

**NJ Funding Inc. v Hen**

2025 NY Slip Op 32863(U)

July 23, 2025

Supreme Court, New York County

Docket Number: Index No. 450963/2025

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

-----X

NJ FUNDING INC.

Plaintiff,

- v -

EYAL HEN,

Defendant.

-----X

INDEX NO. 450963/2025

MOTION DATE 12/12/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 38, 39, 40

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after a final submission date of May 19, 2025, Plaintiff NJ Funding Inc.'s ("Landlord") motion for summary judgment against Defendant Eyal Hen ("Guarantor") on the issue of liability on its first through fourth causes of action, and seeking dismissal of Guarantor's affirmative defenses is granted.

I. Background

Landlord owns the premises at 88-90 Reade Street a/k/a 176 Church Street, New York, New York (the "Premises") and leases to non-party Tribeca Hummus Inc. d/b/a Nish Nush (the "Tenant") a portion of the Premises known as "Corner Store #1" along with a portion of the Premises' basement (NYSCEF Doc. 16). The Tenant operates a falafel restaurant. Eyal Hen, as Guarantor, executed a guaranty (the "Guaranty") of Tenant's lease (NYSCEF Doc. 18). Landlord alleges Tenant owes rental arrears for which Guarantor is liable. There are three separate pending lawsuits between Landlord, Tenant, and Guarantor. In this lawsuit, Landlord seeks to recover alleged rental arrears from Guarantor. This action was commenced in Kings County Supreme Court, but by Decision and Order dated March 5, 2025 (NYSCEF Doc. 33), Hon. Gina Abadi

joined this action with the Gas Outage Action for trial and ordered venue be changed to New York County. This case was assigned to Part 33 on April 10, 2025.

Pending before this Court in a separate proceeding is a breach of contract, negligence, and declaratory judgment action brought by Tenant against Landlord seeking damages due to Landlord's alleged failure to provide gas to the Premises (the "Gas Outage Action") (*see Tribeca Hummus, Inc. d/b/a Nish Nush v NJ Funding, Inc.*, Index No. 153935/2024). There is another non-payment proceeding pending between Landlord and Tenant in New York County Housing Court where, according to NYSCEF, a trial is scheduled on July 22, 2025 in Part 52 (the "Housing Court Action") (*see NJ Funding, Inc. v Tribeca Hummus, Inc. et. al.*, LT-306838-24/NY).

In the Gas Outage Action, Tenant moved for a preliminary injunction staying the Housing Court Action. On February 10, 2025, this Court denied Tenant's request for a preliminary injunction, finding Tenant was unlikely to succeed on the merits because the record showed the delay in restoring gas to the Premises was due to Tenant's installation of multiple gas kitchen appliances without Landlord's permission and without authorization from the New York City Department of Building, which would be a violation of the Lease. The Court further found the issue of the gas interruption could be raised as a defense in the Housing Court Action, and thus there was no reason to stay the Housing Court Action. Now, Landlord moves for summary judgment against Guarantor. For the following reasons, Landlord's motion is granted.

## II. Discussion

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-

moving party” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]). To show entitlement to summary judgment on a breach of contract claim, a movant must prove the existence of a contract, performance, defendant’s breach, and damages (*see Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]).

There is no dispute as to the validity of the Lease and Guaranty. Although Guarantor argues that Tenant’s obligation to pay rent was excused because of an interruption in gas services, this argument is contrary to the clear and unambiguous terms of the Lease. Specifically, in Article 4 of the Lease, Tenant agreed that:

“there shall be no allowance to the Tenant for the diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business arising from Owner, Tenant or others, making or failing to make any repairs, alterations, additions or improvements in or to any portion of the building...or in or to the demised premises or the fixtures, appurtenances or equipment thereof. It is specifically agreed that Tenant shall be not entitled to any set off or reduction of rent by reason of any failure of Owner to comply with covenants of this or any other article of this lease. Tenant agrees that Tenant’s sole remedy at law in such instance will be by way of an action for damages for breach of contract.” (NYSCEF Doc. 16).

Tenant further agreed in Article 26 of the Lease that:

“This lease and the obligation of Tenant to pay rent hereunder and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in no wise (*sic*) be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease or to supply, or is delayed in supplying, any service expressly or impliedly to be supplied, or is unable to make, or is delayed in making, any repair, additions, alterations or decorations, or is unable to supply, or is delayed in supplying, any equipment, fixtures or other materials, if Owner is

prevented or delayed from so doing by reason of...government preemption or restrictions, or by reason of any rule, order or regulation of any department or subdivision thereof of any government agency..." (NYSCEF Doc. 16).

Given the clear and binding language of the Lease, as well as the evidence introduced on Tenant's prior motion for injunctive relief in the Gas Outage Action, of which this Court takes judicial notice (*see, e.g. Kazantzis v Cascade Funding RMI Acquisitions Grantor Trust*, 217 AD3d 410, 411 [1st Dept 2023]), Tenant is not entitled to a rent reduction due to an interruption to gas services. Under similar circumstances, and interpreting similar if not identical lease provisions, the First Department has repeatedly held that a tenant's obligation to pay rent does not cease (*691 Tenth, LLC v A&M Healthy Grill NYC Inc.*, 222 AD3d 469, 470 [1st Dept 2023]; *Bremen House, Inc. v LoBosco*, 214 AD3d 557, 558 [1st Dept 2023]; *Harlington Realty Co., LLC v Lawrence Plumbing Supply Inc.*, 201 AD3d 435, 436 [1st Dept 2020]). "[T]he obligation to pay rent pursuant to a commercial lease is an independent covenant, and thus, cannot be relieved by allegations of a landlord's breach absent an express provision to the contrary" (*Universal Communications Network, Inc. v 229 West 28<sup>th</sup> Owner, LLC*, 85 AD3d 668, 669 [1st Dept 2011]). Thus, there is no triable issue of fact as to Tenant's obligation to pay rent.

Moreover, pursuant to the ledger produced by Landlord, it is undisputed rent has not been paid since December of 2023 (NYSCEF Doc. 21). It is further undisputed that Guarantor has not satisfied Tenant's rent arrears. In opposition, Guarantor submits only an attorney affirmation, which is of no probative value and is insufficient to raise an issue of fact (*Commissioners of State Insurance Fund v Sanitation Salvage Corp.*, 187 AD3d 537, 537 [1st Dept 2020]; *Jones v 3417 Broadway LLC*, 172 AD3d 551 [1st Dept 2019]). Therefore, Landlord is entitled to summary judgment on the issue of liability against Guarantor with respect to Landlord's first through fourth causes of action seeking to recoup arrears consisting of rent, additional rent, late charges, and

reasonable attorneys' fees. Further, Landlord's motion for summary judgment dismissing Guarantor's first through ninth affirmative defenses, each of which consists of a single conclusory and boilerplate sentence is granted (*Chrysler East Building, L.L.C. v Keenwawa, Inc.*, 217 AD3d 494, 494-95 [1st Dept 2023] [affirmative defense bereft of facts and consisting of nothing more than bare legal conclusions are insufficient to withstand a motion for summary judgment]).

Accordingly, it is hereby,

ORDERED that Plaintiff NJ Funding Inc.'s motion for summary judgment against Defendant Eyal Hen on the issue of liability on its first through fourth causes of action, and seeking dismissal of Defendant Eyal Hen's affirmative defenses is granted in its entirety; and it is further

ORDERED that Defendant Eyal Hen's affirmative defenses are hereby dismissed; and it is further

ORDERED that within thirty days of entry, counsel for Plaintiff shall submit, via e-mail to [SFC-Part33-Clerk@nycourts.gov](mailto:SFC-Part33-Clerk@nycourts.gov) and NYSCEF, an updated ledger reflected amounts owed, along with an affirmation in support of an award of attorneys' fees, which shall include a resume, invoices, and contemporaneous billing records, etc. Within fourteen days of receipt of Plaintiff's updated ledger and attorneys fees application, counsel for Defendant shall submit via e-mail to [SFC-Part33-Clerk@nycourts.gov](mailto:SFC-Part33-Clerk@nycourts.gov) and NYSCEF, opposition, if any, to the accounting of money owed and attorneys' fees sought. Within seven days of Defendant's opposition, Plaintiff shall be permitted to submit a reply to Defendant's opposition. Upon submission of the parties' papers on the issue of damages, this Court shall issue a supplemental Decision and Order regarding the total amount of damages for which Defendant is liable to Plaintiff; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on Defendant via NYSCEF.

This constitutes the Decision and Order of the Court.

7/23/2025  
DATE

Mary V Rosado J.S.C.  
HON. MARY V. ROSADO, 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