

**Fifty E. Forty Second Co. LLC v Grand Cent. Physical
Medicine & Rehabilitation P.C.**

2023 NY Slip Op 33583(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 155324/2021

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

-----X

INDEX NO. 155324/2021

FIFTY EAST FORTY SECOND COMPANY LLC,

MOTION DATE 03/17/2023

Plaintiff,

MOTION SEQ. NO. 003

- v -

GRAND CENTRAL PHYSICAL MEDICINE &
REHABILITATION P.C., WILLIAM J. GIBBS, JR.

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

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

Upon the foregoing documents, there being no opposition, and good cause having been shown, Plaintiff Fifty East Forty Second Company LLC's ("Plaintiff") motion for an Order (1) amending the pleadings to conform to the evidence pursuant to CPLR 3025(c); (2) granting Plaintiff summary judgment, pursuant to CPLR 3212, against Defendant Grand Central Physical Medicine & Rehabilitation P.C. ("Tenant"); (3) granting Plaintiff declaratory judgment, pursuant to CPLR 3212, against Defendant William J. Gibbs Jr. ("Guarantor"); and (4) dismissing Tenant and Guarantor's (together "Defendants") affirmative defenses pursuant to CPLR 3211(b), is granted in part and denied in part.

I. Background

Plaintiff is the owner of the building located at 315 Madison Avenue, New York, New York (the "Building") (NYSCEF Doc. 42). Tenant was the commercial tenant of room 1200 in the Building (the "Premises") pursuant to a January 1, 2020 written lease agreement (the "Lease") (NYSCEF Doc. 43). William J. Gibbs Jr. is the guarantor of the Lease pursuant to a written

guaranty agreement date December 20, 2019 (the “Guaranty”) (NYSCEF Doc. 45). The Lease was modified and extended pursuant to an October 27, 2020 agreement (the “Modification Agreement”) (NYSCEF Doc. 44) which, *inter alia*, modified certain base rent requirements.

On November 15, 2020, as a result of Tenant’s failure to pay rent and additional rent due under the Lease, Plaintiff commenced a prior Supreme Court action entitled *Fifty East Forty Second Company LLC v. Grand Central Physical Medicine & Rehabilitation P.C.*, Index No.: 159862/2020 (the “Prior Action”) (NYSCEF Doc. 36 at ¶20). Tenant failed to appear in the Prior Action and Plaintiff was awarded judgment in the amount of \$73,595.19, representing all base rent and certain additional rent due through November 20, 2020, plus interest and costs (NYSCEF Doc. 36 at ¶21).

On April 30, 2021, Tenant unilaterally abandoned the Premises mid-lease without Plaintiff’s permission (NYSCEF Doc. 36 at ¶22). On June 2, 2021, Plaintiff commenced this action to recover rent and additional rent allegedly owed to Plaintiff by Defendants (NYSCEF Doc. 1). After Tenant abandoned the Premises, Plaintiff re-entered the Premises and issued a new lease (the “New Lease”) to a new tenant, third-party OMPT Management, LLC, for the period of December 1, 2021 through November 30, 2026 (NYSCEF Doc. 46).

On March 17, 2023, Plaintiff brought the instant motion for an Order amending the pleadings to conform to the evidence, granting Plaintiff summary judgment against Tenant, declaratory judgment against Guarantor, a money judgment against Defendants in the amount of \$1,207,577.80, and dismissal of Defendants affirmative defenses (NYSCEF Doc. 35). In support of its motion, Plaintiff submitted the affidavit of Adam Abramson, a member of Plaintiff (the “Abramson Affidavit”) (NYSCEF Doc. 36), the affirmation of David B. Rosenbaum (the

“Rosenbaum Affirmation”) (NYSCEF Doc. 37), and a memorandum of law in support (NYSCEF Doc. 38). Defendants have not opposed Plaintiff’s motion.

II. Discussion

a. Plaintiff’s Motion to Amend the Pleadings

Pursuant to CPLR 3025(c), the Court may amend the pleadings at any stage to conform to the evidence. Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinsky v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit (*Greenburgh Eleven Union Free School Dist. V National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]).

In this case, Plaintiff seeks to amend the sum sought to reflect the actual amounts owed by Defendants (NYSCEF Doc. 38 at p. 3). As Plaintiff’s Complaint (NYSCEF Doc. 1) sought an amount “to be adjusted upward through the date of judgment of this action,” and Defendants have made no arguments in opposition to Plaintiff’s motion, the Court finds no appreciable risk of prejudice or surprise to Defendants in the granting of Plaintiff’s motion. In light of the foregoing, and given the lax standard of a motion seeking leave to amend, Plaintiff’s motion to amend the pleadings to conform to the evidence, pursuant to CPLR 3025(c), is granted.

b. Plaintiff’s Motion for Summary Judgment against Tenant

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-

moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). The Court of Appeals has held that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.* 68 NY2d 320 [1986]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. (See e.g., *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see *Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

In this case, summary judgment is warranted as to liability as Plaintiff has shown an entitlement to judgment as a matter of law and tendered sufficient evidence to demonstrate the absence of any material issues of fact. The Court of Appeals has held that “[o]nce a tenant abandon[s] the premises prior to the expiration of the lease...the landlord [is] within its rights under New York law to do nothing and collect the full rent due under the lease (*Hold Properties, Ltd. v Kenneth Cole Productions Inc.*, 87 NY2d 130 [1995]). As shown by the Abramson Affidavit, Tenant defaulted under the Lease by failing to pay rent, and further breached the Lease by unilaterally vacating the premises (NYSCEF Doc. 36).

[The remainder of this page is intentionally left blank]

Paragraph 25 of the Lease states that,

no provision of this lease shall be deemed to have been waived by Owner unless such waiver be in writing signed by Owner . . . No act or thing done by Owner or Owner's agent during the term hereby demised shall be deemed an acceptance of a surrender of said premises, and no agreement to accept such surrender shall be deemed valid unless in writing signed by Owner. No employee of Owner or Owner's agent shall have any power to accept the keys of said premises prior to the termination of the lease, and the delivery of the keys to any such agent or employee shall not operate as a termination of the lease or a surrender of the premises...

(NYSCEF Doc. 43 at ¶25). As set forth in the Abramson Affidavit, Plaintiff never provided Tenant with any written and signed waiver or with any written and signed acceptance of surrender (NYSCEF Doc. 36 at ¶26). Further, Paragraph 18 of the Lease states that in the case of a default by Tenant, Tenant "shall also pay to Owner as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease" (NYSCEF Doc. 36 at ¶18).

As established by the Abramson Affidavit, Tenant defaulted under the Lease by failing to pay rent and further breached the Lease by unilaterally vacating the Premises on April 30, 2021 (NYSCEF Doc. 36 at ¶50). As such, Plaintiff has satisfied its initial burden and demonstrated, *prima facie*, an entitlement to claim, as liquidated damages, the full amount due by Tenant through the remainder of the Lease.

Plaintiff's motion for summary judgment as to damages is denied. The Abramson Affidavit asserts that Tenant is liable to Plaintiff for "pre-vacatur base rent and post-vacatur rent as damages totaling \$1,896,830.13," metered electric charges as additional rent in the amount \$3,695.83, late fee charges as additional rent for the months of November 2020 through April 2021 totaling

\$7,671.45, and interest fee charges as additional rent for the months of November 2020 through April 2021 totaling \$12,211.59 (NYSCEF Doc. 36 at ¶¶52-55). The Abramson Affidavit further asserts that Plaintiff was able to mitigate its damages in the amount of \$713, 522.37 by re-renting the Premises (NYSCEF Doc. 36 at ¶56). The Abramson Affidavit asserts that Tenant is liable to Plaintiff for a total sum of \$1,207,577.80, to be amended upward through the judgment date of this action, plus interest from November 1, 2020, as well as fees, costs, and disbursements (NYSCEF Doc. 36 at ¶¶57-58). However, Plaintiff fails to attach any rent ledger substantiating the alleged amount owed. The Appellate Division has held that a plaintiff fails to demonstrate an outstanding balance when it fails to “provide proof as to the basis for that claimed balance, such as a contemporaneous rent ledger that would satisfy the business records exception to the hearsay rule (*Bay Plaza Community Ctr., LLC v Cablevision Sys. N.Y. City Corp.* 217 AD3d 438 [1st Dept 2023]). Accordingly, Plaintiff is granted summary judgment on the issue of liability, and a hearing is ordered to determine the amount of damages owed by Defendants.

c. Plaintiff’s Motion for Declaratory Judgment against Guarantor

The Court of Appeals has held that “[g]uaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guaranties that are ‘absolute and unconditional,’ have been consistently upheld by New York courts” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485 [2015]). Further, it is well settled that “[o]n a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty” *City of New York v Clarose Cinema Corp.*, 256 A.D.2d 69, 71 [1998]).

In this case, a declaratory judgment in favor of Plaintiff and against Guarantor on the issue of Guarantor's liability is warranted¹. The Guaranty (NYSCEF Doc. 45) provides, *inter alia*, that Guarantor

guarantees to Owner, Owner's successors and assigns, the full payment of Base Rent, real estate tax increases, mechanics' liens caused by Tenant (or removal thereof), insurance Premiums incurred by Landlord because of Tenants failure to maintain required insurance and the reasonable, actual out-of-pocket legal fees incurred by the landlord in enforcing the guaranty without requiring any notice of non-payment, non-performance, or non-observance, or proof, or notice, or demand except for service of a summons and complaint, whereby to charge the undersigned therefor, all of which the undersigned hereby expressly agrees that the validity of this agreement and the obligations of the guarantor hereunder shall in no way be terminated, affected or impaired by reason of the assertion by Owner against Tenant of any of the rights or remedies reserved to Owner pursuant to the provisions of the within lease (NYSCEF Doc. 45).

The Guaranty also contains a clause limiting Guarantor's liability if Tenant vacates and surrenders the Premises "as otherwise required by [the] lease" (NYSCEF Doc. 45). However, Tenant's unilateral abandonment of the Premises does not satisfy the requirements of Paragraph 25 of the Lease, which states that "no provision of this lease shall be deemed to have been waived by Owner unless such waiver be in writing signed by Owner . . . No act or thing done by Owner or Owner's agent during the term hereby demised shall be deemed an acceptance of a surrender of said premises, and no agreement to accept such surrender shall be deemed valid unless in writing signed by Owner..." (NYSCEF Doc. 43 at ¶25). As stated in the Abramson Affidavit, "Plaintiff never consented to Tenant unilaterally abandoning the Premises mis-lease and, accordingly, Plaintiff never executed any surrender agreement" (NYSCEF Doc. 36 at ¶26). As Tenant failed to satisfy

¹ Section 22-1005 of the New York City Administrative Code does not apply to the Guaranty in this case, as Tenant was deemed by New York State to be an essential service provider, not subject to the closure requirements of the executive orders set forth in the statute (New York City Administrative Code §22-1005; *see also* NYSCEF Doc. 47).

the surrender requirements of the Lease, Guarantor remains fully liable for all sums owed by Tenant to Plaintiff. However, as Plaintiff has failed to provide sufficient proof of the amount owed by Tenant, a hearing on the issue of damages is required to determine the amount of damages owed to Plaintiff by Defendants.

d. Dismissal of Defendants' Affirmative Defenses

To avoid dismissal of an affirmative defense, a party must “assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial...and it is insufficient to merely set forth averments of factual or legal conclusions” (*Schiraldi v. U.S. Mineral Products*, 194 AD2d 482, 483 [1st Dept 1993]) (citations omitted). Further, the Court of Appeals has held that “bald, conclusory assertions or speculation...are insufficient to defeat summary judgment...as are merely conclusory claims” (*Stonehill Capital Mgt. LLC v Bank of the W.* 28 NY3d 439 [2016]). Each of Defendants' affirmative defenses must be dismissed as each is asserted in conclusory fashion, devoid of any specificity or proof.

Defendants' first affirmative defense asserts that Plaintiff's Complaint (NYSCEF Doc. 1), “in whole or in part, fails to state a cause of action upon which the relief requested therein can be granted” (NYSCEF Doc. 5 at p. 2). It is well settled that “defendants bear the burden of establishing that the complaint fails to state a viable cause of action” (*Connolly v Long Is. Power Auth.* 30 NY3d 719 [2018]). As Defendants have provided no specificity or evidence in support of their contention that Plaintiff's Complaint fails to state a cause of action, Defendants' first affirmative defense is wholly conclusory, and insufficient to defeat a motion for summary judgment. As such, Defendants' first affirmative defense is dismissed.

Defendants' second affirmative defense asserts that Plaintiff failed to meet a condition precedent and the “within proceeding warrants dismissal as Plaintiffs failed and refused to

comply with the requirements of the contract” (NYSCEF Doc. 5 at p. 2). The Appellate Division has held that “the burden to plead ‘specifically and with particularity’ that any condition precedent has not been fulfilled rests on the party resisting enforcement of the contract” (*1199 Hous. Corp. v Int’l Fid. Ins. Co.* 14 AD3d 383 [1st Dept 2005]). Defendants fail to provide any specificity or evidence in support of their second affirmative defense. Moreover, Defendants fail to specify what requirements of the contract have allegedly not been complied with. As such, Defendants’ second affirmative defense is dismissed.

Defendants’ third affirmative defense asserts that Plaintiff’s Complaint (NYSCEF Doc. 1) is barred under the doctrines of waiver, consent and estoppel. It is well settled that “affirmative defenses, which pleaded conclusions of law without supporting facts, [are] properly stricken as insufficient” (*170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372, 372-373 [1st Dept 2008]). As Defendants fail to assert any supporting facts, their third affirmative defense is dismissed.

Finally, Defendants fourth affirmative defense asserts that “any alleged damages herein are caused by Plaintiffs’ own culpable or negligent conduct and their own failure to mitigate such damages herein and/or by Plaintiffs’ own failure to comply with the contract and/or enable Defendants to comply” (*Id.*). As Defendants fail to set forth any supporting facts, for the reasons outlined above with respect to Defendants’ third affirmative defense, Defendants’ fourth affirmative defense is also dismissed.

e. Plaintiff’s Entitlement to Attorneys’ Fees

It is well settled that where a lease for real property provides for the payment of legal fees, a landlord who is a “prevailing party” in litigation is entitled to recover said fees (*Sykes v. RFD Third Avenue*, 227 AD2d 146 [1st Dept 2007]). The Appellate Division has held that “to be

considered a ‘prevailing party,’ one must simply prevail on the central claims advanced, and receive substantial relief in consequence thereof” (*Id.*).

Here, pursuant to paragraph 19 of the Lease, Tenant agreed to pay and reimburse Plaintiff for any expenditure, including but not limited to, reasonable attorneys’ fees and costs in enforcing the covenant to pay rent under the Lease (NYSCEF Doc. 43 at ¶19). As such, Plaintiff is entitled to reasonable attorneys’ fees, and the matter shall be set down for an attorneys’ fee hearing to determine the amount owed to Plaintiff.

Accordingly, it is hereby

ORDERED that Plaintiff Fifty East Forty Second Company LLC’s motion to amend the pleadings herein to reflect a judgment sought by Plaintiff in the amount of \$1,207,577.80, plus statutory interest, costs, fees, and disbursements, is granted; and it is further

ORDERED that Plaintiff Fifty East Forty Second Company LLC’s motion for summary judgment against Defendant Grand Central Physical Medicine & Rehabilitation P.C. is granted at to liability; and it is further

ORDERED that Plaintiff Fifty East Forty Second Company LLC’s motion for summary judgment against Defendant Grand Central Physical Medicine & Rehabilitation P.C. is denied as to damages, and the matter shall be set down for a hearing on damages at a date and time to be determined by the Court; and it is further

ORDERED that Plaintiff Fifty East Forty Second Company LLC’s motion for a declaratory judgment against Defendant William J. Gibbs Jr. is granted as to liability; and it is further

ORDERED that Plaintiff Fifty East Forty Second Company LLC’s motion for declaratory judgment against Defendant William J. Gibbs Jr. is denied as to damages, and the matter shall be

set down for a hearing on damages at a date and time to be determined by the Court; and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to determine the amount of damages and expenses, including attorneys’ fees, owed by Defendants Grand Central Physical Medicine & Rehabilitation P.C. and William J. Gibbs Jr. to Plaintiff Fifty East Forty Second Company LLC; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Plaintiff Fifty East Forty Second Company LLC shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that Plaintiff Fifty East Forty Second Company LLC shall serve a proposed accounting within 24 days from the date of this order and Defendants Grand Central Physical Medicine & Rehabilitation P.C. and William J. Gibbs Jr. shall serve objections to the proposed accounting within 20 days from service of Plaintiff’s papers and the foregoing papers shall be filed

with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that Plaintiff Fifty East Forty Second Company LLC's motion to dismiss Defendants Grand Central Physical Medicine & Rehabilitation P.C. and William J. Gibbs Jr.'s affirmative defenses is granted; and it is further

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ORDERED that within ten days of entry, counsel for Petitioner shall serve a copy of this Decision and Order, with notice of entry, on Respondent; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

10/12/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, 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