

21 Grace Church St. Realty LLC v Empire Coffee Co., Inc.
2025 NY Slip Op 35378(U)
January 10, 2025
Supreme Court, Westchester County
Docket Number: Index No. 62829/2024
Judge: Alexandra D. Murphy
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.**

----- X
21 GRACE CHURCH STREET REALTY LLC,

Index No. 62829/2024

Plaintiff,

Motion Seq. 1

– against –

DECISION & ORDER

EMPIRE COFFEE COMPANY, INC.,

Defendant.
----- X

In an action to recover damages for breach of a lease agreement, the plaintiff moves for summary judgment on the complaint pursuant to CPLR 3212 and to amend the pleadings:

Papers Considered NYSCEF Doc. 9-22; 26-38

1. Notice of Motion/Affirmation of Giovanni Puerta/Affirmation of Christopher J. Dylewski, Esq./Exhibits A-I;
2. Affirmation of Robert Richter/Affirmation of Lawrence M. Segan, Esq. in Opposition/Exhibits A-D;
3. Memorandum of Law in Reply/Exhibits J-L.

Factual and Procedural Background

The plaintiff's predecessor in interest, as landlord, and the defendant, Empire Coffee Company, Inc., entered into a lease agreement dated May 10, 1994, for the commercial premises located at 106 Purdy Avenue, Port Chester, New York. The lease was thereafter amended extending the term through December 31, 2027. The defendant subsequently defaulted on the lease payments for the period between September 1, 2021, and May 31, 2024.

The plaintiff commenced this action for breach of contract and now seeks summary judgment asserting that the defendant defaulted on the payments owed and there is an outstanding balance of \$546,847.26 plus reasonable attorneys' fees. The plaintiff also moves, pursuant to CPLR 3025(c), to amend the pleadings to conform to the evidence.

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In support of the motion, the plaintiff submits an affidavit of Giovanni Puerta, the property manager for the premises, and attaches copies of the original lease and the amendments to the lease.

In opposition, the defendant argues that the motion is premature and that issues of fact exist. Robert Richter, the defendant's president and sole shareholder, submits an affirmation stating that as a result of the Covid-19 pandemic, the defendant fell behind in rent payments. Richter states that the plaintiff agreed to forebear from collecting the arrears and has been accepting payments of the arrears in installments since February 2023. Richter states that the parties entered into a payment schedule which did not include late charges, interest, or fees, and did not require that rent payments be made on or before the first day of each month. According to Richter, the parties agreed that the current rent would be paid along with the amounts in the payment schedule and the plaintiff accepted current rent and payments according to the schedule. Because the defendant would not agree to terminate the lease, the parties never entered into a formal agreement. However, the defendant continued to make payments and the plaintiff continued to accept payments of current rent and arrears according to the schedule. The plaintiff never gave the defendant notice that it intended to rescind its waiver and modification of terms of the lease. Richter admits that the defendant has fallen behind in its current rent payments and payments under the schedule and has failed to make any payments since June 2024. The defendant is willing to consent to a judgment in the amount of \$117,141.81 representing the current rent and payments due under the schedule for July and August 2024.

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562). The plaintiff demonstrated entitlement to summary judgment on its complaint.

In order to recover damages for breach of contract, the plaintiff must demonstrate the existence of a contract, the plaintiff's performance pursuant to the contract, the

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defendant's breach of its contractual obligations and damages resulting from the breach (see *Investment Retrievers, Inc. v Fox*, 150 AD3d 1090 [2d Dept 2017]).

Here, the plaintiff demonstrated entitlement to judgment as a matter of law on the issue of liability by producing the lease agreement and evidence of the defendant's breach of the agreement. In opposition, the defendants failed to raise a triable issue of fact on the issue of liability (see *82-90 Broadway Realty Corp. v NY Supermarket, Inc.*, 154 AD3d 797 [2d Dept 2017]). Contrary to the defendants' contention, the motion is not premature with respect to liability. The defendant failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing the motion on the issue of liability are within the exclusive knowledge and control of the plaintiff (see *Gaston v Vertsberger*, 176 AD3d 919 [2d Dept 2019]).

However, the amount of damages that should be awarded to the plaintiff as a result of the breach must be determined at the time of trial. The plaintiff argues that it is entitled to \$458,532.80 in fixed rent, taxes, assessments, expenses, and late fees through August 31, 2024, plus interest in the amount of \$88,314.46, for a total of **\$546,847.26** (NYSCEF Doc. 10).¹ However, the ledger submitted by the plaintiff establishes that the last zero balance on the defendant's account was in July 2017. Thereafter, the ledger contains a running balance from August 1, 2017, through August 1, 2024, resulting in purported arrears of \$458,532.80. Inasmuch as this action was commenced on May 22, 2024, and the defendant made significant payments throughout the period of default (NYSCEF Doc. 30-33), the plaintiff has failed to establish entitlement to summary judgment on the amount of damages it is owed. Moreover, issues of fact exist as to the amount of interest that the plaintiff is owed under the lease. As a result, this matter will proceed through discovery on the issue of damages. Further, to the extent that the plaintiff moves to amend the pleadings to conform to the evidence, that branch of the motion must be denied with respect to damages.

The plaintiff established entitlement to summary judgment on the second cause of action seeking to recover reasonable attorneys' fees and costs. The plaintiff has demonstrated its right to recover legal fees by establishing that the lease provides for the payment of legal fees. However, the amount of reasonable attorneys' fees shall be determined by the Court at the conclusion of the damages portion of the trial upon the submission of a detailed affirmation of legal fees.

¹ The plaintiff's calculation of damages includes fixed rent from August 1, 2021, through July 31, 2022, in the amount of \$37,127.49 per month; fixed rent from August 1, 2022, through July 31, 2023, in the amount of \$38,241.32 per month; fixed rent from August 1, 2023, through July 31, 2024, in the amount of \$39,388.56 per month; and fixed rent from August 1, 2024, through July 31, 2025, in the amount of \$40,570.21 per month. The plaintiff further asserts that the defendant must pay 57.59% of taxes and assessments to the building, 57.59% of the operating expenses on the building, and late charges of 4%.

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Accordingly, it is

ORDERED that the branch of the plaintiff's motion for summary judgment on the issue of liability is GRANTED; and it is further

ORDERED that the branch of the plaintiff's motion for summary judgment on the second cause of action seeking attorneys' fees is GRANTED; and it is further

ORDERED that the plaintiff's motion is otherwise DENIED.

Counsel for all parties shall appear for a **Preliminary Conference** at a date and time provided by the part clerk Brenda Jordan-Williams.

Dated: White Plains, New York
January 10, 2025



HON. ALEXANDRA D. MURPHY, J.S.C.