

**Corso, LLC v OTF Studios, LLC**

2024 NY Slip Op 32932(U)

August 19, 2024

Supreme Court, New York County

Docket Number: Index No. 655363/2020

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*

-----X

CORSO, LLC,

Plaintiff,

- v -

OTF STUDIOS, LLC DBA ORANGETHEORY FITNESS,  
ULTIMATE FITNESS HOLDINGS, LLC

Defendant.

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INDEX NO. 655363/2020

MOTION DATE 02/22/2024

MOTION SEQ. NO. 008

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235

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

**Background**

Plaintiff Corso, LLC, brings a motion for summary judgment against Defendants OTF Studios, LLC dba Orangetheory Fitness (“OTF” or “Tenant”) and Ultimate Fitness Holdings, LLC (“UFH”) to collect various amounts Plaintiff claims are due pursuant to a commercial lease, dated December 29, 2017 (“Lease”) and a guaranty, dated December 29, 2017 (“Guaranty”) pursuant to which Plaintiff leased a certain ground floor and basement space of the premises located at 60-66 Crosby Street, New York, New York, 10012.<sup>1</sup> Plaintiff claims there are certain amounts outstanding pursuant to, *inter alia*, Articles 40(D)(1), 40(D)(2), 41, 49(q)(b), and 49(r) of the Lease.

Defendants oppose Plaintiff’s motion. In addition, UFH moves for summary judgment arguing it has already paid the maximum amount it may be liable for pursuant to the guaranty.

<sup>1</sup> The Court would like to thank Jason Lowe, Esq., Special Master to the Court, for his assistance in this matter.

## Discussion

### There Is No Ambiguity in Article 40(d)(2) of the Lease

Defendant argues that Plaintiff is not entitled to summary judgment on its right to collect for each category listed in Article 40(d)(2) of the Lease because the language in that article is ambiguous. The relevant portion of Article 40(d)(2) prescribes (emphasis added):

Landlord shall also be entitled to the repayment of any rent credit theretofore enjoyed by Tenant **and including** Landlord's reasonable attorneys' fees, the costs for Landlord's Construction Requirements under Exhibit E, all costs associated with execution of this Lease and obtaining the "Consent" of the "Prime Landlord" (as such terms are defined below), and Landlord's costs of returning the demised premises to its "white box" condition at the outset of this Lease, which sum shall be deemed Additional Rent and shall be due upon demand by Landlord.

Defendant argues that the words "and including" could indicate that the items listed after it are included in the term "rent credit". This argument is unavailing. Even if the items listed after the term "rent credit" are included in the definition of rent credit, Plaintiff would still be entitled to recover for those items. Therefore, Defendants' argument that Article 40(d)(2) of the lease is ambiguous is rejected.

### Plaintiff's Requirement to Amortize Damages

Defendants argue that summary judgment must be denied because there are disputes regarding the amount due. For instance, Defendants argue that any amounts due pursuant to Article 40(d)(2) must be amortized so that Plaintiff may not recover for the portion of time before Plaintiff breached the Lease. The language of Article 40(d)(2) does require Plaintiff to decrease the amount under Article 40(D)(2) owed by Defendants compared to if Defendants had breached the Lease the day after it was signed.

In response, Plaintiff does not argue that it was not required to amortize pursuant to Article 40(d)(2). Rather, Plaintiff seems to concede the point and attempts to submit proof of amortization on reply. On a summary judgment motion, the Court may not consider new evidence in support of the movant's prima facie burden submitted in reply (*Coon v WFP Tower B Co. L.P.*, 220 AD3d 407, 409 [1st Dept 2023]). Therefore, because Plaintiff failed to submit proof of the amounts due to it pursuant to the mandatory amortization, there is an issue of fact regarding the measure of damages and Plaintiff's motion for summary judgment must be denied.

### **Whether Some of the Requested Damages in the Lease are an Impermissible Penalty**

Defendants also argue that some of the additional charges Plaintiff seeks may be an unenforceable penalty. Where fees are entirely disproportionate or bear no relation to the landlord's damages, the fee may be considered an unenforceable penalty. In this case, most of the fees are directly related to the landlord's damages. However, there is not enough of a record before the Court as to whether the interest Plaintiff seek is unreasonable, especially in conjunction with the late fee. The interest charged in this case, 1.5% a month or 18% a year plus a 3.5% late fee. Together, these are above the 10% late fee in *Wilsdorf v Fairfield Northport Harbor, LLC*, 34 Misc 3d 146[A], 146A, 2012 NY Slip Op 50163[U], \*1 [App Term 2<sup>nd</sup> Dept. 2012]. The Court in *Wilsdorf v Fairfield Northport Harbor, LLC* found the 10% late fee to be an unenforceable penalty. Since the Court is denying summary judgment on other grounds, however, and the record regarding whether the interest charged is related to the landlord's damages is not complete, the Court will not make a determination as to whether the interest is an enforceable penalty at this time.

### **Attorney's Fees**

Defendant also raises issues regarding whether the attorney's fees Plaintiff claims are due are reasonable and whether they are relate to actions taken for this case. The fact that the Plaintiff submits new evidence on reply regarding attorney's fees lends credence to the argument that the original moving papers did not properly submit evidence of damages. Once again, on a summary judgment motion, the Court may not consider new evidence in support of the movant's prima facie burden (*Coon v WFP Tower B Co. L.P.*, 220 AD3d 407, 409 [1st Dept 2023]).

Therefore, due to there being issues of fact regarding the proper calculation of the amount of attorney's fees, Plaintiff's motion for summary judgment must be denied.

### **Additional Security Deposit**

Plaintiff's argument that it is entitled to additional security deposit based on the guarantor's net worth being decreased by ten percent or more is not properly supported by evidence in the moving papers. Once again, Plaintiff impermissibly seeks to submit new evidence on reply. Thus, the motion for summary judgment seeking an additional security deposit is denied.

### **UFH's Motion For Summary Judgment**

Though the Court previously found that there is a maximum liability for UFH, it is not appropriate for UFH to be dismissed from the action at the current time. The evidence presented is that UFH gave money to OTF which OTF used to pay Plaintiff. Since there were no direct payments from UFH, at the very least, there is a question of fact as to whether those payments can be credited to UFH's total maximum liability.

To the extent discovery is not complete in this case, the parties are directed to meet and confer regarding a discovery schedule and submit the schedule to the Court on or before August 30, 2024. If the parties cannot agree on a discovery schedule by August 30, 2024, the parties are directed to email the part to schedule a conference to set a discovery schedule.

Accordingly, it is hereby

ADJUDGED that Plaintiff's motion for summary judgment is denied; and it is further

ADJUDGED that Defendant Ultimate Fitness Holdings, LLC's cross motion for summary judgment is denied; and it is further

ORDERED that parties shall proceed forward with discovery in the manner stated above.

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8/19/2024

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE