

**Bock Realty Corp. v Clean Rite Ctr. - 1332 Flatbush  
Ave., LLC**

2023 NY Slip Op 33960(U)

October 13, 2023

Supreme Court Kings County

Docket Number: Index No. 509134/2020

Judge: Katherine A. Levine

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 92 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of October, 2023.

P R E S E N T:

HON. KATHERINE LEVINE,

Justice.

-----X  
BOCK REALTY CORP.,

Plaintiff,

- against -

Index No. 509134/2020

CLEAN RITE CENTER - 1332 FLATBUSH AVE., LLC,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
Supplemental Affidavit (Affirmation) \_\_\_\_\_

44-52  
63-65, 78-81  
66-71  
140

Upon the foregoing papers in this action for ejectment and rent due under a lease for the commercial property at 1332-1334 Flatbush Avenue in Brooklyn ("Property"), plaintiff Bock Realty Corp. ("Bock Realty" or "plaintiff") moves for an order: (1) granting summary judgment for the ejectment of defendant Clean Rite Center - 1332 Flatbush Ave., LLC ("Clean Rite" or "defendant") from the Property and awarding plaintiff possession of the Property pursuant to CPLR 3212<sup>1</sup>; (2) dismissing Clean Rite's

<sup>1</sup> That branch of Bock Realty's summary judgment motion seeking the issuance of an order of ejectment has now been rendered moot because Bock Realty has advised the court that Clean Rite vacated and surrendered possession of the Property to Bock Realty in January 2023 (*see* NYSCEF

affirmative defenses and counterclaim, pursuant to CPLR 3211 (a) (1), (a) (7) and (b); (3) granting it an award of the rental income, water charges and real estate taxes owed, which continue to accrue, and damages for "withholding" the Property from plaintiff; and (4) an award of attorneys' fees, costs and disbursements, the amount of which to be determined at a hearing at the conclusion of this action.

### Background

#### *This Ejectment/Breach of Lease Action*

On June 4, 2020, Bock Realty commenced this action against its tenant at the Property, Clean Rite, by filing a summons and a complaint verified by Bock Realty's then president, Charles Bock, alleging that it is the fee simple owner entitled to possession of the Property. The complaint alleges that Clean Rite, as tenant, entered into a commercial lease agreement for the Property with Bock Realty's predecessor, as landlord, on July 23, 1999, which was amended by a Second Rider and a First Amendment (collectively, the Lease), a copy of which was annexed to the verified complaint as Exhibit A.

The complaint alleges that Clean Rite is in possession of the Property pursuant to the terms of the Lease, and that it breached the Lease by failing to make the \$8,784.60 fixed monthly rental payments that were due on April 1, 2020 and on May 1, 2020. Bock Realty sent Clean Rite a letter on May 21, 2020 ("demand letter") demanding possession

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Doc No. 140 at En.1).

of the Property based on failure to pay rent. The demand letter is from Bock Realty's counsel and the subject line identifies the Lease for the Property and Clean Rite as tenant thereunder. The demand letter quotes § 17(2) of the Lease, which provides:

"[I]f Tenant shall make default in the payment of the rent reserved herein or any part of either or in making any other payment herein required; then and in any of such events Owner may without notice, re-enter the demised premises either by force or otherwise, and dispossess Tenant by summary proceedings or otherwise, and the legal representative of Tenant or other occupant of demised premises and remove their effects and hold the premises as if this lease had not been made, and Tenant hereby waives the service of notice of intention to re-enter or to institute legal proceedings to that end." Lease, § 17 (2) [emphasis added].

Although notice of default was not required under the plain terms of this provision, plaintiff's demand letter identified Clean Rite's default in payment for the months of April and May 2020, and notified Clean Rite that it "hereby elects to re-enter the Premises and to terminate your right of possession effective as of 11:59 P.M. on June 1, 2020, and demands that possession of the Premises be delivered and surrendered to the Landlord by the aforesaid date . . . or it may commence an ejectment action against you." The May 21, 2020 demand letter also referenced and attached Bock Realty's May 8, 2020 rent demand, which stated:

"Please be advised that if full payment of the Fixed Rent for the months of April, 2020 and May, 2020 are not received by the Landlord by May 19, 2020, the Landlord shall exercise its rights provided under the Lease and pursuant to the law to recover possession of the Premises, and damages, from you"

(May 8, 2020 letter at page 2).

The May 21 and May 8 demand letters from Bock Realty's legal counsel were accompanied by a May 6, 2020 written authorization executed by Charles Bock, Bock Realty's president at that time.

The Lease reflects that Bock Realty, identified as the "current Landlord," succeeded to the interest of Yohann [as Landlord] in the Lease. (First Amendment to Lease, page 1) According to paragraph 4 of the First Amendment to Lease, which was executed on October 20, 2009, by Oren Sauberman, vice president of Clean Rite, as of January 1, 2010, § 42 of the Lease was amended<sup>2</sup> and tenant was then required to pay real estate taxes in the form of "tax rent" (First Amendment to Lease at ¶ 4, page 4). § 28 of the Lease provides that if tenant uses or consumes water for any purpose other than ordinary lavatory purposes, then tenant agrees to pay for water usage as "additional rent" (Lease at ¶ 28). § 18 of the Lease, entitled "Remedies of Owner and Waiver of Redemption," provides in relevant part, that:

"in case of any such default [in the payment of rent], re-entry, expiration and/or dispossession by summary proceedings or otherwise [as referenced in Par. 17 (2)], (a) the rent, and additional rent [i.e., tax rent and water charges], shall become due thereupon and be paid up to the time of such re-entry, dispossession and/or expiration . . ." (*id.*, Lease at ¶ 18).

The complaint further alleges that:

<sup>2</sup> § 42 (j) of the Lease was amended to provide that "Landlord shall have the same remedies for non-payment by Tenant of Real Estate Taxes as Landlord has for non-payment by Tenant of Fixed Rent" (*id.*, First Amendment to Lease at ¶ 4, page 7).

“[p]laintiff has elected pursuant to the terms of Article 17 [2] of the Lease that “[I]f Tenant shall make default in the payment of the rent reserved herein or any part of either or in making any other payment herein required; then and in any of such events Owner may without notice, re-enter the demised premises either by force or otherwise, and dispossess Tenant by summary proceedings or otherwise, and the legal representative of Tenant or other occupant of demised premises and remove their effects and hold the premises as if this lease had not been made. . . .” and due notice of such election by Plaintiff was duly given to Defendant in writing

“That Defendant has refused to surrender peaceful possession of the Premises and failed to vacate the Premises . . . and refuses to do so and is in possession of the Premises and unlawfully withholds possession thereof from Plaintiff and Plaintiff has been damaged and is being damaged by such withholding.”

Plaintiff demands immediate possession of the Property and damages “for the rental amounts owed and which continue to accrue and for withholding the said Premises, together with attorneys’ fees, and the costs and disbursements of this action.”

***Clean Rite’s Answer, Affirmative Defenses and Counterclaim***

Defendant denied the allegations and asserted the following affirmative defenses:

- (1) the complaint fails to state a claim for breach of the Lease; (2) there is a stay of eviction of commercial tenants until August 31, 2021, due to the COVID-19 pandemic;
- (3) the May 21, 2020 demand letter (referred to as the “predicate notice” by Clean Rite) was not signed by an authorized representative of Bock Realty; (4) Bock Realty failed to

serve a valid 14-day rent demand, as required under RPAPL § 711 (2); and (5) Bock Realty failed to serve a written rent demand, which violates § 17 (1) of the Lease.

Clean Rite also asserted a counterclaim seeking a judgment declaring that Bock Realty's May 21, 2020 demand letter is actually a "notice of default" that is contrary to the terms of § 17(1) of the Lease "and therefore is legally insufficient to support Plaintiff's claimed right of re-entry pursuant to § 17(2) of the Lease."

***Bock Realty's Instant Summary Judgment Motion***

On July 12, 2021, Bock moved for: (1) summary judgment on its ejectment claim and awarding it possession of the Property, which branch of the motion has been rendered moot since Clean Rite vacated and surrendered possession of the Property in January 2023; (2) dismissal of Clean Rite's affirmative defenses and counterclaim;<sup>3</sup> (3) an award of the rental payments, including the additional rent consisting of water charges and real estate taxes that Clean Rite owes Bock Realty, pursuant to the terms of the Lease; and (4) an award of attorneys' fees, costs and disbursements, pursuant to § 19 of the Lease.

Bock Realty submits an affidavit from Ellen Bock, its "authorized representative," who attests, based on her personal knowledge, that "[t]o date, Defendant has failed to pay the rent due and owing under the Lease between the Defendant and Landlord and currently owes rent and additional rent arrears [for real estate taxes and water charges] in the amount of \$275,077.71 . . ." from April 1, 2020 through July 1, 2021. Ellen Bock

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<sup>3</sup> Clean Rite's counterclaim, which challenges Bock Realty's right of reentry upon the Property based on the May 2020 Demand Letter is dismissed as moot, since Clean Rite surrendered and vacated the Property in January 2023.

submits printouts from the Department of State, a water bill from the New York City Environmental Protection and a property tax bill from the New York City Department of Finance.

Plaintiff also submits an attorney affirmation reiterating the factual allegations verified by Charles Bock in the complaint, including that this is an ejectment action “based upon the failure of the Defendant to pay the rent due under the terms of the Lease.” Counsel quotes § 17 (2) of the Lease, which states that Landlord has the right to re-enter the Property without notice upon the tenant’s payment default and asserts that “[c]ourts have construed lease provisions such as this to provide commercial landlords with the right to exercise ‘self-help’ possession.” Plaintiff contends that it “chose to avail itself of the remedies available to it at law” because defendant failed to peacefully surrender its possession of the Property.

Plaintiff references the applicable provisions of the Lease to “establish that the rent owed is a sum certain amount that is due from the Defendant to the Plaintiff[,]” and that the tenant was responsible for water charges and for the payment of real estate taxes. Plaintiff also claims that Bock Realty is entitled to an award of attorneys’ fees, costs and disbursements pursuant to the express terms of § 19 of the Lease.

Plaintiff contends that Clean Rite’s first affirmative defense of failure to state a cause of action for breach of contract should be dismissed because defendant breached the Lease, and that the second affirmative defense regarding the COVID-19 pandemic is

meritless because Clean Rite never filed a hardship application and continued to operate its laundromat business throughout the pandemic, and the Governor's Executive orders did not apply to ejectment proceedings. Clean Rite concedes that the second affirmative defense "is no longer viable" since the COVID-19 pandemic stay has been lifted (*see* NYSCEF Doc No. 63 at ¶ 10). Plaintiff further argues that the third affirmative defense (the May 21, 2020 demand letter was not signed by an authorized representative of Bock Realty) should be dismissed because the demand letter was executed by an authorized representative of Bock Realty, as reflected in the attached authorization from its then president, Charles Bock (*id.* at ¶ 70; NYSCEF Doc No. 3), and that the fourth affirmative defense asserting that the May 2020 Demand Letter fails to comport with RPAPL § 711 (2) should be dismissed because "[t]his action was commenced pursuant to Article 6 of the RPAPL, and not pursuant to Article 7 of the RPAPL" and "[t]his is an action for ejectment . . . not a summary proceeding" (NYSCEF Doc No. 45 at ¶¶ 82-84).

Finally, counsel asserts that the fifth affirmative defense and defendant's counterclaim, i.e., Bock Realty's failure to properly serve a written demand in accordance with § 17 (1) of the Lease, should be dismissed because that section "provides the mechanism for the Plaintiff to notify the Defendant of a default [other than for failure to pay the rent or additional rent] under the Lease, and to terminate the Lease if the default is not cured by the Defendant within the applicable time frame" and "[a] careful reading of Article 17 (1) of the Lease reveals that the Plaintiff is not required to serve a notice of

default for the non-payment of rent or to serve a notice of termination” (*id.* at ¶¶ 97-98).

### *Clean Rite's Opposition*

Clean Rite, in opposition, submits an affidavit from William Green (“Green”), its vice president, who attests that he “does not know and has never had any dealings with” the signatories to the predicate rent demand or the May 2020 Demand Letter, and suggests that they were not signed with authority “vested by the landlord” (NYSCEF Doc No. 63 at ¶ 3 [A]). Green also questions Ellen Bock’s authority to submit an affidavit on behalf of Bock Realty and, although Ellen Bock’s affidavit is made upon her personal knowledge, Green claims that “[n]o business record is offered to corroborate what rent is claimed as unpaid” and Ellen Bock’s affidavit “*on its face raises issues of fact that preclude the granting of Plaintiff’s motion for summary judgment*” (*id.* at ¶ 3 [B]-[D] [emphasis added]).

Green also asserts that there is an issue of fact regarding the Lease because “Deponent has searched the records in our office and Deponent cannot find a copy of the Lease identical to that offered by Plaintiff . . .” and “such question of which document is the binding document raises an issue of fact” (*id.* at ¶ 11). Although the Lease was physically annexed to the complaint verified by Charles Bock, Bock Realty’s former president, and the First Amendment to Lease was executed by Clean Rite’s vice president, Oren Sauberman (who does not submit an opposing affidavit), Green asserts that Bock Realty’s summary judgment motion should be denied because it failed to

authenticate the Lease (*id.* at ¶¶ 11-12).

Defendant argues that plaintiff's summary judgment motion is "procedurally flawed" because Bock seeks "a money judgment for an incompletely framed claim for breach of contract . . . together with unpled claims for real estate taxes and water charges"<sup>4</sup> (NYSCEF Doc No. 64 at ¶ 5). Defendant further contends that the complaint fails to state a claim for breach of the Lease in addition to ejectment and that Bock Realty's summary judgment motion is based on inadmissible "hearsay documents that are not probative as a matter of law to support such claims" (*id.* at ¶ 7). Defendant further claims that summary judgment is premature at this juncture without discovery and argues that Clean Rite would be prejudiced without discovery "to establish the accuracy of the claimed rent" (*id.* at ¶¶ 8-9).

### ***Bock Realty's Reply***

Bock Realty, in reply, submits a reply affidavit from Ellen Bock, who clarifies that she is the president of Bock Realty, having replaced her husband, Charles Bock, in that position after his untimely death in June 2021 (NYSCEF Doc No. 67 at ¶ 3). Ellen Bock updated her testimony regarding the fixed rental (\$8,784.60/month) that Clean Rite owed from April 1, 2020 through February 1, 2022, in the amount of \$202,045.80 (*id.* at ¶ 4). Ellen Bock also attested that "Defendant is delinquent in the payment of real estate taxes in the amount of \$67,213.19 . . . less the Base Year Tax amount of \$11,027.00, for a

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<sup>4</sup> Defense counsel further argues that the water and real estate tax bills submitted by Bock are insufficient because they are not *certified* copies (*id.* at ¶ 17).

total sum due in the amount of \$56,186.19 for the period covering January 1, 2021-January 1, 2022” substantiated by a print-out from the New York City Department of Finance (*id.* at ¶ 5 and NYSCEF Doc No. 68). Ellen Bock further attests that “as of January 2, 2022, the New York City Department of Environmental Protection has notified the Plaintiff that the water and wastewater charges for the Premises now amount to \$218,767.30, and that the account is delinquent” (NYSCEF Doc Nos. 67 at ¶ 6 and NYSCEF Doc No. 69). Ellen Bock attests that, as of February 2022, “[t]he total rent and additional rent currently due and owing is \$476,999.29 plus accruing interest” (NYSCEF Doc No. 67 at ¶ 7).

#### Discussion

Summary judgment is a drastic remedy that deprives litigants of their day in court and should, thus, only be granted when there is no doubt as to the absence of triable issues of material fact. *Owens v City of New York*, 183 A.D.3d 903, 906 (2d Dept. 2020); *10 Bethpage Rd., LLC v 114 Woodbury Realty, LLC*, 178 A.D.3d 751, 754 (2d Dept. 2019). “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 N.Y.2d 320, 324 (1986); *Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 (2d Dept. 2023). Once the movant has made a prima facie showing of entitlement to summary judgment, the “burden shifts to the opposing party to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact which require a trial of the action.” *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016), citing *Alvarez, supra*, 68 NY2d at 324. Mere expressions of hope that discovery would reveal something helpful to defendant’s case provides no basis for denying a summary judgment motion. *Jorbel v Kopko*, 31 AD3d 612, 613 (2006); *Grodski v. Greenpoint Bank*, 16 A.D.3d 623, 624 (2d Dept. 2005).

The “essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach.” *Hymowitz v. Nguyen*, 209 A.D.3d 997, 1000 (2d Dept. 2022); *East Ramapo Cent. Sch. Dist. v. New York Schs. Ins. Reciprocal*, 199 A.D.3d 881, 886 (2d Dept. 2021).

Here, the verified complaint annexes the Lease executed by defendant Clean Rite’s vice president and alleges that Clean Rite failed to pay its fixed monthly rent of \$8,784.60 from April 1, 2020 through January 2023, when the Property was eventually surrendered by Clean Rite. The verified complaint, together with Ellen Bock’s moving and reply affidavits and the exhibits annexed thereto, also establish that Clean Rite failed to pay “additional rent” comprised of outstanding water charges and real estate taxes, all of which are due to be paid by Clean Rite under the terms of the parties’ Lease. Contrary to Clean Rite’s argument, § 17 (1) of the Lease specifically relates to notices for defaults *other than the failure to pay rent*. § 17 (2) of the Lease, however, explicitly applies when there is a

default in the tenant's payment of rent or "additional rent," including water charges and real estate taxes, and provides that "[o]wner may, *without notice*, re-enter the demised premises either by force or otherwise, and dispossess Tenant . . ." (NYSCEF Doc No. 2 at ¶ 17 [2] [emphasis added]). § 18 provides that "[i]n case of any such default . . . (a) the rent, and additional rent, *shall become due* thereupon and be paid up to the time of such re-entry . . ." (*id.* at ¶ 18 [emphasis added]).

Bock Realty has satisfied its prima facie case by establishing that Clean Rite breached the parties' Lease by failing to pay fixed monthly rent and additional rent as of April 1, 2020. The sufficiency of Bock Realty's May 2020 Demand Letter and the prior rent demand letter of May 8, 2020 are irrelevant since §s 17 (2) of the Lease explicitly states that landlord may recover possession and rent arrears without notice.

Clean Rite, in opposition, has failed to raise a triable issue of fact regarding its contractual obligations to pay fixed monthly rent and additional rent in the form of water charges and real estate taxes under the terms of the Lease. As a preliminary matter, this court finds Green's unsupported claim that the Lease may not be genuine to be incredible, especially since Green did not address the fact that Clean Rite's vice president executed the First Amendment to Lease that is annexed to the verified complaint.

In addition, Clean Rite fails to establish that it has paid its monthly rent for the Property after April 2020. Plaintiff correctly notes that "nowhere in the Defendant's papers is there any proof of payment of any of the rent and additional rent, including real

estate taxes and water claimed herein” (NYSCEF Doc No. 66 at ¶ 40). Furthermore, contrary to defense counsel’s contention, Clean Rite will not be prejudiced without discovery to determine the “accurate” amount of rent that is due and owing under the Lease because a framed-issue hearing will be conducted to determine the precise amount of monthly fixed rent and additional rent in the form of real estate taxes and water charges that Clean Rite owes to Bock Realty as of January 2023.

Ellen Bock’s moving affidavit only addresses the rent, water charges and tax arrears from April 1, 2020 through July 1, 2021 (see NYSCEF Doc No. 46 at ¶ 3) and her reply affidavit only addresses the rent, water and tax arrears from April 1, 2020 through February 1, 2022 (see NYSCEF Doc No. 67 at ¶ 4). In addition, by an October 14, 2022 order (NYSCEF Doc No. 92), this court granted Bock Realty’s order to show cause for use and occupancy pendente lite (in mot. seq. five) and Clean Rite was ordered to pay monthly use and occupancy in the amount of \$8,784.60 commencing June 10, 2022, and monthly thereafter during the pendency of this action. Thereafter, by a January 21, 2023 order (NYSCEF Doc No. 122), this court found Clean Rite to be in contempt of the prior order for failing to make the use and occupancy payments and ordered it to do so within 30 days. Under these circumstances, a framed-issue hearing is necessary to clarify the precise amount of fixed monthly rent and additional rent for real estate taxes and water charges that are currently due and owing under the Lease from April 1, 2020, the payment default date, through Clean Rite’s surrender of the Property to Bock Realty in January 2023.

Bock Realty's attorneys' fees, costs and disbursements that it incurred in prosecuting this action, which are recoverable under § 19 of the Lease, can also be determined at the framed-issue hearing. § 19 of the Lease provides, in relevant part, that:

*"If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease, then, unless, otherwise provided elsewhere in this lease, Owner may immediately or at any time thereafter and without notice perform the obligation of Tenant thereunder, and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to attorney's fees, in instituting, prosecuting or defending any actions or proceeding, such sums so 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 five (5) days of rendition of any bill or statement to Tenant therefor . . ."* (NYSCEF Doc No. 2, Lease at ¶ 19 [emphasis added]).

Whether characterized as "additional rent" or attorneys' fees, costs and disbursements, the reasonable legal fees that Bock Realty incurred in prosecuting this action are recoverable under § 19 of the Lease. Accordingly, it is

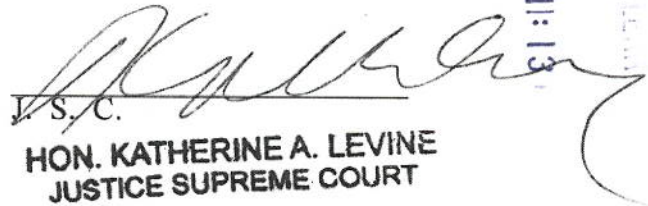
**ORDERED** that Bock Realty's summary judgment motion (mot. seq. three) is granted to the extent that: (1) Bock Realty is granted summary judgment on its only remaining claim for breach of the Lease for Clean Rite's failure to pay fixed monthly rent and additional rent comprised of real estate taxes and water charges that were due and owing under the terms of the Lease since April 1, 2020 through January 2023, when Clean

Rite vacated and surrendered the Property to Bock Realty, and the amount of such rent due and owing shall be determined at a framed-issue hearing; (2) Clean Rite’s affirmative defenses and counterclaim regarding the sufficiency of the May 2020 Demand Letter for reentry upon the Property are dismissed;<sup>5</sup> (2) Bock Realty is entitled to an award of reasonable attorneys’ fees, costs and disbursements in prosecuting this action as “additional rent,” pursuant to § 19 of the Lease, in an amount to be determined at a framed-issue hearing; and it is further

**ORDERED** that the parties shall appear for a framed-issue hearing before a Referee on a date to be determined by the court regarding: (1) the amount of fixed monthly rent and additional rent comprised of water charges and real estate taxes that is due and owing from Clean Rite to Bock Realty from April 1, 2020 through January 2023, and (2) the reasonable attorneys’ fees, costs and disbursements that Bock Realty incurred in prosecuting this action.

This constitutes the decision and order of the court.

E N T E R,

  
J.S.C.  
**HON. KATHERINE A. LEVINE**  
**JUSTICE SUPREME COURT**

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<sup>5</sup> Even if Clean Rite had not surrendered the Property, § 17 (2) of the Lease plainly provides that landlord may enter upon the Property *without notice* if rent has not been paid (*see* NYSCEF Doc No. 2 at ¶ 17 [2]).