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| <b>Acme Realty, LLC v ReMax Realty</b>                                                                                                                                                                                         |
| 2025 NY Slip Op 35426(U)                                                                                                                                                                                                       |
| March 11, 2025                                                                                                                                                                                                                 |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: Index No. 68834/2024                                                                                                                                                                                            |
| Judge: Elena Goldberg-Velazquez                                                                                                                                                                                                |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

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

-----X  
ACME REALTY, LLC,

Plaintiff,

-against-

REMAX REALTY a/k/a RE/MAX TOWN AND  
COUNTRT and HOWARD PAYSON, personally,

Defendants.  
-----X

***Hon. Elena Goldberg-Velazquez, J.S.C.***

**DECISION & ORDER**

Index No. 68834/2024

Motion Seq. No. 1

The following papers numbered 1 – 3 were read and considered in connection with the Notice of Motion (Motion Seq. No. 1) for an Order (1) pursuant to *Civil Practice Law and Rules* § 3212 directing that a Judgment be entered herein in favor of the Plaintiff, on the basis that, there is no issue, either as a matter of law or of fact, that necessitate a trial in this matter, and (2) pursuant to *Civil Practice Law and Rules* § 3211(b) dismissing the affirmative defenses pleaded by the Defendants as unsupported by any allegations of fact, boilerplate and conclusory; and for such other and further relief as the Court may deem just and proper:

**PAPERS**

**NUMBER**

|                                                                                                                                        |   |
|----------------------------------------------------------------------------------------------------------------------------------------|---|
| Notice of Motion (Motion Seq. No. 1)/Affirmation of Peter J. Reynolds, Esq./<br>Affidavit of Edward Falkenberg in Support/Exhibits A-D | 1 |
| Affidavit of Ellen A. Faulkner, Esq. in Opposition/Affidavit of Howard Payson/<br>Exhibits 1-2/ Memorandum of Law in Opposition        | 2 |

Affirmation of Peter J. Reynolds, Esq. in Reply/Affidavit of Edward Falkenberg  
in Reply

3

This action arises from a lease agreement for commercial property for property located at 2013 Crompond Road, Yorktown Heights, New York Unit 2013A.

### **PROCEDURAL HISTORY**

Plaintiff commenced the instant action on September 5, 2024, by filing a Summons and Verified Complaint raising four (4) causes of action. Defendant HOWARD PAYSON [hereinafter PAYSON] was served personally pursuant to *Civil Practice Law and Rules* § 308(1) on September 10, 2024. Defendant REMAX REALTY a/k/a REMAX TOWN AND COUNTY [hereinafter ReMax] was served pursuant to *Civil Practice Law and Rules* § 311(a)(1) by service on the receptionist at 584 Rt. 9 Fishkill, New York on September 10, 2024. The Plaintiff also served Defendants prior counsel, Guiseppina Lita, Esq. pursuant to *Civil Practice Law and Rules* § 308(2) (service on Attorney Lita's assistant) as required by the subject lease on September 10, 2024. Defendants joined issue with the filing of a Verified Answer on October 11, 2024. Plaintiff filed the instant motion for summary judgment on October 30, 2024.

### **FACTS**

Plaintiff contends in their section entitled "Statement of Facts" that the commercial lease was executed by the parties in April 2021 and the lease was for a ten (10) year term beginning May 1, 2021, and terminating April 30, 2021. According to Plaintiff the rent beginning in May 2021 was six thousand seven hundred sixty dollars (\$6,760.00) per month with annual increases of two and half percent (2.5%) per year. Further, the Plaintiff contends that the subject lease provides one optional renewal for a five (5) year period at the tenant's request and conditioned

upon the tenant being compliant with the terms and conditions of the lease at the time of exercising the optional renewal. The Plaintiff also notes that paragraph eleven (11) of the subject lease provides that if the tenant defaults in payment of rent and violates the terms of the lease then the tenant's personal property in the leased property is deemed abandoned and becomes the property of the landlord. Finally, the Plaintiff avers that paragraph fifteen (15) of the subject lease provides the tenant a conditional option to abandon the subject lease after four (4) years of tenancy from the commencement of the lease if the tenant cannot pay the rent due to their business being unable to operate. Under that provision the tenant can be released from the lease upon three (3) months written notice. The Plaintiff asserts that in addition to the commercial lease between the Plaintiff and Defendant ReMax the lease incorporates a personal guaranty executed by Defendant PAYSON.

In regard to the alleged default, the Plaintiff contends that Defendant PAYSON attempted to "abandon his tenancy" effective June 30, 2024, in an email dated June 20, 2024. Plaintiff asserts that based upon the email the Defendants defaulted on their lease as they sought to abandon the commercial lease three (3) years after commencement of the agreement and only provided Plaintiff ten (10) days' notice of their intended abandonment. In response, Plaintiff contends that on August 8, 2024 they served a "formal Notice to Cure" upon Defendant ReMax which demanded payment of outstanding rent totaling sixty-three thousand dollars (\$63,000.00), which reflected unpaid rent from January 1, 2024, through September 2024. Further, Plaintiff asserts that they attempted to ameliorate their damages, but the prospective new tenant could not take possession of the subject location until October 1, 2024. Additionally, Plaintiff argues that they incurred a cost of four hundred eighty-seven dollars and sixty-nine cents (\$487.69) to

remove two ReMax signs the Defendants abandoned at the subject location.

Defendants assert in their submission in opposition that the Plaintiff became aware of an issue with the septic system at the subject location in the fall of 2023, which preceded the period for which Plaintiff is seeking damages for unpaid rental payments. The Defendants contend that as a result they did not have two (2) working or suitable bathrooms at the subject location for an “extended period of time.” The Defendants also contend that Plaintiff was aware as early as March 2024, at the time the septic system issue was occurring, that Defendants would be vacating the subject location based upon email communications.

### **ARGUMENTS**

Plaintiff argues that they have established entitlement to summary judgment as to their claim of “unpaid rent and ejectment” based upon the submission of a copy of the subject commercial lease which demonstrates the lease term and the amount of rent due monthly which is not disputed by the Defendants. In support of their argument Plaintiff cites caselaw from the Appellate Division, Second Department in which the commercial tenants abandoned or vacated the lease locations without making the required lease payments and summary judgment was granted. According to Plaintiff the cases cited in counsel’s Affirmation “reflect[] the same fact pattern that exists in the case at bar.” Specifically, Plaintiff asserts that in the instant action there is a written lease agreement, Plaintiff has satisfied all of their obligations under the lease agreement, Defendant failed to pay the agreed upon rent for nine (9) months and abandoned the tenancy before the conclusion of the lease term upon inadequate notice and failed to remove trade signs from the subject location. Additionally, Plaintiff contends that it is undisputed that Defendant PAYSON executed a personal guaranty in conjunction with the subject lease and as

such is personally liable for Defendants' breach of the lease.

In opposition the Defendants first assert that the lease agreement and guaranty annexed to the Complaint and the instant motion are illegible making argument as to the breach of terms of the lease impossible. The Defendant also argues that issue with the illegibility of the documents is an issue since the matter was recently commenced and the parties have not yet engaged in discovery. According to Defendant the exchange of paper discovery and depositions would not only result in a legible copy of the subject lease but would also address inconsistencies in the arguments made by Plaintiff as to material terms of the lease.

The Defendant contends that in the fall of 2023, prior to the alleged breach, the Plaintiff advised that there was an issue with the septic system servicing the subject location which resulted in a breach of the terms of the lease. Specifically, the Defendants state through the affidavit of Defendant PAYSON that they recall the lease agreement provided that the Plaintiff, as landlord, agreed to provide two (2) working bathrooms in the subject location. According to Defendants due to the issues surrounding the septic system the subject location did not have two (2) working bathrooms. Defendants contend the issue with the non-working bathrooms at the subject location raises a triable issue of fact as to Plaintiff's performance and Defendants' alleged breach.

Defendant also argues that the amounts sought by Plaintiff in rental arrears as stated by Plaintiff's representative, Ed Falkenberg, are inconsistent with the actual rent amounts set forth in the lease annexed to the Complaint and the instant motion. Specifically, the Defendant notes that Attorney Reynolds and Plaintiff representative Ed Falkenberg both claim Defendant owes sixty-three thousand (\$63,000.00) in rental arrears based upon a monthly rent amount of seven

thousand dollars (\$7,000.00). However, Defendants contend that based upon the annexed lease the rental amount for January 2024 through March 2024 was seven thousand one hundred two dollars (\$7,102.00) and for April 2024 through October 2024 was seven thousand two hundred seventy-nine dollars (\$7,279.00). Defendant also asserts that the Plaintiff has not disputed that they are holding Defendants' security deposit of thirteen thousand five hundred twenty dollars (\$13,520.00) but have failed to address these monies in the instant application or how they should be applied to the monies Plaintiff alleges they are owed by Defendants. Again, Defendants argue that based upon the illegible lease and guaranty documents the parties and the Court cannot determine how the security monies were to be addressed. The Defendants assert that these inconsistencies demonstrate the Plaintiff's application is premature since they can be resolved by the parties' engagement in discovery.

The final argument made by Defendants is in relation to Plaintiff's assertion that they attempted to ameliorate the damages by obtaining a new tenant but indicating that the new prospective tenant could not take possession of the subject location until October 1, 2024. Defendants assert that based upon Defendant PAYSON's affidavit that prior to commencing the instant action he was advised that another tenant was able to take possession of the subject location prior to October 1, 2024. The Defendant contends that based upon the inconsistent information it is necessary for the parties to engage in discovery including document exchange and depositions to clarify whether Plaintiff's actions exacerbated their damages.

In reply, Plaintiff contends that the issues regarding the sewage backup and loss of electric power were isolated incidents that they as the property owner did not cause and were not within their obligation or control. Rather, Plaintiff argues that when they became aware of the

issues, they addressed the problems with the “responsible entities” to ensure there was a resolution to the problems. Moreover, Plaintiff asserts that the issues with the sewage and electric did not provide the Defendants the right to withhold rent payments.

Plaintiff also argues Defendants’ assertion that the instant motion is premature as the parties have not engaged in discovery is “unavailing.” The Plaintiff reiterates that the Defendants had an obligation to pay the monthly rent when it was due, and the lease does not provide the Defendant the remedy to withhold rent based upon a defect at the subject location. Further, Plaintiff argues that if the Defendants believe the Plaintiff breached a duty to them based upon the terms of the lease, then the Defendants had legal remedies to address those issues.

Finally, Plaintiff concedes that if Defendants paid a security deposit, they are entitled to an offset of the monies owed to Defendant by the value of the security deposit.

### ANALYSIS

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. *See Giuffrida v. Citibank Corp., et al.*, 100 NY2d 72 (2003), *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). A plaintiff seeking summary judgment based upon a breach of contract claim bears the burden to establish the terms of an enforceable agreement between the parties, the performance of the plaintiff’s obligations under the agreement and a breach of defendant’s payment obligation. *See Winegrad v. New York University Medical Center*, 64 NY2d 851 (1985). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. *See Lacagnino v. Gonzalez*, 306 AD2d 250 (2d Dept 2003); *JMD Holding Corp. v. Congress Fin.*

*Corp.*, 4 NY3d 373 (2005).

“A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment.” *Rutherford v. Brooklyn Navy Yard Development Corporation*, 174 AD3d 932, 933 (2d Dept 2019) quoting *Salameh v. Yarkovski*, 156 AD3d 659, 660 (2d Dept 2017); *See also Civil Practice Law and Rules* § 3212(f). Further, “[a] party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party’s position may exist but cannot then be stated.” *Rutherford v. Brooklyn Navy Yard Development Corporation*, 174 AD3d at 933 quoting *Brea v. Salvatore*, 130 AD3d 956, 956 (2d Dept 2015). Additionally, “[a] party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant.” *Rutherford v. Brooklyn Navy Yard Development Corporation*, 174 AD3d at 933 quoting *MVB Collision, Inc. v. Progressive Ins. Co.*, 129 AD3d 1040, 1041 (2d Dept 2015); *Tarasiuk v. Levoritz*, 216 AD3d 1031, 2035 (2d Dept 2023); *Cantor-Sanchez v. Gonzalez v. Socarras*, 189 AD3d 977 (2d Dept 2020). “The mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion.” *Singh v. New York City Hous. Auth.*, 177 AD3d 475, 476 (1st Dept 2019).

At the outset the Court notes that the images of the lease annexed to Plaintiff’s Complaint or moving papers are illegible. Specifically, the text of the documents is blurry in that without employing the “zoom” feature the text of the documents are unreadable. The condition of the supporting documents renders the Court unable to decipher the terms of the commercial lease. Due to this Court’s inability to review the lease and guaranty, which are the central documents

upon which Plaintiff's action and the instant application are based, this Court cannot make a determination as to Plaintiff's motion seeking summary judgment. *See Castaneda v. Serrano*, 83 Misc3d 1265(A) (Sup Ct. Kings Cty., August 12, 2024) *citing Express Indus. & term. Corp. v. New York State Dept. of Transp.*, 93 NY2d 584, 590 (1999); *See also American Building Supply Corp. v. Frazier Builders Corp.*, 2002 WL31507029, \*2-3 (Civil Ct., New York Cty., May 10, 2002).

Nonetheless, the Court considered the arguments made by Plaintiff in opposition to Plaintiff's motion as to the timing of the application. Here, Plaintiff filed the instant motion seeking summary judgment before a preliminary conference was held, before the parties exchanged any document/written discovery and before any depositions were taken. *See Pinella v. Crescent St. Corp.*, 176 AD3d 985, 987 (2d Dept 2019); *See also Cantor-Sanchez v. Gonzalez-Socarras*, 189 AD3d at 977. The papers submitted by Defendants in opposition to Plaintiff's application demonstrate that there are several issues for which discovery would lead to relevant evidence. *See Id.* Additionally, based upon Defendant's opposition there are facts regarding the issues with the condition of the subject location that effected Defendants' use of the property prior to the breach which are exclusively within the knowledge and control of Plaintiff. Further, the Defendant has also raised issues regarding agreements and discussions that occurred between the parties as to the end of Defendants' tenancy at the subject location, how and when the tenancy would end and the manner in which the Defendants' personal property was handled by the Plaintiff after the alleged agreed upon vacancy date. Defendants contend this information is solely in the possession of Plaintiff and require the parties to engage in discovery. Therefore, the Court finds that Plaintiff's application is premature, and the parties are entitled to engage in the

discovery process which at minimum may result in disclosure of a legible copy of the lease and relevant information as to the inconsistencies raised by Defendants in opposition.

In arriving at this decision the Court has reviewed, evaluated, and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

Accordingly, it is hereby

**ORDERED** that Plaintiff's Motion for Summary Judgment (Motion Seq. No. 1) is denied in its entirety as premature; and it is further

**ORDERED** that the parties are directed to complete and upload a Preliminary Conference Order on or before March 28, 2025

**ORDERED** that the parties are directed to appear for a status conference on May 6, 2025 at 10:00a.m.

The foregoing is the Court's Decision and Order on Motion # 1.

Dated: White Plains, New York  
March 11, 2025



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Hon. Elena Goldberg-Velazquez, J.S.C.

To:

PETER J. REYNOLDS, ESQ.  
LAW OFFICES OF JOSPEH J. TOCK

Attorney for Plaintiff  
(via NYSCEF)

ELLEN FAULKNER, ESQ.  
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Attorney for Defendant  
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