

Greenberger 163 E. 86th St., LLC v JWS Enters., Inc.
2023 NY Slip Op 32873(U)
August 17, 2023
Supreme Court, New York County
Docket Number: Index No. 651337/2021
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

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GREENBERGER 163 EAST 86TH STREET, LLC, 86TH STREET PARTNERS, LLC, HUDSON ON 86TH STREET, LLC, and KIMBRO LLC,

Plaintiffs,

- v -

JWS ENTERPRISES, INC.,

Defendant.

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INDEX NO. 651337/2021

MOTION DATE 08/17/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

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

ORDER

Upon the foregoing documents, it is

ORDERED that the branch of plaintiffs' motion that seeks summary judgment in plaintiffs' favor on the second cause of action of the complaint and a declaratory judgment with respect to the subject matter of that cause of action is granted to the following extent: it is

ADJUDGED and DECLARED that the Lease dated November 24, 2010 expired by its terms on March 31, 2021 and that Tenant was required to vacate the Premises on such date; and it is further

ORDERED that the branch of plaintiffs' motion that seeks summary judgment dismissing the affirmative defenses alleged in defendant's amended answer is granted; and it is further

ORDERED that it appearing to the court that plaintiffs are entitled to judgment on liability and that the only triable issues of fact arising on plaintiffs' motion for summary judgment on their first cause relate to the amount of damages, including outstanding rent, use and occupancy, reasonable attorneys' fees and legal expenses, to which plaintiffs are entitled; it is

ORDERED that the motion is granted with regard to liability; and it is further

ORDERED that an immediate trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that plaintiffs shall, within thirty (30) days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office and shall serve and file with such Clerk a note of issue and statement of readiness and shall pay the fee therefor, and such Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office 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).

DECISION

Defendant has not opposed plaintiffs' motion to the extent that it seeks a declaration with respect to the expiration of the Lease and the obligation of defendant tenant to vacate the premises, and therefore the court grants same. However, with respect to plaintiffs' application for a declaration that directs defendant to pay use and occupancy that accrued after the expiration of the Lease, the court declines to so declare, as such redress must be sought by way of an action at law, see Bartley v Walentas, 78 AD2d 310 (1st Dept 1980), which is the subject of plaintiffs' first cause of action for breach of contract.

Defendant is correct that 3707 Brewington Rd, LLC v Cuomo, Index No. 007139/2020 (Sup Ct, Onondaga County, Neri, J.) establishes that under the Governor Executive Order 202.5 of March 18, 2020, which directed the shutdown of indoor public amusement, billiard halls, such as that owned and run by defendant at bar, remained shuttered until January 15, 2021. Nonetheless, the facts before this court are indistinguishable from those of Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Club Inc, 204 AD3d 536 (2022), wherein the Appellate Division, First Department, overturning the order of the trial judge, dismissed the affirmative defenses of frustration of purpose and impossibility of performance asserted

by defendant tenant adult congregate care facilities and granted partial summary judgment of liability in favor of plaintiff landlord. The appellate court in Knickerbocker Retail LLC reasoned that, as the New York City Emergency Executive Order No. 100, effective March 16, 2020, which directed adult congregate care facilities, such as defendant Bruckner Forever Young, to suspend operations during the pandemic "was temporary", "the purpose of the of the parties' ten-year lease was not completely defeated". The court reasoned that the doctrine of impossibility was likewise inapplicable, because "neither the subject matter of the contract nor the tenant's means of performance was destroyed so as to make performance objectively impossible", ibid, at 537-538.

Debra A. James

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8/17/2023

DATE

DEBRA A. JAMES, J.S.C.

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