

**Avant Guard Props., LLC v Rosy Bleu LJ, LLC**

2023 NY Slip Op 33961(U)

October 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 519405/19

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: TRIAL TERM PART 35 X  
AVANT GUARD PROPERTIES, LLC,

Plaintiff

Index No: 519405/19

-against-

DECISION AND  
ORDER

ROSY BLEU LJ, LLC, LINDSAY ROSE RISK, and  
GLEN CHO,

Defendants.

X

Recitation as required by CPLR 2219(a), of the papers considered in motion and cross-motion for summary judgment.

Papers	NYSCEF Doc. Nos.
Order to Show Cause/Motion and Affidavits Annexed.	21-32
Cross-motion and supporting papers.....	33-40
Answering Affidavits.....	43-50
Reply Papers.....	51-59
Memorandum of law.....	

Upon the foregoing cited papers, the Decision/Order on this motion and cross-motion is as follows:

In this action to recover damages for breach of contract, the defendants move pursuant to CPLR 3212 for an order granting them partial summary judgment dismissing the plaintiff’s complaint. The plaintiff cross-moves pursuant to CPLR 3212 for an order (1) granting it summary judgment against defendants on the causes of action in the complaint and directing the entry of judgment in the amount of \$72,157.60, plus interest from October 2018, attorney’s fees in the amount of \$4,823.85, plus costs and disbursements, and (2) dismissing defendants’ affirmative defenses and counterclaims.

This action arises out of a lease between the plaintiff, as landlord, and the defendants Rosy Bleu LJ, LLC [Rosy Bleu] Lindsay Rose Risk [Risk], and Glen Cho [Cho], for a commercial space in the plaintiff’s building. The commercial lease was for a period of 3 years commencing on October 1, 2015 and ending on October 1, 2018. The monthly rent was \$3000 per month payable on the first day of each month, with a 5% increase each year. Upon execution of the lease, the first month’s rent was payable together with a deposit in the amount of \$6000 to be held as security for repair of

any damages to the space caused by the defendants. The lease provided that the deposit would be returned to defendants within 30 days of the termination of the lease, minus any amounts needed to repair the space, or to pay off any arrears that may be owed. Plaintiff commenced this action against the defendants seeking to recover unpaid rents for the months of July 2018 through December 2018 and for property damage to the commercial space. The defendants filed an answer asserting various affirmative defenses and asserted counterclaims seeking to recover damages for constructive eviction and attorneys' fees.

Defendants seek partial summary judgment dismissing the complaint on the ground that there are no genuine issues of material fact concerning the causes of action set forth in the complaint. Defendants contend that rent was paid through the end of the lease term, but for July 2018 and that plaintiff is improperly seeking rent for 3 months after surrender of the premises. In an affidavit submitted in support of the motion to dismiss, Risk, a member of Rosy Bleu and a signatory to the lease, states that premises was surrendered on the lease's expiration date, October 1, 2018, both by email to plaintiff and by tender of the keys to plaintiff's agent. And that there is no basis to seek rent for October 2018, November 2018 or December 2018. Ms. Risk further states plaintiff was holding \$6000 as security from defendants which should be applied to the August 2018 and September 2018 rent, leaving only the July 2018 rent, in the amount of \$3,240, unpaid.

At the outset, as defendants do not dispute that there is outstanding rent due under the lease, defendants fail to demonstrate their prima facie entitlement to judgment dismissing the complaint. To the extent any issues remain that will affect the amounts due, including how the security deposit was applied, will be resolved at trial (*see P62 LLC v WFP Retail Co. L.P.*, 191 AD3d 583 [1st Dept 2021]). Further, although the answer includes an affirmative defense and a counterclaim alleging constructive eviction (due to two water leaks), defendants did not withhold any rent and remained in full possession of the property. Therefore, defendants cannot demonstrate constructive eviction (*see Prahkin v Fulton Towers Realty Corp.*, 122 AD3d 601 [2d Dept 2014]).

Turning to plaintiff's cross-motion for summary judgment, plaintiff contends that defendants breached the lease agreement by failing to pay rent due under the lease and by causing damage to the property. In an affidavit submitted in support of the cross-motion, plaintiff's officer and owner, Barry Borgen, states that defendants did not pay the monthly rent of \$3200 for the months of July 2018, August 2018, and September 2018. Mr. Borgen further states that defendants damaged the premises by painting over a ceiling mural, breaking the light switches, drilling holes into the ceiling and into the aluminum front door, painting over custom wall tiles, cracking floor tiles, and painting the front sidewalk, resulting in repair costs in the amount of \$58,717.60, which after applying the \$6000 security deposit to the damages as permitted by the lease, brings the total damages down to \$52,717.60. That due to the scope of the damage plaintiff was forced to do

repairs from October 2018 through December 2018, losing an additional \$9,720 in rents. Along with his affidavit, Mr. Borgen submits repair estimates, photographs of the premises, and a ledger he created showing the balances due and owing.

With respect to the claim for unpaid rent, plaintiff establishes, prima facie, through the affidavit of Mr. Borgen and the executed lease agreement, that defendants are liable for unpaid rent in the amount of \$3200 per month from **July 2018 through September 2018** (see *177 Richard Street, LLC v Weeks*, 178 AD3d 644 [2d Dept 2019]). In opposition defendants do not dispute that they failed to pay the amounts due under the lease, and therefore fail to raise a triable issue of fact (see *ESRT 501 Seventh Avenue, LLC v Regine, Ltd*, 206 AD3d 448 [2d Dept 2022]). Therefore, plaintiff is entitled to partial summary judgment as to liability on that portion of its breach of contract claim for unpaid rent. As stated previously, any issues remaining that affect the amounts due, including how the security deposit is applied, shall be resolved at trial.

Plaintiff, however, is not entitled to recover for lost rents. “It is well settled that lost rent is not recoverable as damages for breach of a lease covenant requiring a tenant to keep the premises in good repair” (*Building Service Local 32B-J Pension Fund v 101 Ltd. Partnership*, 115 AD3d 469, 470 [1st Dept 2014]). Damages are limited to the cost of restoring the premises into the condition in which it should have been surrendered (*id.* at 470).

As to the claim for property damage, the parties’ lease agreement required that upon termination of the agreement, the defendants were to restore the premises to the condition received, except for normal wear and tear. The plaintiff, therefore, in order to prevail on its breach of lease claim based on damages to the property, must establish that the premises was not returned to the condition it was in at the outset of the tenancy, and the amount that it would cost to restore the premises (see *Valco Building and Maintenance Supplies Corp. v Werwaiss & Co., Inc.*, 215 AD3d 890 [2d Dept 2023]).

Here, plaintiff fails to establish that the premises were not returned in accordance with the lease. First, the photographs submitted by plaintiff in support of its motion as to the condition of the premises both before and after defendants’ tenancy are not properly authenticated (see *Abbott Bros. II Steak Out, Inc., v Tsoulis*, 162 AD3d 1472 [4th Dept 2018]), and plaintiff’s attempt to remedy the defect in its reply papers is improper (*id.*). Moreover, as the lease allowed for minor cosmetic changes including “painting, shelving and plantings”, plaintiff fails to eliminate all triable issues as to whether defendants’ painting of the premises, including painting over the existing ceiling mural, constituted a breach of the lease for which plaintiff may recover damages. Furthermore, the submissions fail to demonstrate that the work already performed as listed in the ledger or the remaining work to be performed as set forth in the cost estimates, including repaving of the front sidewalk, was/is necessary to restore the premises (see *Valco Bldg.* at 893). As such, plaintiff fails to demonstrate its prima facie entitlement to judgment as matter of

law as to that portion of its breach of contract claim relating to property damage.

In regard to the claim for attorneys' fees, the lease provides that if defendants failed to pay rent or other amounts due to the plaintiff, then plaintiff had the right to commence litigation and that the costs of such litigation were to be paid by defendants. As such the plaintiff is entitled to recover attorneys' fees in connection with this action. The amount of reasonable attorneys' fees to be awarded to plaintiff shall be determined at trial.

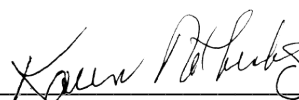
Lastly, defendants' counterclaims for constructive eviction and attorneys' fees are dismissed. In addition, all of the affirmative defenses raised in defendants' answer except with respect to the third affirmative defense (waiver and equitable estoppel) and sixth affirmative defense (damages not caused by defendants) are dismissed.

In view of the foregoing, the defendants' motion for summary judgment dismissing the plaintiff's complaint is denied. The plaintiff's cross-motion for summary judgment is granted solely to the extent as set forth above and is otherwise denied.

This constitutes the order and judgment of the Court

Dated: October 27, 2023

Enter,

  
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Karen B. Rothenberg, J.S.C.