

**841-853 Fee Owner, LLC v Space Initiatives LLC**

2023 NY Slip Op 32288(U)

June 27, 2023

Supreme Court, New York County

Docket Number: Index No. 650542/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

*Justice*

-----X INDEX NO. 650542/2021

841-853 FEE OWNER, LLC,

Plaintiff,

MOTION SEQ. NO. 002

- v -

SPACE INITIATIVES LLC and  
MARK CHRISTIANSEN,

Defendants.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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

were read on this motion to/for

DISMISS

The facts of this case are set forth in detail in the decision and order of this court dated September 17, 2021, which, among other things, denied defendants' pre-answer motion to dismiss the complaint (NYSCEF Doc. No. 42, *September 2021 decision and order*). Following said decision, defendants interposed an answer asserting eighteen (18) affirmative defenses (NYSCEF Doc. No. 45, *answer*).

Plaintiff now moves, pursuant to CPLR 3211 and 3212, for an order dismissing the affirmative defenses, on the grounds that, *inter alia*, they state mere conclusions of law with no factual support or have already been rejected by this court's September 17, 2021 decision and order; directing the clerk to enter judgment against defendants, jointly and severally, for the outstanding rent and additional rent through January 26, 2021, in the sum of at least \$281,710.74, together with interest thereon; entering a judgment against defendant Space Initiatives LLC ("Space Initiatives") in the amount of at least \$95,610.79, together with interest thereon, for the outstanding rent and additional rent due through April 30, 2021; and setting this matter down for a hearing to determine the amount of attorney's fees and costs (NYSCEF Doc. No. 50, *notice of motion*).

In support of said motion, plaintiff submits, *inter alia*, the affidavit of Donna Vocaturo, an agent for Jeffrey Management Corp., the manager of plaintiff, who attests that defendants failed to pay rent and additional rent under the lease. Vocaturo further claims that defendant Mark Christiansen, who guaranteed to landlord the full and timely payment of tenant's obligations under the lease, is also liable for the outstanding debt owed (NYSCEF Doc. No. 52, *Vocaturo's affidavit*). Annexed to her affidavit, Vocaturo proffers, among other things, a copy of the subject lease (NYSCEF Doc. Nos. 54-55, *lease & lease amendment*); tax statements for 2019-2020, 2020-2021 (NYSCEF Doc. No. 56); monthly rent and electric statements (NYSCEF Doc. No. 57); the guaranty (NYSCEF Doc. No. 58); and a ledger representing the amounts owed (NYSCEF Doc. No. 67).

In opposition to the motion, defendant Mark Christensen (“Christensen”), a member of Space Initiatives, submits an affidavit wherein he affirms that, as a result of the COVID-19 pandemic and the shut down orders issued by then-governor Cuomo, the subject space was required to cease operations in March 2020, and subtenants of Space Initiatives were forced to cease meeting in-person with patients and could no longer use the premises for the intended purposes. The subtenants failed to renew, terminated, or simply refused to pay under the subleases. Furthermore, Christensen maintains that there are questions of fact with respect to the amounts owed. He also argues that “the additional rents are based upon self-serving documents created by [o]wner, without any supporting documentation from any primary source.” Christensen maintains that some payments were not included in the calculations and the security deposit was clearly not applied to the amounts claimed owed. He also claims that “[o]ne of the electric charges dated December 1, 2020, is clearly marked in red “INCORRECT/REMOVED” though there is no indication that the amount was in fact removed, corrected or deducted.” (NYSCEF Doc. No. 76, *Christensen’s affidavit*).

In their memorandum of law, defendants argue that the motion is procedurally defective because the application lacks a separate statement of uncontested facts as required by 22 NYCRR 202.8-g. Defendants also argue that the motion is premature insofar as it was made before the completion of discovery in this action. Defendants also claim that issues of fact preclude summary judgment, arguing that discovery is necessary to ascertain the amounts allegedly owed in rent and additional rent from March 2020 through April 30, 2021. Defendants also contend that “[o]wner has refused to disclose any set-offs, insurance payments, grants, small business loan or other relief granted by the Federal, State or City governments in response to the coronavirus pandemic which would serve to offset the amounts claimed” (NYSCEF Doc. No. 75 at 7). They also maintain that this court, in its prior decision, denied dismissal predicated upon issues of fact. Addressing the affirmative defenses, defendants argue that, with respect to its affirmative defense regarding notice, plaintiff failed to serve the proper notice required under RPAPL § 711. Additionally, defendants argue that plaintiff failed to provide notice under COVID-19 Emergency Protect Our Small Businesses Act of 2021. They further assert that the defects in the prerequisite notice provide a foundation for the following affirmative defenses: first (state a claim); three (owner’s breach and failure to perform); four (owner’s misconduct); five (lack of damages); six (documentary evidence); eight (lack particularity in pleadings); nine (set-off); ten (standing); twelve (notice); thirteen and fourteen (jurisdictional defects); and eighteen (failure to provide notice and hardship declaration).

Defendants further argue that plaintiff misapplies this court’s September 2021 order in support of its claim that this court has already determined defenses sounding in *force majeure*, doctrine of impossibility and NYC Admin Code § 22-1005. Defendants argue that denial of the motion to dismiss does not equate preclusion of the issues raised. They further assert that the order served to highlight discovery issues arising from the claims asserted. A defense for frustration of purpose and doctrine of impossibility lies, according to defendants, insofar as the defenses are facts specific to the parties and contracts at issue, particularly regarding the COVID-19 pandemic. They further argue that “[e]xpert testimony is required to address the conflicting guidelines and administrative opinions” as it relates to the applicability of the protection to guarantors found in NYC Administrative Code § 22-1005. (NYSCEF Doc. No. 75, *memorandum of law*).

In reply, plaintiff argues that contrary to defendants' contention, the filing of a motion for summary judgment before the completion of discovery does not render the motion defective nor is the omission of the statement of material facts ground for denial of the same. According to plaintiff, defendants do not allege that they paid rent for any of the months claimed in the complaint; rather, their arguments in opposition are premised entirely on baseless arguments that landlord did not adequately support the rent due, ignoring the proof submitted, and "that [l]andlord may have taken out a government-backed loan (which has no bearing on [d]efendant's obligations to Landlord)." It further contends that this court's order did not identify issues of fact sufficient to preclude summary judgment. As for the argument based on the shut-down orders, plaintiff maintains that defendants fail to establish that tenant or the subtenants were required to shut down and, notwithstanding, inability to operate from the premises does not absolve defendants of their obligations to pay rent. The affirmative defenses, claims plaintiff, are blatantly conclusory, lacking in merit, or reliant on arguments previously rejected by this court in denying defendants' motion to dismiss. (NYSCEF Doc. No. 78, *memorandum in reply*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

Here, upon this court's review of plaintiff's proof, which includes, *inter alia*, the affidavit of Vocaturo; the subject lease agreement between the parties; the guaranty; and a ledger reflecting the total amount outstanding, this court finds that plaintiff has established its *prima facie* entitlement to summary judgment against defendants on its causes of action (See *Bd. of Managers of Ruppert Yorkville Towers Condo. v Hayden*, 169 AD3d 569 [1st Dep't 2019].)

Defendants' procedural arguments are insufficient to warrant denial of the motion. While this court notes that plaintiff failed to annex a statement of material facts to its application, plaintiff cured said defect by submitting one in reply and, in any event, said failure is not fatal to the instant application. (22 NYCRR § 202.8-g [a] ["Upon any motion for summary judgment . . . the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried"]; *Arnett v Sparta Commercial Servs., Inc.*, 2022 NY Slip Op 33784[U], \*\*4-5 [Sup Ct, NY County 2022].) Furthermore, the claim that the motion is procedurally defective on the ground that it was filed before the completion of discovery is rejected on this application (See *Wesco Ins. Co. v Rutgers Cas. Ins. Co.*, 202 AD3d 460, 460 [1st Dept 2022].) As to the substantive arguments raised, although defendants take issue with the ledger submitted by plaintiff, arguing that plaintiff fails to address errors in the accounting, to wit, an electric charge of \$810.50 that is labeled "INCORRECT/REMOVED", this argument is unavailing insofar as the ledger reflects that a credit was made to the account in the amount of \$810.50 on April 1, 2021, thereby rectifying the accounting error. Moreover, the

conclusory and non-specific arguments challenging the calculation of additional rent are also insufficient to raise a material issue of fact. (See *Royal Equities Operating, LLC v Rubin*, 154 AD3d 516, 517 [1st Dept 2017]; *Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept 2017]; *Ca 522 Fulton LLC. Sci.*, NYLJ, Dec. 15, 2021 at 17, col 2, [Sup Ct, NY County 2021].)

Additional arguments that the motion should be denied on the grounds that plaintiff has failed to disclose any set offs, insurance payments, grants, small business loans or other relief granted by the Federal, State or City governments are also rejected since the lease expressly provides that tenant's obligations under the lease are without set offs or deductions whatsoever (NYSCEF Doc. No. 54, *lease*). This court further notes that, to the extent defendants rely on the COVID-19 defenses to argue that issues of fact remain to warrant denial of the motion, these contentions are hereby rejected insofar as case law is clear that these defenses do not absolve defendants of their obligations under the lease (See *Gap, Inc. v 170 Broadway Retail Owner*, 195 AD3d 575 [1st Dept 2021]; *Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020]; *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561 [1st Dept 2021]; *N.Y. Park N. Salem Inc. v Vogrug LLC*, 2021 NY Slip Op 32395[U], \*6 [Sup Ct, NY County 2021, Love, J.].) Additionally, defendants have failed to establish, in opposition to the motion, that the guaranty law absolves Christiansen from liability or that the alleged defective notice prevents plaintiff from recovery under its breach of contract claim. Insofar as defendants have failed to raise an issue of fact sufficient to defeat plaintiff's motion for summary judgment and have failed to raise a viable defense, the motion for summary judgment is granted and the affirmative defenses are dismissed.

That branch of the motion seeking attorney's fees is also granted and shall be referred to a special referee to hear and determine. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

**ORDERED** that defendants' motion is granted; and it is further

**ORDERED** that the Clerk of the Court is hereby directed to enter judgment against defendants, jointly and severally, in the amount of \$281,710.74, with interest from January 26, 2021; and it is further

**ORDERED** that the Clerk of the Court shall enter judgment against Space Initiatives LLC in the amount of \$95,610.79, together with interest from January 26, 2021; and it is further

**ORDERED** that the matter shall be referred to a special referee who shall hear and determine the amount of attorney's fees; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NSYCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants, as well as, upon the Clerk of the Court, who shall enter judgment accordingly; and it is further

**ORDERED** that counsel for the plaintiff shall, within (30) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information

Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

**ORDERED** that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of this court.

June 27, 2023

  
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HON. VERNA L. SAUNDERS, JSC

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