

**37 W. 14th St. Assoc. LLC v Manhattan Mental  
Health Counseling LLC**

2023 NY Slip Op 32294(U)

June 30, 2023

Supreme Court, New York County

Docket Number: Index No. 651405/2021

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*

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INDEX NO. 651405/2021

37 W. 14TH ST. ASSOCIATES LLC,  
Plaintiff,

MOTION SEQ. NO. 001

- v -

**DECISION + ORDER ON  
MOTION**

MANHATTAN MENTAL HEALTH COUNSELING LLC,  
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for

**SUMMARY JUDGMENT**

Plaintiff, the owner and landlord of the premises located at 37-39 West 14<sup>th</sup> Street, New York, New York (“building” or “premises”), commenced this action by summons and complaint against defendant, its tenant, seeking outstanding rent and additional rent due pursuant to a lease agreement entered into between the parties in November 2017, for a term commencing on January 1, 2018 and expiring on December 31, 2027 (NYSCEF Doc. Nos. 1-2, *summons and complaint*).

Issue was joined in this action and defendant raised several affirmative defenses (NYSCEF Doc. No. 10, *answer*).

Plaintiff now moves, pursuant to CPLR 3212, for an order granting it summary judgment on liability on its claims and dismissing defendant’s affirmative defenses. In support of its motion, plaintiff submits, *inter alia*, the affidavit of Jack Cohen, president of M. Cohen Family GP Corp., sole member of M. Cohen Family Limited Partnership, which is a member of plaintiff, who affirms that defendant breached the lease agreement and owes \$52,552.46 in fixed rent and additional rent through March 2021. Cohen also avers that plaintiff is entitled to subsequently accruing rent and attorney’s fees. (NYSCEF Doc. No. 12, *Cohen affidavit*).

In opposition to the motion, defendant submits the affidavit of Steven Buchwald, the managing director of defendant, who contends that genuine issues of fact exist as to the amount of rent allegedly due under the relevant lease. Buchwald asserts that in March 2020, the COVID-19 pandemic prevented defendant — which provides a host of mental health counseling services in New York City — from using the premises in any meaningful way. To wit, he affirms that defendant could not accept prospective customers on site, resulting in a 40% decrease in customers. Furthermore, Buchwald maintains that contrary to plaintiff’s assertion, rent was paid for the months of January 2020 through May 2020 (NYSCEF Doc. No. 19, *Buchwald affidavit*). Defendant attaches bank records reflecting payments for the months of January 2020 through April 2020 (NYSCEF Doc. No. 21, *proof of payment*).

By attorney affirmation, defendant argues that the motion is premature insofar as discovery has not yet been conducted in this action. Defendant also argues that plaintiff fails to establish its *prima facie* entitlement to judgment because ¶ 9 of the lease excuses defendant from paying a portion of the rent amount allegedly due. Defendant further contends that triable issues of fact exist with respect to “(a) whether there were governmental restrictions on defendant’s use of the premises, (b) whether the impact of those restrictions rendered the premises partially or wholly unusable, and relatedly, (c) whether defendant’s non-payment of rent is partially or wholly excused by the casualty clause in the relevant lease, and (d) the amount of rent actually in dispute.” (NYSCEF Doc. No. 22, *Skrabanek affidavit*).

In reply, plaintiff argues that it has satisfied the applicable standard for summary judgment, that defendant’s pandemic related defenses are baseless, and that tenant’s breach of the lease is not disputed. With respect to tenant’s claim that plaintiff failed to credit rent paid for the months of January 2020 through April 2020, plaintiff refers to the “Open Item Statement” attached to the notice of default served upon defendant, which reflects that plaintiff only seeks unpaid additional rent for the January 2020 and unpaid electric for May 2020 and that all other payments were properly credited (NYSCEF Doc. No. 5, *notice of default*).

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, this court finds that plaintiff has established its entitlement to summary judgment on its claims insofar as it has established each of the elements of a breach of contract claim. “The elements of such a claim include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” (See *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] citing *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [1st Dept 2007].) Plaintiff has made such a showing: (1) the lease demonstrates the existence of a contract; (2) plaintiff performed under the lease by providing the premise for defendant’s occupancy; (3) the Notice of Default demonstrates defendant’s breach of the lease by failing to pay, and plaintiff’s demand thereof; and (4) the Open Item Statement submitted on the record demonstrate the resulting damages.

Plaintiff has also established its entitlement to attorney’s fees, insofar as the same is authorized under the lease under ¶¶ 19 and 69 of the lease (NYSCEF Doc. No. 4, *lease*).

Although the burden shifts to defendants to raise an issue of fact sufficient to warrant the denial of the motion, defendant has failed to meet this burden. With respect to its argument that the motion is premature, this court notes that “[a] grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence” and, on this record, defendant has failed to make a

showing “that facts essential to justify opposition to the motion may emerge upon further discovery.” (*Bailey v New York City Transit Auth.*, 270 AD2d 156, 157 [1<sup>st</sup> Dept 2000].)

Furthermore, upon review of the Open Item Statement reflecting the outstanding rent and additional rent plaintiff is seeking, the argument regarding a discrepancy in the amount sought is wholly without merit insofar as same does not include fixed rent for the months of January through May 2020.

Moreover, defendants’ argument that the COVID-19 pandemic and the casualty provision of the lease provide a basis to excuse its obligation to pay rent under the lease is rejected.

Paragraph 9(c) of the lease provides as follows:

“if the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, then the rent and other items of additional rent as hereinafter expressly provided shall be proportionately paid up to the time of the casualty and thenceforth shall cease until the date when the premises shall have been repaired and restored by Owner (or sooner reoccupied in part by Tenant then rent shall be apportioned as provided in subsection (b) above).” (NYSCEF Doc. No. 4, *lease*).

As held by the Appellate Division, First Department, this casualty provision does not contemplate loss of use due to a pandemic or resulting government lockdown. (See *Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577 [1st Dep’t 2021]). Moreover, the defenses raised herein, based on frustration of purpose and impossibility/impracticability, have already been rejected as defenses to the nonpayment of rent (see *88 Greenwich Owner LLC v 21 Rector St LLC*, \_\_\_ AD3d \_\_\_, \_\_\_, 2023 NY Slip Op 02960, \*\*1 [1st Dep’t 2023]; *Fives 160th, LLC v Zhao*, 204 AD3d 439, 439-440 [1st Dept 2022].) Based on the foregoing, summary judgment is granted in favor of plaintiff as against defendant on its claims, and the affirmative defenses are hereby dismissed. Accordingly, it is hereby

**ORDERED** that that branch of plaintiff’s motion seeking summary judgment against defendant on its first cause of action, in the amount of \$52,552.46, representing rent and additional rent through March 2021, is granted, and the Clerk shall enter judgment accordingly; and it is further

**ORDERED** that that branch of plaintiff’s motion seeking summary judgment against defendant on its second cause of action for rent and additional rent due and owing under the lease through and including the date of judgment, is granted, and shall be determined by a special referee; and it is further

**ORDERED** that that branch of the motion seeking summary judgment against defendant on its third cause of action for attorney’s fees, is granted, and is hereby referred to a special referee to hear and determine; and it is further

**ORDERED** that defendant’s affirmative defenses are dismissed; and it is further

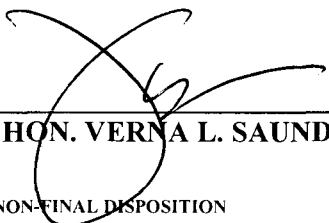
**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant, the Clerk of the Court, and the Special Referee; and it is further

**ORDERED** that counsel for the plaintiff shall, within thirty (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 30, 2023

  
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**HON. VERNA L. SAUNDERS, JSC**

<b>CHECK ONE:</b>	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
<b>APPLICATION:</b>	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
<b>CHECK IF APPROPRIATE:</b>	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input checked="" type="checkbox"/> REFERENCE