

**Aetna Realty Fin. Corp. v West Side Physicians of  
NYC, PLLC**

2025 NY Slip Op 33129(U)

August 15, 2025

Supreme Court, New York County

Docket Number: Index No. 652148/2025

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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AETNA REALTY FINANCIAL CORP.

Plaintiff,

- v -

WEST SIDE PHYSICIANS OF NYC, PLLC d/b/a MIDOC  
URGENT CARE et al

Defendant.

-----X

**INDEX NO. 652148/2025**

**MOTION DATE 04/07/2025,  
05/19/2025**

**MOTION SEQ. NO. 001 002**

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for PENDENTE LITE.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for POSSESSION.

Upon the foregoing documents, motion seq. 001 is granted, motion seq. 002 is denied and the cross-motion to 002 is denied.

**Background**

These motions arise out of a case involving an alleged breach of commercial lease for an urgent care location on Ninth Avenue. A lease was entered into between Aetna Realty Financial Corp. (“Plaintiff”) and West Side Physicians of NYC, PLLC d/b/a MiDoc Urgent Care (“Tenant”) in March of 2017. Defendants Vino K. Palli and Christina Zhang (the “Guarantors”, collectively with Tenant the “Defendants”) signed as guarantors of the Lease. Plaintiff alleges that Tenant was in default of the required rent payments from October of 2024. In March of 2025, Plaintiff served a ten-day Notice of Intention to Terminate Lease to Tenant, claiming that there was outstanding rental arrears of \$117,389.48. The termination date was March 17, 2025.

On March 26, 2025, Defendants sent a payment of \$10,000 to Plaintiff. Plaintiff brought this underlying proceeding on April 03, 2025.

### Discussion

Plaintiff moved by order to show cause in motion sequence 001 for a temporary restraining order directing Tenant to pay use and occupancy in the amount of \$69,975.36 monthly. The portion directing use and occupancy payments was so-ordered pending a hearing on this order to show cause. In motion sequence 002, Plaintiff moves by order to show cause seeking a judgment granting them immediate possession of the space and a monetary judgment against Defendants. Defendants cross-move on motion 002 for dismissal. For the reasons that follow, motion 001 seeking to have Tenant post an undertaking for the rental arrears and use and occupancy at the rate specified in the lease is granted. Motion 002 seeking an order of ejectment is denied, and the cross-motion seeking to dismiss the complaint is denied.

#### *Dismissal Would Be Premature Due to Ambiguous No Waiver Clause*

Defendants cross-moves to dismiss on the grounds that the Termination Notice was defective, and that their March 26th payment that was accepted created a month-to-month tenancy that required further notice of termination. The general rule is that when a landlord accepts a rental payment after a notice of termination and does not “immediately return [it] or claim and explain any inadvertence”, then the termination notice is vitiated, and a month-to-month tenancy is created. *591 Realty LLC v. Curanaj*, 228 A.D.3d 401, 401 [1st Dept. 2024]. But the Real Property Law § 232-c creates an exception to this rule for when “an agreement either express or implied is made providing otherwise.” The terms of the lease between the parties can satisfy the § 232-c requirement. *See, e.g., North Shore Community Servs., Inc. v. Community Dr. LLC*, 120 A.D.3d 1142, 1143 [1st Dept. 2014]. Article 24 of the Lease here contains a no waiver

clause stating that any payment of an amount less than the monthly rent “shall be deemed to be other than on account of the earliest stipulated rent [...] and [Plaintiff] may accept such check or payment without prejudice to [Plaintiff’s] right to recover the balance of the rent or pursue any other remedy in this lease provided.”

The issue therefore is whether this provision of the lease either explicitly or impliedly provides that the acceptance of the payment in March did not create a month-to-month tenancy. By its terms, the provision does not explicitly state that the acceptance of any tender towards rent would not create a month-to-month tenancy. But there is an interpretation of the provision that would read the reservation of the right to pursue any other remedy to include the right to continue to pursue an ejection pursuant to a termination notice. On a motion to dismiss all inferences must be drawn in favor of the non-moving party, and therefore dismissal based on an ambiguous contract would be improper. *See, e.g., Duane Reade, Inc. v. Cardtronics, LP*, 54 A.D.3d 137, 144 [1st Dept. 2008].

*Dismissal Based on the Termination Notice’s Alleged Defects Is Countermanded by Article 17 of the Lease*

Defendants have also moved to dismiss the action based on alleged defects in the termination notice. They argue that it did not comply with the requirements set forth in the Lease. Article 58(a) states that “[i]n addition to the rights and remedies set forth in Articles 17 and 18 hereof, [Plaintiff] shall have the right to cancel this lease in the manner therein provided in the event that (i) Tenant shall have failed to pay any installment of Rent or additional rent provided herein with ten (10) days after written notice and demand for payment thereof.” In Article 17(2), the Lease states that if the Tenant defaults on rent, the Plaintiff “may without notice, re-enter the demised premises either by force or otherwise, and dispossess Tenant by

summary proceedings or otherwise [...] and hold the demised premises as if this lease had not been made.” Here, by the terms of the Lease Plaintiff was not required to give notice to terminate the Lease. Even if the Termination Notice was defective, this would not remove Plaintiff’s ability to terminate the lease due to a rent default. Additionally, the Termination Notice contained a written notice of the arrears and a demand for the payment thereof, thus satisfying the requirements of Article 58(a) of the Lease.

*Plaintiff’s Requests for Use and Occupancy and an Undertaking Are Granted, but the  
Eviction Request is Denied*

Because Defendants did not meet their burden on the cross-motion to dismiss, the analysis turns to motions 001 and 002. Plaintiff in motion sequence 002 is requesting that Tenant be ordered to post an undertaking sufficient to assure payment of the \$105,833.52 in arrears, an order of ejectment based upon Tenant’s failure to comply with the TRO, and a monetary judgment in the form of \$69,975.36 per month from April 17 of 2025 to the date Plaintiff recovers possession of the premises. In motion sequence 001, Plaintiff is seeking an order directing Tenant to pay use and occupancy in the monthly rate of \$69,975.36 pursuant to the holdover terms of the Lease and directing Tenant to post an undertaking to cover the rental arrears.

Courts have the broad discretion to require holdover tenants to pay use and occupancy during the pendency of litigation. *See, e.g., Alphonse Hotel Corp. v. 76 Corp.*, 273 A.D.2d 124, 124 [1st Dept. 2000]; *Ballinteer Corp. v. SNRP W. 37 LLC*, 217 A.D.3d 597, 598 [1st Dept. 2023]. Here, Tenant is still in possession of the premises, and the terms in the Lease provided for a holdover monthly rate. Therefore, to the extent that Plaintiff requests that Tenant be ordered to pay use and occupancy at the monthly rate of \$69,975.36, it is granted. Courts have also had the

discretion to require a party to deposit the alleged rental arrears in an undertaking during the pendency of litigation. *See, e.g., Gap, Inc. v. 44-45 Broadway Leasing Co., LLC*, 191 A.D.3d 549, 550 [1st Dept. 2021]. To the extent that Plaintiff requests that Tenant be obligated to post an undertaking sufficient to cover the rental arrears, the request is granted.

In motion 002, Plaintiff requests that the Court issue an order granting them immediate possession of the premises and directing the Sherriff to evict the Tenant. This is the same relief that is sought in Plaintiff's second cause of action. Orders that grant the ultimate relief sought before a determination on the merits are generally an abuse of discretion. *See generally Booston LLC v. 35 W. Realty Co., LLC*, 194 A.D.3d 609, 610 [1st Dept. 2021]; *Moltisanti v. East Riv. Hous. Corp.*, 149 A.D.3d 530, 531 [1st Dept. 2017]. Ejectment may be proper when there are repeated failures to comply with orders directing use and occupancy. *Park Terrace Gardens, Inc. v. Penkovsky*, 100 A.D.3d 577, 577 [1st Dept. 2012]. The Court here will not grant the order of ejectment sought by order to show cause but will permit Plaintiff leave to seek ejectment again if the provisions of this Order are not complied with or through other such relief as appropriate. Accordingly, it is hereby

ADJUDGED that motion sequence 001 is granted; and it is further

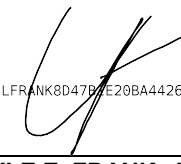
ADJUDGED that motion sequence 002 is denied; and it is further

ADJUDGED that the cross-motion to motion sequence 002 is denied; and it is further

ORDERED that defendant West Side Physicians of NYC, PLLC d/b/a MiDoc Urgent Care is directed to pay plaintiff Aetna Realty Financial Corp. monthly use and occupancy in the agreed-upon amount of \$69,975.36 on the first of the month from the date of this order and monthly thereafter on the first of the month through the course of this litigation, and the acceptance of such shall not prejudice the rights and remedies of any party; and it is further

ORDERED that defendant West Side Physicians of NYC, PLLC d/b/a MiDoc Urgent Care is to pay to plaintiff Aetna Realty Financial Corp. unpaid monthly use and occupancy in the amount of \$69,975.36 from the date of April 10, 2025, to the date of this Order, within 30 days of the date of service of this order with notice of entry; and it is further

ORDERED that defendant West Side Physicians of NYC, PLLC d/b/a MiDoc Urgent Care post an undertaking in the amount of \$105,833.52 pending the resolution of this proceeding not more than 30 days following the date of this Order, in an escrow account to be determined by the parties.

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8/15/2025  
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: