

20 Broad St. Owner LLC v Sonder USA, Inc.

2023 NY Slip Op 33743(U)

October 13, 2023

Supreme Court, New York County

Docket Number: Index No. 653493/2020

Judge: Debra A. James

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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. DEBRA A. JAMES

PART 59

Justice

-----X

20 BROAD STREET OWNER LLC,

Plaintiff,

- v -

SONDER USA, INC. AND, SONDER CANADA, INC,
SONDER GROUP HOLDINGS LLC, SONDER HOLDINGS
INC., XYZ CORP., JOHN DOE, and JANE DOE,

Defendants.

-----X

INDEX NO. 653493/2020

MOTION DATE 12/20/2021

MOTION SEQ. NO. 001 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 158, 160, 161, 162, 163, 164, 165, 166, 167, 168, 176, 177, 178, 179, 180, 181, 182, 184, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 170, 171, 172, 173, 174, 175

were read on this motion to/for LEAVE TO FILE.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196

were read on this motion to/for VACATE STAY.

Upon the foregoing documents, it is

ORDERED that the application by show cause order of defendants for leave to file a sur-reply in further opposition to motion sequence number 001 (motion sequence number 003) is DISMISSED upon decline to sign, with leave to defendants to file

and serve a sur-reply with letter memorandum of law; and it is further

ORDERED that the application by show cause order of defendants to lift the automatic stay of disclosure pursuant to CPLR 3214(b) to permit discovery to proceed in a third-party action to the herein action (motion sequence number 004) is DISMISSED upon decline to sign, with leave to renew upon filing of a third-party complaint pursuant to CPLR §§ 306(a), 3011 and 8018(a) and (c); and it is further

ORDERED that the branch of the motion of plaintiff for summary judgment in its favor on its second cause of action (breach of contract/lease) against defendant Sonder USA, Inc., is GRANTED as to liability only; and it is further

ORDERED that the branch of the motion of plaintiff for summary judgment striking the affirmative defenses and counterclaims interposed by defendant Sonder USA, Inc. is GRANTED, and the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth (failure to state a cause of action; breach of contract; breach of implied warranty; impossibility; excuse from performance; frustration of purpose; impracticability; failure to mitigate damages; unclean hands) affirmative defenses and first (breach of contract), second (breach of covenant of quiet enjoyment); third (breach of warranty of habitability); fourth (conversion); fifth (negligence); sixth (declaratory relief); and seventh (attorneys'

fees and costs) counterclaims (improperly captioned as third-party claims) are dismissed; and it is further

ORDERED that the branch of the motion of plaintiff for summary judgment on its third cause of action against defendant Sonder USA, Inc. (attorneys' fees damages), is GRANTED as to liability only; and it is further

ORDERED that the branch of the motion of plaintiff for summary judgment on its fourth cause of action (breach of guaranty) against defendant Sonder Canada, Inc., is GRANTED as to liability only; and it is further

Appearing to the court that plaintiff is entitled to judgment on liability as to its second, third and fourth causes of action, and that the only triable issues of fact arising on plaintiff's motion for summary judgment relate the amount of damages (rent, additional rent, holdover rent, and reasonable attorneys' fees), to which plaintiff is entitled, and plaintiff's motion as to liability on its second, third and fourth causes of action having been granted, as aforesaid; it is further

ORDERED that pursuant to CPLR 3212(e) an immediate trial of the issues regarding damages, including rent, additional rent, holdover rent, reasonable attorneys' fees, and legal costs and disbursements to which plaintiff is entitled shall be had before the court; and it is further

ORDERED that plaintiff 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

This court agrees with plaintiff that defendant Sonder USA, Inc. has raised no issues of fact with respect to such defendant's affirmative defenses, captioned failure to state a cause of action; breach of implied warranty; impossibility; excuse from performance; frustration of purpose; impracticability; failure to mitigate damages; and unclean hands or its counterclaims, captioned breach of contract, breach of covenant of quiet enjoyment; breach of warranty of habitability; conversion, negligence; declaratory relief; and attorneys' fees and costs.

Plaintiff is correct that defendant Sonder USA's election to stop paying rent as of July 1, 2020, while remaining in the premises, in lieu of seeking damages, renders meritless its constructive eviction counterclaim/affirmative defense. See Schwartz v Hotel Carlyle Owners Corp, 128 AD3d 546 (1st Dept 2015). Such election also bars defendant's counterclaim for breach of the covenant of quiet enjoyment. See Dave Herstein Co v Columbia Pictures Corp, 4 NY2d 117, 120 (1958).

This court agrees with plaintiff that defendant's affirmative defense/counterclaim of constructive eviction likewise fails, as defendant was not relieved of its rent obligations upon having been allegedly constructively evicted, as it waived the protections of Real Property Law § 227 by way of section 14.5 of the lease. See Schwartz, Karlan & Gutstein v 271 Venture, 172 AD2d 226, 228 (1st Dept 1991).

Defendant's defense/counterclaim of breach of contract must be dismissed, as well. This court agrees with plaintiff that the legionella that contaminated the water system of the premises (see Addison v New York Presbyterian Hospital, 52 AD3d 269, 270 [1st Dept 2008]), which contamination defendant claims was not properly remediated by the plaintiff, does not constitute a casualty under Article 14, entitled "Casualty", of the lease. Such section does not apply to the action at bar, as giving the provisions of Article 14 their plain meaning, such

environmental hazard is not a "singular incident[], like fire, which [has] a physical impact in or to the premises". See Arista Development, LLC v Clearmind Holdings, LLC, 207 AD3d 1127, 1129 (4th Dept 2022), citing Gap Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575, 577 (1st Dept, 2021).

As argued by plaintiff, defendant's defense/counterclaim of breach of warranty of habitability lacks merit, as such defense is inapplicable to the lease at bar, which is not residential, but commercial. See Rivera v JRJ Land Property Corp, 27 AD3d 361, 364 (1st Dept 2006).

Nor has defendant raised any issue of fact with respect to its affirmative defenses sounding in impossibility; excuse from performance; frustration of purpose; impracticability; failure to mitigate damages; or unclean hands. With respect to its defenses of frustration of purpose and impossibility of performance, respectively, defendant has failed to proffer any evidence that demonstrates either that the purpose of the lease was "completely thwarted" by the legionella bacteria or, that such condition resulted in the destruction of the "subject matter of the [lease] or that the means of [rendering] performance objectively impossible." Valentino USA, Inc v 693 Fifth Owner, LLC, 203 AD3d 480 (1st Dept 2022).

Finally, defendant's affirmative defenses and counterclaims sounding in mitigation of damages, conversion, negligence, declaratory relief, and attorneys' fees are wholly unsustainable. This court concurs with plaintiff, that (a) a commercial landlord has not duty to mitigate under New York law, see Holy Props v Kenneth Cole Prods, 87 NY2d 130, 133 (1995); (b) the defense of unclean hands is unavailable in an action exclusively for damages, see Manshion Joho Ctr Co, Ltd v Manshion Joho Ctr, Inc, 24 AD3d 189, 190 (1st Dept 2005); (c) "[t]he conversion claim is legally insufficient because it merely restates a claim for damages for breach of contract based on a failure to pay charges alleged due and owing", Cronos Group Ltd v XComIP, LLC, 156 AD3d 54, 74 (1st Dept 2017); and (d) "because [counterclaimant] has an adequate legal remedy for breach of contract, the cause of action for declaratory judgment should be dismissed", Cronos Group, supra.

Defendant's negligence counterclaim fails as it alleges neither personal injury nor property damage but only seeks a diminution or abatement of rent. See 532 Madison Ave Gourmet Foods, Inc v Finlandia Center, Inc, 96 NY2d 280, 291-292 (2001).

However, as for damages (i.e., rent, additional rent, hold-over rent, reasonable attorneys' fees and legal costs and expenses), the record before this court raise issues of fact, which must be determined by the factfinder at a trial. Though the record at bar includes detailed spreadsheets, there are no detailed invoices documenting outstanding rent arrears. Cf Dee Cee Assoc LLC v 44 Beehan Corp, 148 AD3d 636, 641 (1st Dept 2017) and NYSCEF

Document Number 28, statement of account addressed to tenant/defendant, Dee Cee Assoc LLC v 44 Beehan Corp, NY County Supreme Court Index No 652005/2013. Nor is there any proof of when defendant USA Sonders, Inc, surrendered possession of the premises after termination of the lease on July 28, 2020¹.

Debra A. James

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<u>10/13/2023</u>			<u>DEBRA A. JAMES, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE

¹ For example, by its terms, the Surrender Agreement dated September 9, 2020 (NYSCEF Document No 139) “resolves solely the issue of possession of the Seventh Floor Units”.