

Flatiron 30 LLC v Continuum Co. LLC
2023 NY Slip Op 32298(U)
July 5, 2023
Supreme Court, New York County
Docket Number: Index No. 653355/2021
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK P. NERVO PART 04

Justice

-----X

FLATIRON 30 LLC

Plaintiff,

- v -

THE CONTINUUM COMPANY LLC,

Defendant.

-----X

INDEX NO. 653355/2021

MOTION DATE 01/06/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

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

This matter was recently administratively transferred to Part IV.

Plaintiff landlord moves for summary judgment on its claim for rent and additional rent, pursuant to the parties' commercial lease agreement. Plaintiff further seeks partial summary judgment on its claims for attorney's fees, following either a hearing or paper submissions as to the amount of same. Defendant opposes contending, inter alia, that the COVID-19 pandemic and concomitant non-essential business shutdown rendered performance under the lease impossible, that landlord "committed numerous wrongful acts that

constitute commercial tenant harassment,” and that defendant was constructively evicted.

The standard by which the Court evaluates the instant motion is well-established. On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer Lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact” (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Here, there is no dispute that the parties entered into a commercial lease agreement and that, beginning in March 2021, defendant failed to make rent and additional rent payments pursuant to that agreement. Consequently, plaintiff has met its prima facie burden evincing its entitlement to summary judgment on its claims of rent and additional rent.

Turning to defendant's affirmative defenses and opposition to this motion, same fail to raise a triable issue of fact or otherwise rebut, as a matter of law, plaintiff's entitlement to summary judgment. To the extent that defendant contends the COVID-19 pandemic rendered its performance under the lease impossible or otherwise represents a casualty necessitating a rent abatement, the Appellate Division, First Department has repeatedly rejected these arguments (*see e.g. Gap, Inc., v. 170 Broadway Retail Owner, LLC*, 195 AD3d 575 [1st Dept 2021]; *Gap, Inc. v. 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503 [1st Dept 2022]; *Bremen House, Inc. v. LoBosco*, 214 AD3d 557 [1st Dept 2023]). Neither does the COVID-19 pandemic, or shutdowns related to same, frustrate the purpose of a commercial lease (*id.*; *see also Valentino USA Inc. v. 693 Fifth Owner LLC*, 203 AD3d 480 [1st Dept 2022]).

Defendant's remaining claims, related to constructive eviction, landlord-harassment, and complaints of improper building maintenance are unsupported by any admissible evidence and therefore fail to raise a triable issue of fact. Likewise, it is undisputed that defendant did not surrender the premises and, therefore, defendant's claims of eviction, actual or constructive, must fail (*International Dev. Inst. Inc. v. Westchester Plaza, LLC*, 194 AD3d 411 [1st Dept 2011]). Consequently, plaintiff's motion seeking summary judgment for rent and additional rent is granted.

Finally, plaintiff's motion for partial summary judgment on attorney's fees is granted to the extent of finding plaintiff entitled to attorney's fees, in an amount to be determined following submissions, as below. It is beyond cavil that plaintiff is entitled to attorney's fees pursuant to the parties' lease agreement.

Accordingly, it is

ORDERED that plaintiff's summary motion is granted; and it is further

ORDERED, DECLARED, and ADJUDGED, that plaintiff FLATIRON 30 LLC, PO Box 234481 Great Neck, NY 11023, shall have judgment as against

defendant, THE CONTINUUM COMPANY LLC, 30 W 21st Street 11th Floor
New York, NY 10010, in the amount of \$846,605.77 together with costs and
interest at the statutory rate, as calculated by the Clerk of the Court, from
March 1, 2020; and it is further

ORDERED that plaintiff's papers in support of the amount of attorney's
fees shall be filed via NYSCEF, with courtesy copy to chambers via first-class
mail, no later than August 25, 2023; and it is further

ORDERED that papers in opposition to the amount of attorney's fees
sought by plaintiff shall be filed via NYSCEF, with courtesy copy to chambers
via first-class mail, no later than September 29, 2023; and it is further

ORDERED that should defendant seek to cross-examine plaintiff's
witness(es) as to attorney work performed in this matter, defendant shall so
request in bold type face on the first page of its affirmation/brief in opposition
and defendant shall further detail those entries on which it seeks to cross-
examine plaintiff's witness(es); and it is further

ORDERED that absent a limited cross-examination hearing being scheduled by the Court, the inquiry into the amount of attorney's fees due plaintiff shall be returnable on papers on October 2, 2023; and it is further

ORDERED that the above deadlines shall not be adjourned absent Court order; and it is further

ORDERED that judgment shall be submitted to the Clerk Office, and not to chambers or the part, unless directed otherwise by that office.

THIS CONSTITUTES THE DECISION, ORDER, AND JUDGMENT OF THE COURT.

<u>7/5/2023</u>			
DATE		HON. FRANK P. NERVO	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	J.S.C.
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE