SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

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YSHO HOLDING, INC.,
Plaintiff,

- v -

274 BOWERY LEASEHOLD LLC and
NEW GOLDEN AGE REALTY INC.,
Defendants.

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INDEX NO. 655850/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125

were read on this motion to/for **SUMMARY JUDGMENT**.

As alleged in the summons and complaint, plaintiff, the owner of the property located at 274 Bowery Street, New York NY 10012 (the, "premises") (NYSCEF Doc. No. 101, *deed*), asserts that, on or about August 13, 2019, it entered into a triple net lease with defendant 274 BOWERY LEASEHOLD LLC ("Bowery"), relating to the subject premises for a lease term of forty-nine years, with the option to renew for two (2) additional terms of twenty-five (25) years each. Plaintiff alleges that, pursuant to the lease, Bowery agreed to pay $3,000,000.00 upon the closing of the lease, with the first-year annual rent being $0.00. Thereafter, defendant was required to pay annual rent in the sum of $168,000.00 in equal monthly installments of $14,000.00 for lease year two (2) and lease year three (3). Plaintiff further alleges that the annual and monthly rents for lease years four (4) through forty-nine (49) increased in accordance with an itemized rent schedule annexed to the lease as an exhibit. The parties executed the lease in August 2019 and plaintiff claims that defendant failed to pay rent to plaintiff for lease year two (2) and three (3), each equal to $14,000.00 a month.

Plaintiff asserts a breach of contract claim as against defendant (first cause of action), as well as attorney's fees and costs for the prosecution of this action (second cause of action) (NYSCEF Doc. No. 93, *summons and complaint*).

By decision and order dated September 25, 2025, this court denied Bowery's motion to dismiss the summons and complaint pursuant to CPLR 3211(a)(1) and (a)(7). In denying the motion, this court noted conflicting provisions in the lease and the rent schedule and found that the ambiguity as to the terms agreed to by the parties, required denial of the motion (NYSCEF Doc. No. 41, *decision and order*).

Plaintiff now moves, pursuant to CPLR 3212, for an order granting it summary judgment on its breach of contract claim against defendant and setting this matter down for an inquest on

damages. It also seeks summary judgment on its claim against Bowery for attorney's fees and costs (NYSCEF Doc. No. 91, *notice of motion*).

Plaintiff argues that there is no triable issue of fact that the parties intended that the rent schedule C (NYSCEF Doc. No. 103) be the rent schedule under the lease. Moreover, it contends that there is no triable issue of fact as to Bowery's failure to pay the sum of $168,000.00 for year 2 (August 1, 2020 through July 31, 2021); $168,000.00 for lease year 3 (August 1, 2021 through July 31, 2022); $192,000.00 for lease year 4 (August 1, 2022 through July 31, 2023); $192,000.00 for lease year 5 (August 1, 2023 through July 31, 2024); $192,000.00 for lease year 6 (August 1, 2024 through July 31, 2025). Inasmuch as the court has already ruled that the lease is ambiguous, petitioner contends that extrinsic evidence is permitted to determine the intent of the parties as to the rent schedule. It maintains that the parties' conduct proves, as a matter of law, that the rent payment obligations were set forth in schedule C of the lease, warranting summary judgment in plaintiff's favor against Bowery. Moreover, it maintains that pursuant to Section 3.03 of the lease agreement, plaintiff is entitled to attorney's fees and costs (NYSCEF Doc. No. 113, *memo of law*).

In support of its application, plaintiff relies on, *inter alia*, the affidavit of its president Ying Sang Ho ("Ho") who affirms that, on March 25, 2019, Dean Lui, a real estate broker with NEW GOLDEN AGE REALTY INC. d/b/a CENTURY21 NEW GOLDEN AGE REALTY ("New Golden Age") sent an e-mail to plaintiff's attorney Jay Lau, Esq. ("Lau") and attorney Jeffery Dayton, Esq. ("Dayton"), who represented Bowery, regarding a proposed lease rent schedule negotiated by the parties for the triple net lease of the property (NYSCEF Doc. No. 102, *March 25, 2019 e-mail*). The rent schedule, as incorporated in the March 25, 2019, e-mail was renegotiated, avers Ho, and these new iterations were memorialized in e-mails dated April 12, 2019, July 31, 2019, e-mail (NYSCEF Doc. Nos. 103, *April 12, 2019 e-mail*; 104, *redlined version from May 2019*; 105, *July 31, 2019 e-mail*). Ho affirms that, pursuant to the last iteration of the rent schedule, the parties agreed to $14,000.00 for years 2 through 3; $16,000.00 for years 4 through 6; and $17,000.00 for years 7 through 10. The lease was entered on August 13, 2019 (NYSCEF Doc. No. 106, *lease*) and, at closing, $3 million was paid by tenant to plaintiff (NYSCEF Doc. No. 111, *closing statements e-mails and statement*). Ho avers that during the COVID-19 pandemic, tenant asked plaintiff to allow for a delay in paying the rent (NYSCEF Doc. No. 108, *text messages*). According to Ho, plaintiff proposed to tenant a new rent schedule during the COVID pandemic, but no amendment to the lease was reached between the parties and, thus, the rent schedule at schedule C remains in full force and effect.

Ho further represents that section 3.01(a) of the lease, which provides that tenant is not required to pay rent for the first ten (10) years, is a scrivener's error which in no way obviates the intent of the parties to enter into the rent schedule at schedule C (NYSCEF Doc. No. 114, *Ho's affidavit*).

In opposition to the motion, defendant argues that plaintiff has failed to demonstrate, *prima facie* entitlement to judgment as a matter of law. Defendant argues that, to sustain its burden, plaintiff is required to prove that the lease required defendant to pay "base rent" prior to year ten (10) of the lease term, which it cannot establish given that plaintiff's reliance on rent schedule C is belied by the "clear, express terms" of the lease agreement, specifically section

3.01(a). Defendant maintains that the $3 million paid at signing of the lease covered its rental obligations for the first one-hundred twenty (120) months, which period is set to expire on August 1, 2029. The rent schedule, argues defendant, goes into effect only after the expiration of the 10-year period. Inasmuch as its obligation to pay rent under the rent schedule has not become due, defendant argues that no breach of contract claim lies. To the extent plaintiff contends that the lease contains errors, defendant posits that a claim for reformation of the lease agreement is required before plaintiff can assert a claim for breach of contract under the agreement.

Harold Sherr ("Sherr"), the managing member of defendant, testified at his deposition that he had never seen pages 1-3 of the documents annexed to Ho's affidavit as exhibit G, titled e-mails and proposed schedule. It is unclear, argues defendant, what this document is supposed to be, and it further argues that "its credibility and authenticity is speculative, at best, and it amounts to no more than inadmissible hearsay."

Defendant maintains that the motion should be denied because the lease is either, unambiguous, and, thus, not subject to extrinsic evidence, or, alternatively, there are unresolved material issues of fact that preclude the granting of judgment at this juncture (NYSCEF Doc. No. 116, *memo in opposition*).

Defendants submit the affidavit of Sherr, who avers that the parties were represented by counsel and negotiated the lease through the broker, New Golden Age. Sherr claims that, upon review of the redlined version of the lease sent in 2019, it is evident that Section 3.01(a)(i) was one of the sections being negotiated and no objection was raised thereto (NYSCEF Doc. No. 119, *April 2019 draft*), belying plaintiff's assertion that same was as a result of a scrivener's error. He further affirms that in a May 2019 draft, this same provision was edited to adjust the location of the word "Dollars" to be after the $3 million (NYSCEF Doc. No. 120, *May 2019 draft*). In redlined drafts submitted in July and August 2019, no notations were made with respect to Section 3.01(a)(i). Sherr further represents that the $3 million upfront payment was an advance for the first ten (10) years of the lease. Sherr also states that he has no knowledge of the certain documents submitted as exhibit G to Ho's affidavit, which, although styled like an e-mail, is devoid of any characteristics of a printed e-mail. He affirms that he first saw said document during his deposition (NYSCEF Doc. No. 123, *EBT transcript*), that he has no recollection of any purported discussion with Dean, that the correspondence reflects no agreement between the parties, and that no change was made to the lease terms (NYSCEF Doc. No. 117, *Sherr's aff*).

In reply, plaintiff argues that defendant has not submitted an affidavit in admissible form in opposition to the motion. Specifically, plaintiff argues that Sherr's affidavit is not notarized nor is the affirmation made under the penalty of perjury under New York law. Since there is no triable issue of fact that the rent schedule C sets forth the rent obligations of defendant, summary judgment, argues plaintiff, is warranted for breach of the lease agreement. The feigned allegations, argues plaintiff, that defendant did not agree that the rent schedule C would govern the defendant's obligation to pay rent under the lease is insufficient to defeat the motion because plaintiff's claims regarding the parties understanding of the terms of the lease are not refuted by anyone with personal knowledge (NYSCEF Doc. No. 125, *memo in reply*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

Here, Section 3.01(a)(i) and (ii) states as follows:

(a) "Tenant shall pay to Landlord during the Term, a Base Rent over and above the other payments to be made by Tenant as hereinafter provided at the rates as follows:

(i) Tenant shall pay to Landlord Three Million ($3,000,000.00) Dollars upon Signing of the Lease which amount represents rent for the first one hundred and twenty (120) months of the Lease term allocated on the monthly basis; and

(ii) For the remaining Term the Base Rent shall be pursuant to the rent schedule annexed hereto as Exhibit C. All rent shall be paid to Landlord at the address to which notices to Landlord are given, or to such other person or such other place as directed from time to time by written notice to Tenant from Landlord."

The rent schedule C, annexed to the lease, shows "$0.00" for year one and then commences with payment of rent starting on year 2 (NYSCEF Doc. No. 106).

Here, the motion is denied. The law is clear that "[r]esolution by a fact finder is required where . . . interpretation of a contract term is susceptible to varying reasonable interpretations and intent must be gleaned from disputed evidence or from inferences outside the written words" (*Time Warner Entm't Co., L.P. v Brustowsky*, 221 AD2d 268, 268 [1st Dept 1995], citing *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 291 [1973]). This court, as it previously held in the decision and order deciding defendant's motion to dismiss, finds that the lease agreement is ambiguous given the conflicting terms in the lease agreement and rent schedule C. Section 3.01(a)(i) and (ii) expressly provides that the initial $3 million dollars paid by defendant would satisfy defendant's rental obligations for one hundred twenty (120) months of the lease, despite the rent schedule C indicating that rent of $14,000.00 would commence on year 2. Contrary to plaintiff's assertion, this court cannot find, as a matter of law, that the drafting of Section 3.01(a)(i) and (ii), a lease negotiated for months by sophisticated parties, amounts to a mere scrivener's error. As held by the Appellate Division, First Department, "a court may correct a scrivener's error outside of a claim for reformation of a contract in 'those limited instances where some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part'" (*NCCMI, Inc. v Bersin Props.*, LLC, 226 AD3d 88, 93-94 [1st Dept 2024]). While there is a colorable claim that the conflicting terms were due to poor drafting, it cannot be said, as a matter of law, and viewing the evidence in the light most favorable to the non-moving party (see *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), that Section 3.01(a)(i), (ii) as written, i.e., that the parties agreed to an upfront

payment of $3 million dollars for the first ten years of the lease agreement, rises to the level of "absurdity", and no argument is raised that Section 3.01(a)(i), (ii) is otherwise unenforceable. Thus, "the intent of the parties must be resolved at trial from disputed evidence or from inferences outside the written words" (*Kohman v Rochambeau Realty & Dev. Corp.*, 17 AD3d 151, 152 [1st Dept 2005]; see *Time Warner Entertainment Co. v Brustowsky*, 221 AD2d at 268). Since plaintiff fails to establish *prima facie* entitlement to summary judgment, the motion is denied. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff's motion, pursuant to CPLR 3212, for summary judgment on its claims against defendant 274 BOWERY LEASEHOLD LLC is denied; and it is further

ORDERED that, within twenty (20) after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant.

December 9, 2025

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**