

**SMA Acquisitions LLC v Kinesthesia Physio, LLC**

2023 NY Slip Op 33629(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 159869/2021

Judge: Frank P. Nervo

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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. FRANK P. NERVO PART 04

*Justice*

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SMA ACQUISITIONS LLC,

Plaintiff,

- v -

KINESTHESIA PHYSIO, LLC, KEVIN PARETTI

Defendant.

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INDEX NO. 159869/2021

MOTION DATE 04/20/2022

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, 28

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

This matter was recently transferred to Part IV.

Plaintiff moves for summary judgment on this commercial landlord-tenant nonpayment matter. The issues presented here are straightforward and the law on summary judgment well-settled.

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]).

Here, plaintiff has submitted the parties' lease and guarantee, establishing that defendants entered in a 10-year lease and guarantee of such lease with plaintiff (NYSCEF Doc. Nos. 13 and 14).<sup>1</sup> Plaintiff has further submitted its rent ledger, invoices, and affidavit evincing that defendants failed to remit payment under the lease agreement (NYSCEF Doc. Nos. 9, 16, and 17). Accordingly, plaintiff has established, as a matter of law, its entitlement to summary judgment. The burden, therefore, shifts to defendants to establish a material issue of fact sufficient to defeat summary judgment.

Defendants have failed to raise a triable issue of fact. Defendants' allegation that summary judgment is precluded by plaintiff's failure to provide an original lease agreement, a required statement of undisputed facts pursuant to the uniform rules, and authentication of the lease or guarantee is without merit. Conspicuously absent from defendants' papers is any assertion that the lease or guarantee is fraudulent, that defendants did not execute same, or that defendants made the required payments under the lease. Defendants' contention that enforcement of the guarantee is precluded by executive order related to COVID shutdowns has been repeatedly rejected by the Appellate Division (*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]). Defendants' remaining contentions are without merit.

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<sup>1</sup> The lease agreement is between defendants and plaintiff's predecessor-in-interest Madisonpark Real Estate Company. There can be no genuine argument that plaintiff lacks standing to bring this action on the basis that it purchased the subject premises from Madisonpark Real Estate.

Defendant's affirmative defenses are stricken, excepting only for defendants' seventh affirmative defense seeking, in essence, to apply the security deposit towards unpaid rent. Plaintiff contends that the lease agreement permits the application of the security deposit towards unpaid rent, but does not mandate such. Consequently, plaintiff contends it is entitled to keep the security deposit without crediting defendant for same in any judgment for unpaid rent. However, noticeably absent from those portions of the lease is any provision expressly allowing plaintiff to keep defendants' security deposit without crediting same towards unpaid rent (*see e.g.* NYSCEF Doc. No. 13 at ¶ 9). The Court will not countenance such inequitable double recovery, absent an express contract provision otherwise. The amount of unpaid rent due plaintiff by defendants, as either tenant or guarantor or tenant, shall be reduced by the amount of security deposit held by plaintiff.

However, while plaintiff has established its entitlement, as a matter of law, to judgment in its favor, it has not established the amount of the judgment. Stated differently, plaintiff has established liability on this motion, but has not established damages. The papers on this motion do not readily set forth the amount of any security deposit paid by defendants, and the Court declines to search the record in hopes of finding same. Likewise, the papers on this motion fail to explain the \$150,000.00 discrepancy in judgments sought as against defendant Kinesthesia Physio, as tenant, and defendant Kevin Paretti as guarantor of tenant (*see e.g.* NYSCEF Doc. Nos. 7 and 8, judgments of \$237,965.58 and \$108,728.69, respectively).

Accordingly, it is

ORDERED that the motion is granted to the extent of finding defendants liable to plaintiff for unpaid rent, as tenant and guarantor, for the subject commercial property in an amount to be determined before the Special Referee Part; and it is further

ORDERED that the pleadings are amended to conform with the evidence so as to include amounts due through the resolution of this matter, as presented before the Special Referee Part; and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the amount defendant Kinesthesia Physio owes plaintiff for unpaid rent and additional rent under the lease agreement;

(2) the amount defendant Kevin Paretti owes plaintiff as guarantor of Kinesthesia Physio;

(3) the amount of any credit, including but not limited to any security deposit, as an offset to unpaid rent;

(4) plaintiff’s entitlement to attorney’s fees and, if so entitled, the amount of same;

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), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by 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 on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence, unless directed otherwise by the Special Referee 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 any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

[continued on following page]

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

10/17/2023  
DATE

  
HON. FRANK P. NERVO

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

J.S.C.  
 OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE