

**28-30 W. 37th St. LLC v 37th St. Lot, LLC**

2023 NY Slip Op 34589(U)

December 22, 2023

Supreme Court, New York County

Docket Number: Index No. 654643/2020

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M**

*Justice*

-----X

28-30 WEST 37TH STREET LLC,

Plaintiff,

- v -

37TH ST. LOT, LLC, and ABRAHAM TALASSAZAN,

Defendants.

-----X

INDEX NO. 654643/2020

MOTION DATE 03/11/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 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, and 61

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion for summary judgment is granted in part and denied in part; and the cross-motion for partial summary judgment dismissing certain of the claims in the complaint as against defendant Abraham Talassazan, insofar as plaintiff seeks to recover rent and additional rent accruing after defendants asserted vacatur of the premises, and dismissing the second and fifth causes of action against both defendants, is granted in part and denied in part, in accordance with the following memorandum.

**Background**

Pursuant to a ground lease dated April 8, 1996, and subsequently modified, plaintiff leased a parcel of unimproved land to nonparty 28-30-26 Enterprise Ltd., predecessor in interest of defendant 37th St. Lot, LLC, which subsequently constructed a two-story building on the lot (“tenant”) (ground lease, NYSCEF Doc. No. 14). Talassazan agreed, as part of the lease, to guarantee the payment of all sums due under the lease, from the commencement thereof to the

earlier of “[i] Tenant’s claimed residential subtenants’ complete vacating and removal from the Demised Premises and complete surrender of full possession thereof to Landlord (except for permitted commercial subtenancies) . . . broom-clean and in good condition and repair” or the return of a warrant of eviction (*id.*, § 31.01). Tenant agreed not to interpose “any counterclaim, set-off or defense of whatever nature or description” in any action or special proceeding brought by plaintiff for nonpayment (*id.*, § 29.11). The parties to the lease agreed to provide each other with estoppel certificates upon request, “as to the validity and force and effect of this lease . . . as to the existence of any default on the part of any party thereunder, as to the existence of any offsets, counterclaims, or defenses thereto, and as to any other matters which may be reasonably requested” (*id.*, § 25.01). If either party failed to object to anything contained in the requested certificate within 30 days of receipt, the party failing to object would be bound to the same extent as if “the non-objecting party had delivered a written[,] executed[,] and acknowledged instrument confirming the said claim or statement” (*id.*, § 25.02). Upon tenant’s failure to pay rent, and plaintiff’s reentry and repossession of the premises, “tenant shall remain and continue liable to [plaintiff] in a sum equal to all rent, additional rent, and other charges payable hereunder for the remainder of the term of this lease” (*id.*, § 19.03).

Tenant last paid rent for March 2020, and thereafter ceased paying rent. On July 27, 2020, defendants notified plaintiff that tenant would vacate the premises as of July 31, 2020, under the terms of the lease (letter dated July 27, 2020, NYSCEF Doc. No. 53). It is undisputed that two commercial subtenants remained in the building following tenant’s surrender. The parties do dispute, however, whether these subtenants were permitted to be in the building, the answer to which question determines whether Talassazan remains liable for rent for the remainder of the lease term, which ends in 2027. This action followed.

### **Standard of Review**

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

### **Discussion**

Of the five causes of action asserted in the complaint, and on which plaintiff seeks summary judgment, defendants seek to dismiss only two in their entirety: the second and fifth causes of action. The second cause of action seeks to recover rent due from October 2020 through the end of the lease in 2027. A claim for breach of contract requires proof of the contract, plaintiff's performance, defendant's breach, and damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Here, plaintiff has established prima face

entitlement to summary judgment against tenant through submission of the ground lease and the affidavit of the co-trustee of one of its members, Edward Vrona, who sets forth the facts regarding tenant's surrender of the premises and failure to continue paying rent following March 2020 (NYSCEF Doc. No. 10). Defendants argue that the lease lacks an acceleration clause, barring plaintiff from recovering all remaining rent due following a payment default. The lease, however, provides that upon tenant's failure to pay rent and plaintiff's repossession of the premises, "tenant shall remain and continue liable to [plaintiff] in a sum equal to all rent, additional rent, and other charges payable hereunder for the remainder of the term of this lease" (lease, NYSCEF Doc. No. 14, § 19.03). Defendants do not offer any further argument in defense of this cause of action as to tenant, and accordingly plaintiff is, at least, entitled to summary judgment against tenant. The lease provides the amount of rent due for the remainder of the lease term (lease, NYSCEF Doc. No. 14, § 2.01[24-30]), and judgment may, therefore, be awarded on this cause of action without further hearing on damages. The same is true as to the first cause of action, which seeks damages that accrued prior to October 2020.

Similarly, the fifth cause of action seeks to recover for "costs to repair and restor[e the premises] to an "AS WAS" condition" (amended complaint, NYSCEF Doc. No. 2, ¶ 50). Contrary to defendants' argument, the lease does provide that upon the end of the lease or tenant's surrender of the premises, tenant shall return possession to plaintiff with the building in "broom-clean and in good condition and repair" (lease, NYSCEF Doc. No. 14, §§ 21.01, 31.01). However, the record contains only vague and conclusory allusions to repairs necessary to remedy problems caused by tenant's subtenants, with no detail as to what repairs are necessary or how much they cost, or even whether or not the repairs have already been done or remain to be completed. Accordingly, plaintiff has not established prima facie entitlement to summary

judgment on this claim. Since plaintiff has not supplied proof of necessary repairs anywhere in the record, defendants are entitled to dismissal of this cause of action (*Genger*, 123 AD3d at 447 [“it is insufficient to merely set forth averments of factual or legal conclusions”]).

With respect to Talassazan, defendants also argue that his liability for all causes of action should be cut off as of July 31, 2020, the day that tenant purported to vacate the premises. As set forth above, the lease provides that Talassazan’s liability ceases upon tenant’s surrender of the premises, “except for permitted commercial subtenancies” (lease, NYSCEF Doc. No. 14, § 31.01). It is this language that lies at the heart of the biggest dispute between the parties, as there is a disagreement as to whether or not the two commercial subtenants remaining in the building when tenant vacated were “permitted.”

As an initial matter, the phrase “permitted commercial subtenancies” is not defined in the lease. Where a term is undefined, the court may consider evidence of the parties’ course of conduct to determine whether the parties are in compliance with the terms of the contract (*Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 [1st Dept 1999] [“the parties’ course of performance under the contract is considered to be the most persuasive evidence of the agreed intention of the parties”] [internal quotation marks and citations omitted]). Here, it is undisputed that the two commercial subtenants have been in the building for several years. Charm Design Inc. subleased the ground floor beginning in 1998 (Talassazan aff., NYSCEF Doc. No. 37, ¶ 9; Charm Design sublease, NYSCEF Doc. No. 42), and Warrior Fitness Boot Camp LLC subleased the second floor by sublease dated December 30, 2016 (Talassazan aff., NYSCEF Doc. No. 37, ¶ 10; Charm Design sublease, NYSCEF Doc. No. 43). The master lease allows tenant to sublease the building without plaintiff’s consent provided that tenant is not presently in default of the lease when the sublease begins, and tenant delivers the original sublease or a copy to plaintiff

within ten days of entering the sublease (lease, NYSCEF Doc. No. 14, § 4.03). Talassazan avers that he did provide copies of the subleases to tenant's representative Leonard Weiss, who offered no objections thereto (Talassazan aff., NYSCEF Doc. No. 37, ¶ 12). Moreover, plaintiff twice executed estoppel certificates requested by tenant, including one after both subtenants were operating in the building, in which plaintiff stated that tenant was not in default under the lease (2015 estoppel certificate, NYSCEF Doc. No. 50; 2018 estoppel certificate, NYSCEF Doc. No. 52). Contrary to plaintiff's argument, plaintiff is bound by its representations in the certificates absent a defense to the making of the documents, which plaintiff cannot assert herein (*JRK Franklin, LLC v 164 E. 87th St. LLC*, 27 AD3d 392, 393 [1st Dept 2006] ["defendant had a duty and the ability (right of entry) to investigate before voluntarily certifying an absence of any tenant lease defaults. Also, the lease expressly provides that plaintiff is entitled to rely upon defendant's representations in the estoppel certificate. Moreover, an estoppel certificate will be enforced unless the certifying party can show a defense to the making of the document"] [citation omitted]). Given the violations asserted against Warrior Fitness Boot Camp LLC by the New York City Department of Buildings, it is disputed as to whether Warrior Fitness Boot Camp LLC, at least, was no longer permitted at some point following the issuance of the estoppel certificates. Thus, questions of fact preclude summary judgment as to Talassazan's liability on the first four causes of action, as all of them seek damages which accrued, in whole or in part, following tenant's surrender of the premises.

As to tenant, defendants offer as an affirmative defense, the sixth and seventh such defenses, to be specific, that plaintiff must credit the security deposit and any rents received from the subtenants against plaintiff's claimed damages. As indicated by the estoppel certificates and uncontroverted by tenant, however, plaintiff is not holding a security deposit for plaintiff

(estoppel certificates, NYSCEF Doc. Nos. 50, 52). Moreover, the record is devoid of any evidence that plaintiff ever accepted rents from the subtenants. Thus, these defenses must be dismissed.

Of the remaining affirmative defenses asserted in the answer, defendants failed to raise the fifth, eighth, ninth, eleventh, fourteenth, and seventeenth through twenty-second defenses in opposition to the motion. Accordingly, these defenses are dismissed as waived (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017]). The first affirmative defense of failure to state a cause of action must be dismissed as plaintiff clearly alleges its causes of action. The second affirmative defense that Talassazan failed to consent to the modifications of the lease must be dismissed because Talassazan signed the first lease modification, and Talassazan does not state, except in vague and conclusory terms, that the modifications actually harmed him (*385 Fifth Ave., LLC v Cohen Fashion Opt. Store No. 273, LLC*, 2021 WL 2336765, \*3 [N.Y. Sup Ct, New York County 2021] [“The fact is that the Guarantor agreed to pay all outstanding rent and additional rent while the Tenant occupied the premises. The three alleged modifications at issue did not increase the amount of the Guarantor’s liability”]). The tenth affirmative defense of the statute of frauds is unsupported by the record. Issues of fact, as set forth above, preclude summary dismissal of the remaining affirmative defenses.

Defendants assert a counterclaim for tenant harassment in violation of the New York City Administrative Code. Section 22-1005 of the Code (a/k/a the “Guaranty Law”) provides that:

A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be

enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):

(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;

(b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

(c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020, and June 30, 2021, inclusive” (Administrative Code of City of N.Y. § 22-1005).

Tenant does not meaningfully dispute that, as the primary tenant, its business does not fall under any of the above categories of businesses affected by the Governor’s executive orders.<sup>1</sup>

Accordingly, plaintiff is entitled to summary judgment dismissing this counterclaim.

Finally, defendants do not meaningfully dispute plaintiff’s right under the lease to its reasonable attorneys’ fees or defendants’ liability for Department of Buildings violations caused by the subtenants, as against tenant – respectively, the third and fourth causes of action.<sup>2</sup> As the attorneys’ fees are not set forth in detail, resolution of the amount due on such claim must await trial as to tenant. As to Talassazan, however, the instant action was commenced, and the violations were issued, subsequent to tenant surrendering the premises. If Talassazan’s liability ceased, which remains in issue (*see, supra*), he will have no liability for plaintiff’s attorneys’ fees

<sup>1</sup> Even if tenant’s business did fall within the business categories affected by the Governor’s executive orders, the court notes that doubts have been raised as to the continuing viability of the Guaranty Law (New York City Admin Code § 22-1005) (*see, 513 W. 26th Realty LLC v George Billis Galleries, Inc.*, 220 AD3d 525, 525 [1st Dept 2023]).

<sup>2</sup> The violations are annexed as exhibits to the moving papers (NYSCEF Doc. Nos. 23, 24).

or the Department of Buildings violations. Accordingly, plaintiff is not entitled to summary judgment against Talassazan on the third and fourth causes of action at this time, nor is Talassazan entitled to dismissal of the same.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant 37th St, Lot, LLC on the first, second, third, and fourth causes of action as follows; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant 37th St. Lot, LLC in the amount of \$ 2,807,957.46, with interest thereon at the statutory rate from the date of December 1, 2020,<sup>3</sup> through entry of judgment, as calculated by the Clerk; and it is further

ORDERED that the first, second, and fourth causes of action against defendant 37th St, Lot, LLC are severed, and the balance of the claims are continued; and it is further

ORDERED that the defendant 37th St., Lot, LLC, is found liable to plaintiff on the third cause of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the first, second, fifth through eleventh, fourteenth, and seventeenth through twenty-second affirmative defenses, and defendants' counterclaim, are severed and dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

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<sup>3</sup> "Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date" (CPLR 5001[b]; *Kachkovskiy v Khlebopros*, 164 AD3d 568, 572 [2d Dept 2018]).

ORDERED that defendants' cross-motion for partial summary judgment is granted to the extent of dismissing the fifth cause of action, and the fifth cause of action is hereby severed and dismissed; and it is further

ORDERED that the cross-motion is otherwise denied; and it is further

ORDERED that the action shall continue as to the first through fourth causes of action as to defendant Abraham Talassazan, and as to damages on the third cause of action against defendant 37th St. Lot, LLC; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 1166, 111 Centre Street, New York, New York, on January 17, 2024, at 2:15 PM.

This constitutes the decision and order of the court.

ENTER:



|                           |                          |                            |                          |                                     |                              |                          |           |
|---------------------------|--------------------------|----------------------------|--------------------------|-------------------------------------|------------------------------|--------------------------|-----------|
| <u>12/22/2023</u><br>DATE |                          |                            |                          |                                     | <u>LOUIS L. NOCK, J.S.C.</u> |                          |           |
| CHECK ONE:                | <input type="checkbox"/> | CASE DISPOSED              |                          | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION        |                          |           |
|                           | <input type="checkbox"/> | GRANTED                    | <input type="checkbox"/> | <input checked="" type="checkbox"/> | GRANTED IN PART              | <input type="checkbox"/> | OTHER     |
| APPLICATION:              | <input type="checkbox"/> | SETTLE ORDER               |                          | <input type="checkbox"/>            | SUBMIT ORDER                 |                          |           |
| CHECK IF APPROPRIATE:     | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN |                          | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT        | <input type="checkbox"/> | REFERENCE |