Fives 160th, L.L.C. v Qing Zhao

2023 NY Slip Op 32842(U)

August 16, 2023

Supreme Court, New York County

Docket Number: Index No. 155927/2020

Judge: Sabrina Kraus

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS, Justice	PART 57TR
FIVES 160TH, L.L.C., Plaintiff, - v - QING ZHAO, XIANG LIN, ABC CORP., JOHN DOE, JANE DOE Defendant.	INDEX NO. 155927/2020
	MOTION DATE N/A
	MOTION SEQ. NO. 002
	DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 62, 63, 64, 65, 66

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

BACKGROUND

Plaintiff commenced this action seeking rent arrears and related relief arising out of the parties' lease agreement for a commercial store at 3840-3848 Broadway a/k/a 3844 Broadway a/k/a 3846 Broadway a/k/a 5555 West 160th Street, New York NY. Defendants made a CPLR §3211 motion seeking dismissal of the complaint, which was denied by the court as to all causes of action except for the first cause of action for ejectment which was dismissed by the court as that Plaintiff acknowledged that it had already regained possession of the subject premises.

Defendants then filed an answer asserting defenses and counterclaims and appealed the court's denial of the 3211 motion.

Pursuant to an order issued April 7, 2022, the Appellate Division affirmed the denial of the 3211 motion and held in pertinent part:

The complaint states a cause of action for unpaid rent and additional rent due. Plaintiffs sufficiently allege that defendants did not pay rent from March 2020 through the end of the lease term, and that defendants owed $35,803.39 through July 31, 2020, the date plaintiffs commenced this action (*see Siegmund Straus, Inc. v East 149th Realty Corp*.,104 AD3d 401, 403 [1st Dept 2013]). Defendants' motion fails to dispute plaintiff's allegations regarding the rent.

As to defendants' assertions that they should be excused from performance under the contract because of the COVID-I9 pandemic, we have already determined that the pandemic cannot serve to excuse a party's lease obligations on the grounds of frustration of purpose or impossibility (*see 558 Seventh Ave, Corp. v Times Square Photo lnc*.,194 AD3d 561, 562 [1st Dept 2020), appeal dismissed 37 NY3d 1040 [2021]). Although the pandemic did make it more difficult and less profitable for defendants to run their business, they were never prevented from using the space or operating their restaurant (*see Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34, 42-43 [1st Dept 2020]). Nor did the lease contain a force majeure clause, and this Court may not add or imply such a clause (*see Morlee Sales Corp, v Manufacturers Trust Co*., 9 NY2d 16, 19 [1961]; *Riverside S. Planning Corp. v CRP/Extell Riverside*, L.P.,6o AD3d 61,66 [lst Dept 2008], *affd* 13 NY3d 398 [2009]).

Furthermore, plaintiff demonstrated that it properly effected service on defendants in accordance with CPLR 308 at their usual place of business. Affidavits submitted by plaintiff demonstrated that defendants effectively held out the address of the premises as their business address by keeping the signage for their restaurant there (*see Gibson, Dunn & Crutcher v Global Nuclear Servs. & Supply*, 280 AD2d 360, 361 [1st Dept 2001]). Moreover, defendant Xiang Ling averred that he did not mail the keys to the premises to plaintiff until August 18, 2020, after plaintiff had already commenced the action (*cf LaSorsa v Corigan*, 256 AD2d 313, 313 [2d Dept 1998]).

PENDING MOTION

Plaintiff now moves for summary judgment and seeks an order dismissing defendants' defenses and counterclaims and judgment on their remaining causes of action.

Plaintiff's motion is granted to the extent set forth below.

ALLEGED FACTS

Plaintiff is the owner of the Subject Premises.

On or about March 22, 2002, Plaintiff entered into a written lease agreement with Po Yuk Chan and Kei Ko for the rental of Ground Floor Retail Space Number 3 and Basement Storage

Space, at 3840-3848 Broadway a/k/a 3844 Broadway a/k/a 3846 Broadway a/k/a 555 West 160th Street, New York, New York 10032 (the "Premises") for a term of ten (10) years commencing on March 1, 2012 and expiring on February 28, 2022 (the "Lease").

The term of the Lease was subsequently extended pursuant to a Lease Modification and Extension Agreement dated October 31, 2011, which extended the lease term for an additional ten (10) years commencing on March 1, 2012 and expiring on February 28, 2022.

The Lease was subsequently assigned to Defendants Qing Zhao and Xiang Lin pursuant to an Assignment and Assumption Agreement dated July 22, 2016, between and among Plaintiff, Po Yuk Chan and Kei Ko as assignors, and Defendants Qing Zhao and Xiang Lin as assignees. Pursuant to said Agreement, Defendants "assume[d] and agree[d] to be bound by and perform all covenants, conditions, obligations and duties of Assignor accruing under the Lease from and after the Commencement Date".

Commencing in or about February 2020, Defendants stopped paying rent and additional rent, although Defendants allege they paid Real Estate Taxes through June 30, 2020.

On June 25, 2020, Plaintiff served Defendants with a Fourteen Day Notice seeking rent arrears. The arrears were not paid, and Plaintiff commenced this action on July 31, 2020.

Defendants allege they vacated the subject premises on or about June 15, 2020, but they acknowledge they did not tender the keys to Petitioner until on or about August 18, 2020.

The premises were re-rented to a new tenant in October 2020 for a term of ten years commencing October 1, 2020 and expiring on September 30, 2030.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in

its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers *Alvarez v Prospect Hospital,* 68 NY2d 320, 324 (1986). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 (1st Dept 2007), citing *Alvarez,* 68 NY2d at 324.

"[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion." *People v Grasso,* 50 AD3d 535,544 (1st Dept 2008).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact." *Martin v Citibank, N.A.,* 64 AD3d 477,478 (1st Dept 2009); *see also Sheehan v Gong,* 2 AD3d 166,168 (1st Dept 2003) ("The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"), *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 (1957).

Plaintiff Has Established a Prima Facie Entitlement to Summary Judgment

The affidavit in support of the motion along with the exhibits annexed thereto establish a *prima facie* case on its second and third causes of action.

The second cause of action seeks $35,803.39 in rent arrears through July 31, 2020, the date this action was commenced. These monies include: (a) $23,000.00 in Fixed Rent, representing March 2020 through July 2020 Rent at the rate of $4,600.00 per month; (b)

$10,296.06 in Real Estate Taxes; (c) $2,107.33 in water and sewer charges; (d) $100.00 in charges for a Sanitation Violation; and (e) $300.00 in security.

The court finds Plaintiff is entitled to all of the charges sought herein, with the exception of additional security and the sanitation violation. Given that defendants vacated, and a new tenant is in place the request for additional security is deemed moot. Additionally, plaintiff failed to establish how and when it mailed notice of the sanitation violation to the tenant.

Based on the foregoing, the court finds Plaintiffs have made out a *prima facie* case of $35,403.39 due in arrears through July 31, 2020.

Similarly, Plaintiff has established an entitlement to an additional $17,117.50 for the balance of the lease sought in the third cause of action.

The rents due under the Lease for the period of time from August 2020 through February 2022 total $ 86, 600.00 as follows: a) $32,200.00, representing August 2020 through February 2021 rent at $4,600.00 per month; and b) $56,400.00, representing March 2021 through February 2022 rent at $4,700.00 per month.

The rents set forth in the New Lease for the same time period total $78, 682.50 and are as follows: a) $54,000.00 representing October 2020 through September 2021 rent at $4,500.00 per month, and; b) $24,682.50, representing October 2021 through February 2022 rent at $4,635.00 per month.

The difference between the rent due under the Defendants' Corp. lease and the New Lease for the period after the Defendants' August 2020 vacatur total $7, 917.50 Adding rent for August and September 2020-the period after the Defendants vacated but before the premises were re-rented-in the amount of $9,200.00 results in a total of $17, 117.50 which is due pursuant to paragraph 18 of the Lease.

Defendants Have Failed to Raise a Triable Issue of Fact Precluding Summary Judgment

Having established its *prima facie* entitlement to judgment for the arrears, the burden shifts to Defendants to raise a triable issue of fact. The affidavit submitted in response is insufficient to raise any triable issue of fact. The affidavit primarily discusses the difficulties Defendants' business faced due to the pandemic.

Defendants challenge the claim for real estate taxes and contend that payment of at least half of the $10,296.06 in real estate taxes for year 2020-2021 was the responsibility of the new tenant. However, the October 31, 2011 Lease Modification and Extension Agreement states that the "Tax Payment shall be due and payable on demand after Tenant is invoiced for the amount." Plaintiff duly sent Tenant an invoice for Real Estate Taxes for 2020-2021 on June 18, 2020. Plaintiff invoiced Tenant for one-half of the taxes in the amount of $10,296.06 payable on July 1, 2020. The real estate tax obligation was incurred as of June 18, 2020. The real estate tax bill in the amount of $10,296.06 was due as of July 1, 2020, pursuant to the lease. The tenant was still in possession as of July 1, 2021, as the Defendants did not tender the keys to Plaintiff until August 18, 2020. Therefore, Defendants are liable for the $10, 296.06 real estate tax bill

As set forth in further detail below, the affirmative defenses are also insufficient to raise a triable issue of fact.

Defendants' Defenses

Defendants assert seventeen affirmative defenses: failure to state a cause of action, *force majeure* (asserted as a second and thirteenth defense), impossibility due to COVID, violations of executive orders, a denial that Plaintiff is entitled to attorneys' fees, failure to make repairs, partial constructive eviction, breach of the covenant of quiet enjoyment, floods in the premises,

unreasonable denial of requests to assign the lease, improper notice of real estate taxes, defective rent demand, frustration of purpose due to covid, failure to credit or return the security deposit, RPL §227, improper service.

Several of these defenses have already been ruled upon by the Court's prior decision on the 3211 motion [2021 NY Slip Op 31111(U)]and the affirmance by Appellate Division, First Department (204 AD3d 439). Based on said decisions the following defenses are dismissed:

The first affirmative defenses of failure to state a cause of action; and

The second and thirteenth defenses of *force majeure*; and

The third affirmative defense of impossibility; and

The seventh affirmative defense of partial constructive eviction based on COVID; and

The fourteenth affirmative defense of frustration of purpose; and

The seventeenth affirmative defense of improper service.

The Fourth Affirmative Defense is Dismissed

Defendant's fourth affirmative defense alleges that this action is "illegal" as it violates Executive Orders 202.28, 202.55 and 202.55.1.

Executive Order 202.28, as modified, is inapplicable to this action as it covers and prohibits only the commencement of new summary nonpayment proceeding or the issuance of a warrant of eviction issued in such proceeding. The aforesaid Executive Order bars "the initiation of a proceeding .... for nonpayment of rent." As held in *Smart Coffee, Inc. v. Sprauer*, 71 Misc. 3d 193 (Civ. Ct. NY Co 2021) "(t)he Governor's Executive Orders placed a moratorium on the commencement of eviction proceedings and enforcement of judgments of possession and warrants of eviction issued by Courts in summary eviction nonpayment proceedings."

This case is an action, and not a summary proceeding. Additionally, plaintiff's remaining causes of action are plenary causes of action for money only, which are not prohibited by the Executive Order.

The court notes further no part of defendants papers address plaintiff's request for dismissal of this defense.

The Fifth Affirmative Defense is Dismissed

The fifth affirmative defense asserts in a conclusory manner that Plaintiff is not entitled to attorneys' fees.

Article 19 of the lease states the following in pertinent part:

> [I]f Owner in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditure or incurs any obligation for the payment of money, including but not limited to reasonable attorneys fees, in instituting, prosecuting or defending any action or proceeding and prevails in any such action or proceeding, such sums to be paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant and if Tenant's lease term shall have expired at the time of making such expenditures or incurring such obligation such sums shall be recoverable by Owner as damages.

Defendants have not disputed that they failed to pay the rent due for the Subject Premises. The lease provision is sufficient to entitle Plaintiff to attorneys' fees and the court finds that Plaintiff is the prevailing party herein.

Defendants Sixth Affirmative Defense is Dismissed

Defendants' sixth affirmative defense alleges various conditions including lack of heat and hot water, leaks and flooding, and sagging floors. Plaintiff's sixth affirmative defense alleges that these conditions violate the "implied warranty of suitability", and that Defendants have been "actually partially evicted".

As an initial matter, the alleged failure of Plaintiff to make repairs defense does not constitute a defense to their nonpayment of rent. The first page of the lease states that Tenant will pay the rent " without any setoff or deduction whatsoever."

Article 4 of the lease states the following in pertinent part:

> It is specifically agreed that Tenant shall not be entitled to any set off or reduction of rent by reason of any failure of owner to comply with the covenants of this or any other article of this lease. Tenant agrees that Tenant's sole remedy at law in such instance will be by way of an action for damages for breach of contract.

Such "no setoff" provisions are enforceable. A commercial tenant's withholding of rent is a violation of a fundamental covenant of the lease, regardless of any breach by the landlord. *Green 440 Ninth LLC v. Duane Reade*, 10 Misc. 3rd 75 (AT 1 2005); *Allerand LLC v. 233 E 18th St Co LLC*, 19 AD 3d 275 (1st Dept. 2005).

In *Universal Communications Network, Inc. v. 229 W 28th Owner LLC*, 85 AD 3d 668, 926 NYS2d 479 (1st Dept. 2011), the Appellate Division affirmed the granting of judgment to the landlord notwithstanding the tenant's claims, and held:

> Initially, the obligation to pay rent pursuant to a commercial lease is an independent covenant, and thus cannot be relieved by allegations of a landlord's breach, absent an express provision to the contrary. Here, the claims are also barred by the express language of the lease between the parties.

A tenant's duty to continue to pay rent is not suspended, even if the landlord breaches its obligations under the lease, unless there is an express provision in the lease declaring the circumstances under which the tenant may withhold his rent. The obligation of a commercial tenant to pay rent is not suspended if the tenant remains in possession of the leased premises, even if the landlord fails to provide essential services. *Westchester County Industrial Development Authority v. Morris Industrial Builders*, 278 AD2d 232 (2d Dept. 2000).

Additionally, paragraph 45 of the lease provides that the tenant is responsible to provide heat, electric and utility services to the subject premises, and the tenant is also responsible for the repair and maintenance of such heating and utility system.

To the extent that Defendants are basing this defense on the "implied warranty of suitability", such defense is not applicable to the facts of this action. The implied warranty of suitability is applicable to chattels and personal property and does not apply to real property. *Builders Brick & Supply Co. Inc v. Walsh Transp. Co Inc*. 106 Misc. 2d 469 (AT 1 1919).

To the extent that Defendants claim an "actual partial eviction" it is undisputed that Defendants did not abandon or vacate the premises until after the pandemic. The affidavit of Defendant Xiang Lin states:

> Since I took over day-to-day operations in July 2016, the already successful Restaurant has continued to grow on a linear trajectory until it came to a sudden halt on March 16, 2020, when the Restaurant had to be temporarily closed to comply with the "stay at home" order issued by Governor Cuomo of the State of New York.

There is no statement at all by Lin alleging what parts of the Subject Premises were abandoned or when that happened. Nor are any such facts included in the answer. In fact, Lin states that after the pandemic began, he not only occupied the premises but had his children on site all day because he had no other childcare.

The Seventh Affirmative Defense

Defendants' seventh affirmative defense alleges constructive eviction. Constructive eviction requires tenant abandonment of the premises as a result of the wrongful acts of the landlord. As held by the Court of Appeals in the seminal case of *Barash v. Pennsylvania Terminal Real Estate Corp*.:

> [C]onstructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises. The tenant, however, must

> abandon possession in order to claim that there was a constructive eviction. Thus, where the tenant remains in possession of the premises, there can be no constructive eviction.

26 NY 77 (1862). In the case at bar defendants fail to allege any wrongful act by Plaintiff that led to their vacating the premises. In fact, it is clear from defendants' submissions that they vacated because of the pandemic. As noted above, defendants, acknowledge occupying the premises even during the pandemic with their entire family including minor children.

Lin describes the circumstances leading up to his vacating the premises and moving to Georgia. Nowhere does he allege it was because of a lack of repairs. Instead, Lin asserts:

> Before COVID hit New York City, my two daughters were enrolled at the St Rose of Lima School, just a few blocks away from the Restaurant. However, when COVID arrived in New York, schools were ordered to close, so my daughters had to stay at home. But I couldn't afford to stay at home to take care of my kids for too long, as I still had the Restaurant to manage, and the Restaurant was my sole source of income for me and my family.
>
> I had to deal with a very tough situation beginning in March–April of 2020: on the one hand, I had to continue to manage the Restaurant; on the other hand, my kids lacked a school to attend in person, and I couldn't find childcare for my kids – the childcare facilities were all closed and no nannies would come to other people's house due to fear of COVID. In the end, I had no choice but was forced to bring my kids to the Restaurant during the daytime, so that I could work while still taking care of them.
>
> However, I soon realized that my decision put my daughters in a potentially fatally risky situation. The Restaurant was not large enough to have room for an office; so the only space for the kids to stay inside the Restaurant, other than the kitchen, was the dining area, which is extremely small and could only accommodate two small tables and perhaps no more than ten customers. That's where my daughters spent their daytime attending virtual classes and playing. While sit-in dining had already been banned, there were still some customers who came in for pick-up orders. As customers came and went, my daughters were in close proximity to total strangers all the time all day long. At that time, nobody was vaccinated, nobody knew how bad this virus could get, and nobody knew how long the situation was going to last and when all of this would end. I realized that I was putting my daughters' life on the line to keep the Restaurant running.
>
> Another unexpected dangerous situation I encountered was that we became a target of hate crimes. The most egregious instance was that a group of toughs rushing into the eating area of the Restaurant and cursing us while shouting things like, "You Chinese brought this virus to us." They frightened us enormously and robbed me and the

> customers who happened to be there to pick up food. They also broke utensils and took away anything they could pick up of any value. My daughters witnessed this entire very frightening incident including the robbery and were scared to death. The police came when we reported the attack which we did as soon as it ended, but by then the culprits were already gone. …. I then was forced to realize that in addition to the financial impossibility of operating under COVID conditions as described in my affidavit dated September 18, 2020, those COVID conditions rendered it no longer safe for my family, especially my kids, to keep operating this Restaurant.

It is clear based on defendant's statements, that the condition that led them to vacate was COVID and not an inability to use the Subject Premises due to any vague assertions of conditions at unspecified periods. This is not a basis for a constructive eviction claim nor is it sufficient to require a trial on Plaintiff's claims.

The Eighth Affirmative Defense is Dismissed

Defendants' eighth affirmative defense alleges breach of the covenant of quiet enjoyment. Article 22 of the lease sets forth the covenant of quiet enjoyment and states:

> Owner covenants and agrees with Tenant that upon Tenant paying the rent and additional rent and observing and performing all the terms, covenants, and conditions, on Tenant's part to be observed and performed, Tenant may peacefully and quietly enjoy the premises hereby demised, subject nevertheless to the terms and conditions of this lease.

As held in *TDS Leasing LLC v. Tradito*, 148 AD 3d 1079, 51 NYS3d 96 (2d Dept. 2017):

> In actions for damages for breach of the covenant of quiet enjoyment, a tenant must show an ouster, or, if the eviction is constructive, an abandonment of the premises. However, the tenant must perform the conditions precedent to maintain the action for breach of covenant for quiet enjoyment unless there was a waiver of those conditions.

It is undisputed that Tenant has not paid the rent as required pursuant to the lease. Therefore, Defendants cannot rely upon paragraph 22, and this defense lacks merit.

The Ninth Affirmative Defense

Defendants' ninth affirmative defense relies upon the "casualty clause" of the lease and alleges that there have been several floods that constitute a casualty and thereby should result in the rent being abated.

Article 9 of the lease addresses the premises becoming unusable due to fire or other casualty. In opposition to the summary judgment motion defendants fail to bring any evidence of when the casualty occurred, what portion of the premises it affected and for what duration.

In fact, it appears from the scant submission that there was no such casualty but rather complaints of intermittent leaks which would not be applicable to this lease provision.

In any event defendants have failed to come forward with anything regarding a casualty that raises a triable issue of fact.

The Tenth Affirmative Defense is Dismissed

Defendants' tenth affirmative defense alleges that "on multiple occasions, Defendants had introduced to the Plaintiff several qualified tenants to take over the assignment of the Lease" but that Plaintiff "has unreasonably withheld consent."

Paragraph 66 of the lease provides that defendants only remedy in such an event is to seek injunctive relief or specific performance. Such an alleged breach would not constitute a defense to the nonpayment of rent.

Additionally, based on the documents provided and the facts asserted by plaintiffs which are not disputed by defendants it does not appear that plaintiff unreasonably withheld consent to any proposed assignment.

Finally, Defendants fail to assert facts or provide documents pertaining to any remaining defenses that raise a triable issue of fact.

Defendants' Counterclaims Are Dismissed Except for the Return of the Security Deposit

Defendants' answer includes six counterclaims, including (a) breach of the covenant of quiet enjoyment; (b) partial constructive eviction; (c) harassment; (d) damage for repair; (e) damage for utility expenses; and (f) return of the security deposit.

The counterclaim for breach of quiet enjoyment is dismissed for the reasons discussed above.

The counterclaim for partial constructive eviction is also dismissed. There are no facts alleged either in the counterclaim or in the motion papers that provide any specifics as to the wrongful act of petitioner, when it occurred or what portion of the premises was allegedly unusable.

Defendants' third counterclaim is for harassment under the commercial tenant harassment law. The Commercial Harassment Law, or NYC Adm Code 22-902, defines "commercial tenant harassment" as any act or omission by a landlord that (a) would "reasonably cause a commercial tenant to vacate the premises or to surrender or waive a right under the lease, and; (b) includes one or more of the acts specified in the statute. The particular "act" element alleged by Defendants consists of seeking rent from Defendants. Specifically, the "harassment" alleged by Defendants consists of the following:

> Plaintiff 's action to collect rents from the Defendants when the Defendants have been severely impacted by the COVID-19 pandemic threatens the wellbeing of Defendants and constitutes harassment

However, none of the acts specified in 22-902(a)(1) through 11 involve seeking rent. Seeking the rent that is due from a commercial tenant is not harassment pursuant to the statute. In fact, Section, 22-903(b) of the statute provides that the commercial tenant shall not be relieved of the obligation to pay any rent for which the commercial tenant is otherwise liable.

Defendant's fourth counterclaim alleges that Defendants "were forced to make their own repairs " and had to hire a contractor in the amount of $6,500.00. Article 4 of the lease requires the tenant to, *inter alia*, " take good care of the demised premises" and "make all nonstructural repairs" at its "sole cost and expense." Plaintiffs allege and defendants do not dispute that the repairs made were not structural.

Defendants' fifth counterclaim alleges "utility expenses in that Defendants were 'forced to supply his[sic] own heat ant hot water." Tenant was required to do so pursuant to paragraph 45 of the lease as noted above. Similarly, paragraph 46 of the lease states that the tenant is responsible for providing electricity to the premises and shall pay for all electricity costs and maintenance of electrical meter.

Defendants sixth counterclaim seeks a return of the security deposit. Plaintiffs fail to provide a reason why the security deposit should not be credited to Defendants arrears. Thus, the request to dismiss this counterclaim is denied and the court shall credit Defendants $27,000.00 towards outstanding arrears ($52,520.89) in full satisfaction of the security being held by Plaintiff, leaving a remaining balance of $25,520.89. [1]

Jury Demand

The lease includes an enforceable waiver of trial by jury, however as the court has granted summary judgment, the request to strike the jury demand is moot.

[1] While Defendants did not move for summary judgment on this claim, the court is entitled to search the record on a summary judgment motion and make such a determination. *Ruggiero v Cardella Trucking Co.*, 16 AD3d 342 (1st Dept 2005)

CONCLUSION

WHEREFORE it is hereby:

ORDERED that the motion to dismiss defendants' defenses and counterclaims is granted to the extent set forth above; and it is further

ORDERED that plaintiff's motion for summary judgment is granted on its second and third causes of action, and the Clerk is directed to enter Judgment in favor of Plaintiff FIVES 160th LLC, with a principal place of business located at 111 North Central Park Avenue, Suite 400, Hartsdale, NY 10530, as against defendants QING ZHAO and XIANG LIN with an address of 77 Howell Run, Duluth, Georgia 30096-5312, in the sum of $25,520.59 with interest at the statutory rate from July 31, 2020, until entry of judgment, as calculated by the clerk, together with costs and disbursements, as taxed by the clerk; and it is further

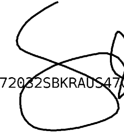
ORDERED that plaintiff is entitled to attorneys' fees as the prevailing party herein and may move for a specific amount of fees by notice of motion; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.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8/16/2023	SABRINA KRAUS, J.S.C.
DATE	

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