

**Kang Irrevocable Trust ex rel. Yong Kang v
Dolgopolova**

2025 NY Slip Op 33419(U)

September 11, 2025

Supreme Court, New York County

Docket Number: Index No. 655593/2024

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

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KANG IRREVOCABLE TRUST EX REL. YONG KANG

Plaintiff,

- v -

NATALYA DOLGOPOLOVA,

Defendant.

-----X

INDEX NO. 655593/2024

MOTION DATE 02/05/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after a final submission date of June 9, 2025, Plaintiff Kang Irrevocable Trust ex rel. Yong Kang's ("Plaintiff") motion for summary judgment on its claims for declaratory judgment, breach of contract, ejection and use and occupancy asserted against Defendant Natalya Dolgopolova ("Defendant") is granted in part and denied in part.

Plaintiff allegedly owns a condominium unit located at 310 West 52nd Street, Unit 18C, New York, New York (the "Apartment") and leased the Apartment to Plaintiff on July 11, 2023 with the lease term ending on July 10, 2024 (the "Lease") (NYSCEF Doc. 19). On July 15, 2024, Plaintiff allegedly sent Defendant an RPL 226-c notice of non-renewal with a lease termination date of October 17, 2024 (NYSCEF Doc. 13). After Defendant did not vacate, Plaintiff commenced this action in Supreme Court on October 22, 2024. Defendant Answered on December 2, 2024 asserting several affirmative defenses, including failure to send a proper 90 day notice of termination, and alleging counterclaims for breach of the warranty of habitability.

On February 5, 2025, Plaintiff filed the instant motion for summary judgment with a return date of March 7, 2025. Defendant's opposition was due by February 28, 2025, but no opposition

was filed. On March 5, 2025, Defendant made an application to “Justice Nancy Rosado” (*sic*) seeking a four-week extension to file opposition, stating vaguely that they are a small firm and have been busy (NYSCEF Doc. 32), but the application was never addressed by the motions submission part or this Court. Nonetheless, Defendant proceeded to file opposition on April 4, 2025 (NYSCEF Docs. 33-34) to which Plaintiff filed a notice of rejection (NYSCEF Docs. 35-36). In the interest of justice and resolving cases on the merits and given the absence of any demonstrable prejudice to Plaintiff, the Court considers Defendant’s late opposition.

“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]).

Given the conflicting testimonial evidence, and the lack of any discovery, the Court denies Plaintiff’s motion for summary judgment without prejudice as premature, with leave to renew upon further discovery. Based on the record before the Court, it cannot rule summarily that the notice of termination was properly delivered to Defendant nor can it assess the total amount owed to Plaintiff given Defendant’s claims for breach of the warranty of habitability.

However, the Court grants Plaintiff’s motion to the extent it seeks use and occupancy *pendente lite*. A court has broad discretion in awarding use and occupancy (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124 [1st Dept 2000]). “The award of use and occupancy during the pendency

of an action or proceeding ‘accommodates the competing interests of the parties in affording necessary and fair protection to both’” (*MMB Associates v Dayan*, 169 AD2d 422 [1st Dept 1991] quoting *Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730, 731 [1st Dept 1984]). “[A] dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord’s real property gratis” (*Levinson v 390 West End Associates, L.L.C.*, 22 AD3d 397, 403 [1st Dept 2005]).

The Court finds use and occupancy *pendente lite* at the rate of \$4,300.00, as agreed by the parties in their Lease, is appropriate (*Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011] [“in determining the reasonable value of use and occupancy, the rent reserved under the lease, while not necessarily conclusive, is probative”]). To the extent the parties dispute this rate, the remedy for any over or underpayment of use and occupancy is a speedy trial (*Ballinteer Corp v SNRP West 37 LLC*, 217 AD3d 597, 598 [1st Dept 2023]). If, during the pendency of this litigation, Defendant prevails on her counterclaim for breach of the warranty of habitability, Defendant may be entitled to a credit based on use and occupancy paid.

Accordingly, it is hereby,

ORDERED that Plaintiff’s motion for summary judgment against Defendant is denied, without prejudice, with leave to renew after further discovery; and it is further

ORDERED that Plaintiff’s motion for use and occupancy *pendente lite* is granted, and Defendant shall pay Plaintiff use and occupancy *pendente lite* in the amount of \$4,300.00 beginning on September 17, 2025 and continued monthly until this matter has been discontinued; and it is further

ORDERED that no later than October 1, 2025, Defendant shall post a bond for retroactive use and occupancy in the amount of \$4,300 per month that has accrued since July 11, 2024 through the date of this Decision and Order; and it is further

ORDERED that the parties shall meet and confer immediately and submit a proposed preliminary conference order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov, but in no event shall the proposed conference order be submitted any later than October 15, 2025;¹ 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 all parties via NYSCEF; and it is further

ORDERED that should the parties elect to resolve their dispute through the Court's ADR program, they shall notify the Court via e-mail so the appropriate referral order can be issued.

This constitutes the Decision and Order of the Court.

<u>9/11/2025</u> DATE			<u>Mary V Rosado J.S.C.</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE

¹ This date is for the submission of a conference order only, it is not to appear for a conference. If a discovery issue arises requiring a conference, the parties shall contact the Court via e-mail to SFC-Part33-Clerk@nycourts.gov.