

Good Co. Pictures, LLC v 132 Cloud Nine, LLC

2025 NY Slip Op 33736(U)

September 12, 2025

Supreme Court, New York County

Docket Number: Index No. 159260/2018

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

INDEX NO. 159260/2018
MOTION DATE 06/10/2025
MOTION SEQ. NO. 006

GOOD COMPANY PICTURES, LLC, JONATHAN LIA, RYAN HEIFERMAN,

Plaintiffs,

- v -

132 CLOUD NINE, LLC, CLAIRE ANNE OLIVER, IAN MARTIN RUBENSTEIN,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

This action arises from a commercial lease of a residential condominium unit (the "Unit"). The lease, which was executed in September 2015 by the Unit's then-owners, defendants Claire Anne Oliver and Ian Martin Rubinstein, as landlord, and plaintiff Good Company Pictures, LLC ("Good Company"), as tenant, provided for a five-year term ending in October 2020. An associated lease guaranty was also executed by Good Company's owners, plaintiffs Jonathan Lia and Ryan Heiferman. During the term of the lease, Oliver and Rubinstein transferred title to the Unit from themselves to defendant 132 Cloud Nine, LLC ("Cloud 9"), of which they were the sole members. Plaintiffs principally allege the Unit cannot be used for business purposes pursuant to the condominium's by-laws and certificate of occupancy; that they would not have entered into the lease had they known they could not use the Unit for such purposes; and that defendants fraudulently induced them to execute the lease and associated guaranty by withholding the condominium's governing documents during lease negotiation and knowingly misrepresenting that the Unit could be used "for either residential or commercial purposes or for both purposes." Good Company ceased paying rent for the Unit in June 2018 and thereafter purported to surrender possession of the Unit in December 2018.

Plaintiffs' amended complaint seeks a declaratory judgment that the lease and guaranty were terminated as of their effective dates due to frustration of purpose (first and second causes of action) and/or rescinding the lease and guaranty (third and fourth causes of action). Plaintiffs also, as relevant here, assert causes of action, numbered here as in the amended complaint, for (5) breach of contract; (6) fraud; (7) reimbursement of attorneys' fees; (8) violation of GBL § 349; (9) refund of security deposit; and (10) breach of the duty of good faith and fair dealing. Defendants assert three counterclaims seeking: (1) unpaid rent due under the lease and guaranty; (2) ejectment; and (3) reimbursement of contractual attorneys' fees.

Defendants now move pursuant to CPLR 3212 for summary judgment on their first and third counterclaims, and dismissal of plaintiffs' first through tenth causes of action and affirmative defenses. Plaintiffs oppose the motion. The motion is denied.

This is defendants' second motion for summary judgment. They previously moved, in August 2021, after the completion of document discovery but before any depositions were taken, for summary judgment on their first and third counterclaims (MOT SEQ 001). By decision and order dated January 19, 2022, the court denied defendants' prior summary judgment motion, holding that there were triable issues of fact as to what transpired between the parties when they entered into the lease and thus whether rescission or termination of the lease is warranted based on either fraud or frustration of purpose. Though the court's decision noted that no depositions had yet been taken, defendants' motion was not denied "without prejudice" nor were they granted leave to renew after discovery was completed.

"[I]t is axiomatic that successive summary judgment motions are disfavored" (*Priester v Phanor*, 228 AD3d 593, 594 [1st Dept. 2024]), and "should not be entertained without a showing of newly discovered evidence or other sufficient justification" (*Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept. 2010]; see *Amill v Lawrence Ruben Co., Inc.*, 117 AD3d 433, 433-34 [1st Dept. 2014]). Defendants' current, successive summary judgment motion is denied, as defendants fail to offer newly discovered evidence or "demonstrate other sufficient cause for making the second motion" (*Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526, 527 [1st Dept. 2013]).

Defendants' arguments on the present motion, including with respect to the central issues of frustration of purpose and fraud, are identical to those advanced on their prior summary judgment motion. In support of those arguments, defendants rely primarily on the lease and guaranty, the relevant condominium documents, and a series of emails between the individual plaintiffs or with their broker. "Such evidence was either submitted, or could have been submitted, with the initial motion and therefore does not constitute newly-discovered evidence" (*Pavlovich v Zimmet*, 50 AD3d 1364, 1365 [3rd Dept. 2008]; see *Brown Harris Stevens*, 107 AD3d at 527). "[A] court may not on a subsequent motion consider matter which a party has withheld or failed to urge as a ground for summary judgment theretofore denied" (*Priester*, 228 AD3d at 594 [internal quotation marks omitted]), and even evidence that was merely available before a prior motion was made "should be rejected for failure to show due diligence in attempting to obtain [it] before the submission of the prior motion" (*Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept. 2010], quoting *Taub v Art Students League of New York*, 63 AD3d 630, 631 [1st Dept. 2009]; see *Lorne v 50 Madison Ave LLC*, 198 AD3d 483, 483 [1st Dept. 2021]; *Landis v 383 Realty Corp.*, 175 AD3d 1207, 1207 [1st Dept. 2019]). Notably, defendants make no attempt to show that any of the documentary evidence on which they now rely was unavailable, or even not yet in their possession, when they filed their prior motion.

While defendants also submit plaintiffs' deposition testimony, which was obtained only after defendants' first summary judgment motion was decided, that testimony is only very sparsely cited in their motion papers and is not integral to any of their principal contentions. In any event, while deposition testimony that was not elicited until after the original summary judgment motion was decided may constitute new evidence, "such evidence is not 'newly discovered' simply because it was not submitted on the previous motion" but instead "must be used to establish facts that were not available to the [movant] at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means" (*Vinar v Litman*, 110 AD3d 867, 868-69 [2nd Dept. 2013]; see *Perretta v New York City Transit Auth.*, 230 AD3d 428, 432-33 [1st Dept. 2024]; *Dembele v Action Carting Env't Servs., Inc.*, 211 AD3d 508, 508 [1st Dept. 2022]; *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 625-26 [1st Dept. 2015]; *Brown Harris Stevens*, 107 AD3d at 527; *Pavlovich*, 50 AD3d at 1365; cf. *Priester*, 228 AD3d at 595; *Pough v Aegis Prop. Servs. Corp.*, 186 AD2d 52,

53 [1st Dept. 1992]). Here, defendants fail to identify anything in plaintiffs' deposition testimony that "yield[s] new evidence" to resolve or eliminate the factual issues previously found by the court "[so] as to warrant consideration of the second motion" (*Brown Harris Stevens*, 107 AD3d at 527; *see Perretta*, 230 AD3d at 432-33; *Dembele*, 211 AD3d at 508).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



9/12/2025
DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE