

**Olympic Galleria, Co., Inc. v Sitt**

2025 NY Slip Op 30291(U)

January 22, 2025

Supreme Court, New York County

Docket Number: Index No. 150391/2024

Judge: Lyle E. Frank

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

OLYMPIC GALLERIA, CO., INC.,

Plaintiff,

- v -

JACKIE SITT, JOHN DOES

Defendant.

-----X

INDEX NO. 150391/2024

MOTION DATE 07/15/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 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, 90

were read on this motion to/for JUDGMENT - MONEY.

Upon the foregoing documents, plaintiff’s motion for summary judgment is granted in part and denied in part, and defendant’s cross-motion is granted in part and denied in part.

This Court held a traverse hearing regarding the service of the 90-day notice on defendant. The Court found the witness credible, reviewed the footage of the service, and found that service of the notice was in conformity with the CPLR.

**Background**

Olympic Galleria, Co., Inc. (“Plaintiff”) owns a luxury apartment located in Manhattan (the “Premises”). In 2011, Plaintiff leased the apartment to Jackie Sitt (“Defendant”), and the lease was modified and extended in 2019 to last through March 2020. When this modification expired, Defendant remained in possession of the unit as a month-to-month tenant. Plaintiff served a notice of termination in March of 2022, and Defendant successfully moved to dismiss the subsequent proceeding on the grounds of notice deficiency. A second notice of termination was served in August of 2022, but Defendant wired a rental payment during the window period

thus negating the notice. Plaintiff then served a third notice of termination in September of 2023. Defendant again attempted to wire a payment during the window period, but Plaintiff was monitoring their bank account, and they rejected the wire.

Plaintiff then commenced this underlying action seeking a money judgment for unpaid rent and use and occupancy. Defendant challenged the service of the summons and complaint. A traverse hearing was held in which service was determined to be proper, and Defendant's motion to dismiss was denied. Plaintiff brought the present motion for summary judgment, and Defendant has cross-moved for summary judgment in their favor. Defendant also requested another traverse hearing on the issue of service of the September 2023 notice. The hearing was held, and service was found to have been proper.

### **Standard of Review**

Under CPLR § 3212, a party may move for summary judgment and the motion "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR § 3212(b). Once the movant makes a showing of a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opponent 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). The facts must be viewed in the light most favorable to the non-moving party, but conclusory statements are insufficient to defeat summary judgment. *Id.*

### **Discussion**

For the reasons that follow, plaintiff's motion for summary judgment in their favor is granted as to the first, second, and third causes of action. Defendant's motion for summary

judgment is granted as to the fourth and fifth causes of action, and their counterclaim is dismissed.

*Plaintiff's First Cause of Action for Breach of Contract*

Plaintiff alleges that Defendant failed to pay rent between January 2023 and December 31, 2023. As a result, they are seeking summary judgment on their breach of contract claim. Defendant argues that because the attempted January 2023 rent payment was returned by Plaintiff in order to prevent extinguishing the termination notice, there was no breach of contract because Defendant could not pay rent during 2023. Defendant moves to dismiss the first cause of action or alternatively, to deny the summary judgment motion on the grounds that there is a triable issue of fact on if Plaintiff waived the right to rent arrears.

Rejection of a tender of rent out of concern for prejudicing any claims against that tenant does not remove a landlord's ability to recover rent arrears. *See W. 54-7, LLC v. Farber*, 62 A.D.3d 485, 485 (1st Dept. 2009). But when a landlord rejects a rent tender without seeking a court order stating that the money can be accepted without prejudice, they waive their entitlement to prejudgment interest on the rent arrears or attorneys' fees. *Id*; *see also B.N. Realty Assoc. v. Lichtenstein*, 96 A.D.3d 434, 435 (1st Dept. 2012). Defendant argues that Plaintiff has also waived their right to seek rent arrears because they rejected the two attempted rent payments made during the notice windows in 2023. But in *San-Dar*, the First Department held that there had been no waiver of right to collect rental arrears, even when the plaintiff "may have unnecessarily refused to accept the tendered monthly payments", when there was "no question that plaintiff has continuously pursued its claim to the rental payments." *San-Dar Assocs. v. Toro*, 213 A.D.2d 233, 234 (1st Dept. 1995). Here, there is no doubt that Plaintiff has been attempting during this time to recover on their claim for unpaid rent.

In *San-Dar*, the court there found that there was no breach when “defendant was ready and willing to tender the monthly rental payments as they came due.” *Id.* There is no dispute that Defendant only attempted to tender payment twice in 2023, once in January and once in December, which was only during the window periods for the two notices of termination. This is not the same thing as being ready and willing to tender payment “as they come due” throughout the year. Therefore, there is no triable issue of fact as to waiver, and summary judgment for Plaintiff is appropriate.

*Plaintiff’s Second Cause of Action for Use and Occupancy*

In their second cause of action, Plaintiff seeks fair market value for the use and occupancy of the apartment for the period starting on January 1, 2024, and continuing until the date that Defendant surrenders possession. Defendant’s sole ground for opposing summary judgment on this claim is that when a claim for ejectment is dismissed, a claim for use and occupancy must likewise be dismissed. For the reasons given below, the Plaintiff’s claim for ejectment is not dismissed, therefore the second cause of action is not dismissed. Recovery for use and occupancy is permitted under Real Property Law § 220. Courts have “broad discretion in awarding use and occupancy.” *Alphonse Hotel Corp. v. 76 Corp.*, 273 A.D.2d 124, 124 (1st Dept. 2000). Here, summary judgment on the second cause of action in favor of Plaintiff is proper.

*Plaintiff’s Third Cause of Action for Ejectment*

Plaintiff is seeking in their third cause of action a judgment directing Defendant’s removal from the Premises. The elements for a cause of action to recover real property are that the plaintiff must 1) own the real property, 2) with a present right to possession, and 3) have been unlawfully ousted or disseised from the property by the defendant who is in present possession.

*Merkos L'Inyonei Chinuch, Inc. v. Sharf*, 59 A.D.3d 408, 410 (2nd Dept. 2009). Defendant opposes, arguing that Plaintiff failed to serve a six-month notice. In support of their contention that termination of a month-by-month tenancy requires six months' notice, they cite to two trial level cases from Kings County.

Real Property Law § 226-c(2)(d) states that if a tenant has occupied a unit for more than two years, as is the case here, “the landlord shall provide at least ninety days’ notice.” Defendant argues that this statute does not apply to month-by-month tenancies, but such a restriction is not found in the express terms of the statute. Therefore, the ninety-day notice provided by Plaintiff here is satisfactory, and a common-law six-month notice was not required. Because the ninety days have expired, Plaintiff has the present right to possession of the Premises and has met all elements of a cause of action for ejectment. There are no triable issues of material fact regarding this claim, and therefore summary judgment in favor of Plaintiff is appropriate.

*Plaintiff's Fourth Cause of Action for a Declaratory Judgment*

In addition to the claim for ejectment, Plaintiff seeks a declaratory judgment stating that Defendant’s right to occupy the Premises terminated as of December 31, 2023, and that Plaintiff is entitled to regain immediate possession of the Premises. Defendant opposes on the grounds that this is duplicative of the claim for ejectment. When resolution of another cause of action “will necessarily require determination of [...] the same relief plaintiffs are seeking in their declaratory judgment”, dismissal of the declaratory judgment cause of action as duplicative is proper. *Upfront Megatainment, Inc. v. Thiam*, 215 A.D.3d 576, 578 (1st Dept. 2023). Here, the resolution of the cause of action for ejectment necessarily requires a determination that Defendant’s right to possession of the Premises expired at the end of the ninety-day notice period (December 31, 2023) and that Plaintiff has the immediate right to possession. Therefore,

summary judgment in favor of Defendant on this cause of action is proper, as there are no triable issues of material fact regarding the duplicative nature of the claim.

*Plaintiff's Fifth Cause of Action for Attorneys' Fees*

As stated above, because here Plaintiff failed to move the court for the ability to accept Defendant's rent payments without prejudice to their claim, they have waived any right for prejudgment interest and attorneys' fees. *San-Dar*, at 234-35. Therefore, this cause of action is properly dismissed.

*Defendant's Counterclaim for Attorneys' Fees Pursuant to Real Property Law § 234*

Defendant also cross-moves for summary judgment on their counterclaim for attorneys' fees pursuant to Real Property Law § 234. Plaintiff opposes. Real Property Law § 234 allows for a tenant who successfully defends an action commenced by a landlord to recover attorneys' fees, should the landlord have been entitled to do so under the lease if they had won. That is not the situation here, therefore this provision of the Real Property Law provides no basis for Defendant to counterclaim for attorneys' fees. The Court has considered the parties' other arguments and found them unavailing. Accordingly, it is hereby

ADJUDGED that plaintiff's motion for summary judgment on the first, second, and third causes of action in their favor is granted; and it is further

ADJUDGED that defendant's motion for summary judgment on the fourth, and fifth causes of action in his favor is granted; and it is further

ADJUDGED that defendant's counterclaim is dismissed; and it is further

ORDERED that the motion of plaintiff for summary judgment on the first cause of action for ejectment is granted; and it is further

ADJUDGED that plaintiff is entitled to possession of 641 Fifth Avenue Apartment No. 43DEF, New York, New York 10022, as against defendant Jackie Sitt, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place plaintiff in possession; accordingly, and it is further

ADJUDGED that immediately upon entry of this Order and Judgment, plaintiff may exercise all acts of ownership and possession of 641 Fifth Avenue Apartment No. 43DEF, New York, New York 10022, including entry thereto, as against defendant Jackie Sitt; and it is further

ORDERED that an assessment of damages against defendant Jackie Sitt is directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

20250122151557LFRANKBED1C705A7E5435A8F62E14DA8249724

1/22/2025

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: