

**Jiesheng Group NYC Inc. v New Gold Equities Corp.**

2024 NY Slip Op 31656(U)

May 9, 2024

Supreme Court, New York County

Docket Number: Index No. 654487/2023

Judge: Lyle E. Frank

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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. LYLE E. FRANK **PART** **11M**

*Justice*

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JIESHENG GROUP NYC INC.

Plaintiff,

- v -

NEW GOLD EQUITIES CORP.,

Defendant.

-----X

**INDEX NO.** 654487/2023

**MOTION DATE** 01/10/2024

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The instant action arises out of disputes concerning a commercial lease agreement. Plaintiff, tenant, now moves for summary judgment on its fourth, fifth and seventh causes of action and severing those causes of action from the remaining claims. Defendant, landlord, opposes the instant motion and cross moves for summary judgment. For the reasons set forth below, plaintiff’s motion for summary judgment is denied and defendant’s motion for summary judgment is granted in part<sup>1</sup>.

**Background**

The parties entered into a written lease agreement dated May 5, 2022, wherein defendant leased to plaintiff a portion of the ground floor, the 2nd, 3rd and 4th floors and the 4th floor mezzanine of the building located at 762-766 Eighth Avenue, New York, New York.

<sup>1</sup> Plaintiff has withdrawn its first, second, third, eighth and ninth causes of action, the remaining causes of action all seek declaratory relief.

Plaintiff's manager, Joseph P. Morrissey, conducted an inspection of the premises on June 22, 2022, at which time he discovered water leaks on the third floor. By email the following day, Mr. Morrissey notified defendant's representatives about the water leaks and accumulation at the third floor and requested that they remedy same.

Plaintiff contends that on October 25, 2022, the ground, second, and third floors of the premises experienced flooding emanating from the third-floor roof, with extensive damage to the alterations/renovations being performed.

Plaintiff now seeks a declaration on its fourth cause of action that it is released of its obligation to perform pursuant to the lease, on its fifth cause of action that defendant's obligation to maintain and properly repair the structural components of the building, include making structural repairs to the third floor roof and roof slab; and on its seventh cause of action, that plaintiff is entitled to an abatement of rent based on having been partially constructively evicted.

Defendant opposes and contends that declaratory judgment is inappropriate in this action, there is no structural defect that requires defendant to make any repairs, plaintiff was not constructively evicted and by withholding its rental payments has elected its remedy.

### **Summary Judgment Standard**

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a

motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

### **Discussion**

Plaintiff has failed to establish its prima facie case with respect to the relief it seeks on its fourth cause of action. Plaintiff contends that contrary to the plain language of the lease, that it is entitled to be released from its obligation to perform thereunder. Plaintiff has failed to establish that contrary to the lease that specifically provides “It is specifically agreed that Tenant shall not be entitled to any set off or reduction of rent by reason of any failure of Owner to comply with the covenants of this or any other article of this Lease”. *See* NYSCEF Doc. 65. Moreover, as this cause of action is raised as an affirmative defense in the underlying civil court action, non-payment proceeding, that was initiated by the defendant before the commencement of this action, it is inappropriately raised herein. Accordingly, plaintiff’s fourth cause of action is dismissed.

The Court finds that neither party has established entitlement to judgment as a matter of law with respect to the issue of structural repairs. Each party has submitted competing expert affidavits, which create an issue of fact with respect to the alleged defect and the obligations to repair. As such, plaintiff’s fifth cause of action survives defendant’s motion for summary judgment and plaintiff’s motion for summary judgment on that cause of action is denied.

Defendant has established dismissal of plaintiff’s sixth cause of action. Plaintiff’s sixth cause of action seeking a declaration that plaintiff is entitled to an abatement based on “those part of the premises that have been rendered unusable” pursuant to article 9 of the lease. Article 9 of the lease is entitled “destruction, fire and other casualty” and provides in relevant part that if the demised premises is rendered partially unusable the rent shall be apportioned.

Defendant contends that the alleged water issue is not the type of event contemplated by article 9. In support of this contention defendant cites to *Andreas v 186 Tenants Corp.*, 208 AD3d 406 [1st Dept 2022], wherein the First Department held that “leaks and flooding, which happened on a regular basis” do not release the tenant from rent obligations based on the destruction, fire and casualty clause in the commercial lease. Defendant has established, through admissions made in the complaint, that the alleged condition, water infiltration and leaks was not unexpected or unknown to plaintiff, thus it does not constitute a casualty pursuant to the lease. Accordingly, plaintiff’s sixth cause of action is dismissed.

As to the seventh cause of action, seeking a declaration that plaintiff has been constructively evicted thus entitled to withhold rent, the Court finds that defendant has established entitlement to dismissal of this claim. It is undisputed that plaintiff retains possession of the premises and has made no showing that it surrendered any portion thereto. Notwithstanding that deficiency, the ultimate issue of the cause and responsibility to repair the alleged defective condition is not resolved, thereby precluding a finding in plaintiff’s favor as to this cause of action.

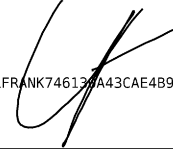
After the instant motion was fully briefed and oral argument was held, counsel for defendant submitted a post-argument court decision issued by the First Department, *20 Broad St. Owner LLC v Sonder USA, Inc.* 2024 NY Slip Op 02580 [1st Dept 2024] addressing similar causes of action. Consistent with the holding in *20 Broad St.*, plaintiff’s possession of the premises requires dismissal of the instant cause of action seeking a declaration of constructive eviction.

The Court has reviewed the parties remaining contentions and finds them unavailing. Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant’s cross-motion for summary judgment is granted in part in that fourth, sixth and seventh causes of action are dismissed.

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5/9/2024  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: