defenses in the guaranty and that the defendants' affirmative defenses failed to state a cognizable defense to plaintiff's claims.

In opposition, defendants contend that there are issues of fact that compel the Court to deny the instant motion. They argue that plaintiff breached the lease by not providing heat in the winter or air conditioning in the summer as required under the lease. Defendants maintain that there should be a rent abatement for the months of June, July, and August of 2022. They also insist that the plaintiff's failure to provide heat or air conditioning interfered with their right to quiet enjoyment of the leased premises. Defendants assert that some of their 12 affirmative defenses should remain. They also claim that discovery is necessary and that the instant motion is premature.

In reply, plaintiff maintains that it met its prima facie burden for summary judgment and that defendants did not raise a material issue of fact in opposition. It insists that vague claims about heating and cooling does not constitute a valid defense to paying the rent and the real estate taxes.

**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]).

The Court grants the motion with respect to plaintiff's claim for unpaid rent and real estate taxes. The affidavit of the Guarantor (who is also the principal of the Tenant) did not raise a material issue of fact. The Guarantor only offered vague claims about the lack of heat and air conditioning. He did not attach anything to support these claims, such as contemporaneous communications with the plaintiff, to substantiate these assertions. Without some specific information, or records of complaints made at the time, the defendants fail to raise an issue of fact to defeat summary judgment.

Moreover, the lease contains a provision that states:

> "Landlord shall have no obligation to provide to Tenant or the Premises any services except as specifically set forth in this lease. Landlord does not warrant that any Building system or service to be provided by Landlord, or any other systems or services which Landlord may provide (a) shall be adequate for Tenant's particular purposes or (b) shall be free from interruption or reduction. Building systems and services, including access, may be interrupted or reduced by reason of Laws, repairs or changes which are, in Landlord's judgment, necessary or desirable, or Unavoidable Events, in which event such interruption or reduction shall not,

> unless otherwise provided in this lease (i) constitute an actual or constructive eviction, or a disturbance of Tenant's use of the Premises, (ii) entitle Tenant to any compensation or abatement of the Rent, (iii) relieve Tenant from any obligation under this lease, or (iv) impose any obligation or liability on Landlord" (NYSCEF Doc. No. 20, § 9.8).

This provision, which barrs offsets, compels the Court to reject defendants' claim that it is entitled to an offset (*Carlyle, LLC v Beekman Garage LLC*, 133 AD3d 510, 511, 19 NYS3d 520 [1st Dept 2015] [concluding that a lease provisions barring offsets compelled the dismissal of an affirmative defense that the landlord breached the lease]). In other words, even if the defendants raised a material issue of fact about the lack of heating and air conditioning (which they did not), they are still not entitled to rely on it as a defense to not paying any rent or real estate taxes whatsoever for many, many months.

The Court also observes that there are two remaining issues. This includes the $1,500 charge for a power pole disconnection and a $5,500 charge for furniture and debris removal. Defendants insist that the electric pole was installed by plaintiff or the prior tenant. They also insist that they leased the premises as is and should not be liable for furniture that was in the premises at the time the lease was commenced.

The Court finds that plaintiff is entitled to recover the $5,500 for the furniture removal. The lease provides that "On the Expiration Date (a) Tenant (and all other occupants) shall vacate and surrender the Premises, broom clean and in good order and condition, except for ordinary wear and tear and damage for which Tenant is not responsible under this lease, and otherwise as may be required by this lease, and (b) Tenant shall remove all of Tenant's Property and any Tenant's Work required to be removed pursuant to this lease" (NYSCEF Doc. No. 20, § 24.1).

The fact is that it is undisputed that there was furniture left in the premises (plaintiff also submitted a photo of the furniture [NYSCEF Doc. No. 44]) and plaintiff attached an email from

the previous tenant in which it observed that the only items left in the premises were items the Tenant wanted (NYSCEF Doc. No. 32). And the Tenant did not raise a material issue of fact that it was not obligated to remove it. The Tenant did not submit anything to show it complained to plaintiff about the furniture left by the previous tenant or demanded that it be removed (and the plaintiff failed to comply with this request). Even if defendants (as it claims) merely inherited the furniture, asserting in conclusory fashion that furniture left in their space for five years without complaint is not their property strains credulity.

However, the Court is unable to award plaintiff $1,500 it seeks for the electric pole removal as there is simply not enough evidence about who installed the pole. Plaintiff asserted in its memorandum of law in support that "Upon information and belief, while Jay United occupied the Premises, it installed electric power poles" (NYSCEF Doc. No. 15). Defendants insist that it was either plaintiff or the previous tenant who installed it. Unlike the furniture (which presents a clear item that the Tenant should have removed), it is unclear from these papers who installed the electrical power pole, nor is it clear why plaintiff needed to disconnect it.

The Court observes that none of defendants' affirmative defenses state cognizable defenses. The claims for failure to state a cause of action (first), failure to demand sums properly due (fourth), that defendants did not proximately cause plaintiff any damages (fifth), that plaintiff unilaterally changed the terms of the agreement (sixth), the doctrines of waiver, laches, and estoppel (tenth) and that plaintiff made it impossible for defendants to perform (twelfth) are all without merit. Plaintiff established that the Tenant signed a lease and the Tenant stopped paying rent.

The second and third affirmative defenses are dismissed as utterly without merit. Defendants claimed that the Guarantor is not liable and that the Guarantor never signed the

guaranty. Wisely, defendants appear to have abandoned these claims in the instant motion. The seventh affirmative defense—that defendants acted lawfully and in good faith—is not a defense to not paying the rent.

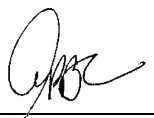
Similarly, the remaining affirmative defenses for an abatement (eighth), unclean hands (ninth) and that plaintiff cannot recover because it consented to the conduct (eleventh) are barred by the lease, which prohibits an offset. Plus, defendants did not meet their burden to show that plaintiff consented to defendants not paying the rent.

The Court therefore grants the motion to the extent that plaintiff is entitled to recover $74,670.02 (the amount sought minus the pole disconnection). There shall be a trial on damages for the pole issue and to assess the amount of plaintiff's reasonable legal fees. The Court prefers to issue only one judgment per case so the amount cited above shall be included in the final judgment.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted to the extent that defendants' affirmative defenses are severed and dismissed, plaintiff is entitled to recover $74,670.02 against defendants jointly and severally; and it is further

ORDERED that there shall be a trial on damages with respect to the $1,500 charge for the pole disconnection and the reasonable legal fees to be awarded to plaintiff. A note of issue shall be filed on or before July 20, 2023.



6/28/2023
DATE

ARLENE P. BLUTH, J.S.C.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |