

695 Nicholas Realty Corp. v Rivera

2025 NY Slip Op 30888(U)

March 18, 2025

Supreme Court, New York County

Docket Number: Index No. 653920/2023

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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695 NICHOLAS REALTY CORP.

Plaintiff,

- v -

VICTOR M RIVERA,

Defendant.

-----X

INDEX NO. 653920/2023

MOTION DATE 03/13/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff’s motion for summary judgment on its first cause of action is denied and defendant’s cross-motion for summary judgment is granted. This case is dismissed.

Background

In this unpaid rent matter, it is undisputed that plaintiff (the landlord) entered into a ten-year lease with defendant on May 26, 2010 which was set to end on May 31, 2020. It is also undisputed that in 2014, defendant entered into an assignment and assumption of that lease with non-party Apollo Deli, which the landlord approved.

In this motion, plaintiff seeks \$50,339.63 with interest from August 1, 2014 for unpaid rent through the termination of the lease. Plaintiff emphasizes that the assignment did not release defendant from any obligations with respect to the rent under the lease.

Defendant cross-moves for summary judgment dismissing this matter on the ground that after applying all payments and crediting the security deposit, all charges due through the end of the lease, May 31, 2020, were fully paid. He contends that after the lease expired, plaintiff

decided to accept payments from Apollo Deli and allowed Apollo Deli to remain on the premises on a month-to-month basis. Defendant argues that he sold the business in 2014 to Apollo Deli and had no further involvement in this transaction. He argues that the post-May 31, 2020 payments and credits recorded in the ledger total over \$60,000 which far exceeds the amount plaintiff seeks. He claims that plaintiff never sent him any statements or invoices and instead sent them to Apollo Deli.

In reply, plaintiff contends that defendant's responsibility to pay the rent did not terminate on the expiration date of the lease term. It complains that defendant Rivera breached the lease by not surrendering the premises in a broom clean condition as required under the terms of the lease. Plaintiff argues that Apollo Deli stayed in the premises until November 2021 and that there is a balance due of \$163,511.73.

In reply, defendant argues that once the lease expired, Apollo Deli occupied the premises on a month-to-month tenancy and so plaintiff's belated assertion that defendant failed to leave the premises in broom clean condition is without merit.

Discussion

As an initial matter, the Court denies plaintiff's motion because it did not meet its prima facie burden. In support of the motion, plaintiff included an affidavit from the managing agent that cites to a tenant ledger for the proposition that defendant owes \$50,339.63. But that citation is merely to NYSCEF Doc. No. 3 and no pincite is included. NYSCEF Doc. No. 3 (which was attached to the complaint) is 34 pages and the first pages assert that the balance is \$137,396.20. Simply put, it is not this Court's role to hunt around in the ledger and figure out which numbers support plaintiff's case.

Moreover, plaintiff sought the \$137,396.20 in the complaint, based on the same ledger, and there was no mention whatsoever of the \$50,339.63 in the pleading. In this motion, plaintiff did not offer any explanation as to why it is only seeking a small portion of the total amount it seeks in the complaint. For instance, plaintiff's notice of motion seeks summary judgment on its first cause of action but the complaint seeks \$137,396.20 for that claim; it is unclear whether or not plaintiff is seeking partial summary judgment or something else.

Next, the Court turns to the assignment agreement. This agreement provides, in relevant part, that:

“Assignor hereby ratifies and confirms that it remains primarily liable for the payment of rent and the performance of each and every covenant, agreement, provision and conditions of the Lease on the part of the Tenant to be performed throughout the term of the Lease and any renewal term. Assignor further agrees that acceptance of rent by Landlord from Assignee, or performance by Assignee of any of the covenants, agreements, provisions and conditions to be performed in the Lease shall not constitute a waiver of Assignor's obligations or liabilities under the Lease or a release of Assignor from primary liability as aforesaid. Assignor does further agree that the Landlord may, at its election, make the Assignor a defendant in any proceeding commenced against the Assignee under the applicable provisions of the Real Property Actions and Proceedings Law” (NYSCEF Doc. No. 17 at 2).

What is most striking to this Court about the above-cited provision is that defendant agreed to be primarily liable “throughout the term of the Lease and any renewal term.”

Defendant argued in support of his cross-motion that the amount plaintiff seeks in this motion (the \$50,339.63) was fully paid off when considering later payments and credits from Apollo Deli. Defendant, who did include pincites to the ledger, points to various payments that he claims shows that he would not owe anything if plaintiff properly credited these payments. He argued that this would conform with general accounting principles to apply these payments in this way (i.e., apply payments to the oldest charges first). Plaintiff wholly failed to address this issue in its opposition to the cross-motion or even dispute that the amount defendant cites would exceed

the amount owed at the termination of the lease. In other words, when confronted with proof from its own ledger, plaintiff does not dispute that it was fully paid through the end of the lease.

The Court therefore grants the cross-motion for summary judgment dismissing this case as defendant met his burden to show that what he owed was satisfied.

Summary

No party argues that the assignment agreement functioned like a guarantee in which defendant was obligated to ensure that the tenant pay all unpaid rent forever, even after the expiration of the term of the lease, so long as Apollo remained in possession. Rather, defendant agreed to pay all rent through the end of the lease term (May 31, 2020) or any renewal term. There is nothing submitted on this record to suggest that plaintiff and defendant entered into a lease renewal or defendant somehow became obligated to pay the rent for Apollo Deli past the end of the lease. Instead, the record suggests that Apollo Deli continued to occupy the space, with the plaintiff's consent, on a month-to-month tenancy after the expiration of the lease. In that scenario the landlord-tenant relationship was between plaintiff and Apollo Deli, and not with defendant. And plaintiff did not address this renewal issue whatsoever.

Plaintiff's arguments in reply about the space not being left in "broom clean condition" is without merit as they were raised for the first time in reply. Nothing in the complaint or in the moving papers raised any arguments about the failure to vacate the space in broom clean condition.


And most importantly, plaintiff did not oppose defendant's contention that if Apollo Deli's payments were applied to the earliest payments due, as they should have been in accordance with generally accepted accounting principles, then the balance owed through the end of the lease is paid in full and defendant does not owe anything.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted and the Clerk is directed to enter judgment accordingly in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

3/18/2025

DATE


ARLENE P. BLUTH, 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