# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. LOUIS L. NOCK** **PART** **38M**

***Justice***

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TOUR CENTRAL PARK INC.,

Plaintiff,

- v -

THOR 38 PARK ROW LLC and AUSTIN KNIEF,

Defendants.

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**INDEX NO.** 651406/2021

**MOTION DATE** 04/06/2022

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, and 47

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the defendants' motion for summary judgment is granted for the reasons set forth in defendants' moving papers (NYSCEF Doc. Nos. 33, 38, 42) and the exhibits attached thereto, in which the court concurs as set forth below.

## Background

In this commercial landlord-tenant action, defendant Thor 38 Park Row LLC ("landlord") leased to plaintiff Tour Central Park Inc. ("tenant") a commercial space at 38 Park Row, New York, New York (the "premises"), in which tenant operated a bicycle rental business. The lease ran through June 30, 2020 (First Amendment to Lease, NYSCEF Doc. No. 41 at 1), but allowed for landlord to terminate the lease before the term expired in the event of significant alterations to the building or ownership structure thereof, or "for any other reason in Landlord's sole business judgment" (Lease, NYSCEF Doc. No. 39, § 21.13). On June 20, 2017, landlord sent tenant a termination notice pursuant to Section 21.13 of the lease, which was ultimately withdrawn upon the parties entering into the First Amendment to Lease (NYSCEF Doc. No. 41 at 1). Pursuant to the First Amendment to Lease, the term of the lease was to expire on

December 31, 2019 (*id.*, § 2). Landlord asserts that tenant remained in the space for several months without paying rent after the lease expired (Stanchfield aff., NYSCEF Doc. No. 38, ¶ 9).

Tenant – while not meaningfully disputing that it received a termination notice, entered into the First Amendment to Lease, and remained in the premises for at least some time after the lease expired – tells a somewhat different story. Tenant alleges that the termination notice was an attempt to force tenant out so that landlord could rent to a competing bicycle rental company, and that landlord used the termination notice as leverage to get tenant to agree to increased rent and then rented to tenant's competitor after entering the First Amendment to Lease (Saryyev aff., NYSCEF Doc. No. 46, ¶¶ 13-25). Further, after informing landlord following expiration of the lease that tenant would be vacating the premises, landlord then fraudulently induced tenant to remain in the space through March 2020 before refusing to return tenant's security deposit (*id.*, ¶¶ 26-37). It is undisputed that in February 2022, landlord repaid tenant the full amount of the security deposit (Email dated February 15, 2022, from landlord's counsel, NYSCEF Doc. No. 44).

**Standard of Review**

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

**Discussion**

Tenant asserts causes of action for *prima facie* tort, fraudulent inducement, breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. The only measure of damages specified by tenant is the amount of the security deposit, which tenant concedes has now been reimbursed. Landlord has thus established *prima facie* entitlement to summary judgment by showing that tenant has no recoverable damages, a core element of each of tenant's causes of action. Tenant's assertions of other damages, even in opposition to the motion, are conclusory, vague, and unsupported by any record evidence. It is undisputed that tenant did not pay any rent following the termination of the lease. As a general matter, one may not oppose summary judgment simply by pointing to holes in the moving party's proof (*see Bryan v 250 Church Assoc., LLC*, 60 AD3d 578 [1st Dept 2009]). In opposing summary judgment, one must "lay bare his or her proof and demonstrate the existence of a triable issue of fact" (*Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 711 [2d Dept 2007]).

Tenant argues that it cannot yet demonstrate evidence of triable issues of fact because there has been no discovery, but its arguments on this point are similarly vague as to what records or testimony would establish the merit of its claims or the amount of its damages that it does not already have in its own possession. In order to succeed on this ground, it is the opposing party's burden to demonstrate that "facts essential to justify opposition to the motion may lie within [landlord's] exclusive knowledge or control" (*Barreto v City of New York*, 194 AD3d 563, 564 [1st Dept 2021]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion" (*Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016]).

Moreover, tenant's causes of action other than breach of contract are all individually flawed beyond tenant not establishing a triable issue of fact as to damages. A claim for *prima facie* tort requires proof that defendants acted solely with "disinterested malevolence" (*WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 258 [1st Dept 1992]). Plaintiff's own complaint provides ample proof of defendants' potential economic motivations for their actions (Complaint, NYSCEF Doc. No. 1, ¶¶ 13-16), which defeats the claim (*Cohen's W. 14th St. Corp. v Parker 14th Assoc.*, 125 AD2d 249 [1st Dept 1986]). The claim for fraudulent inducement amounts to no more than a claim that landlord agreed to hold the space for three months following tenant vacating the premises without charging rent with no intent to actually perform, which is insufficient to state a claim for fraud (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). The claim for breach of the covenant of good faith and fair dealing must be dismissed because it arises from the same facts as the breach of contract claim (*Baker v 16 Sutton Place Apartment Corp.*, 2 AD3d 119, 121 [1st Dept 2003]), and also contradicts landlord's right to terminate the lease early based on its own business judgment (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). Finally, the claim for unjust enrichment also impermissibly arises out of the same facts as the claim for breach of contract (*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), and following payment of the deposit amount tenant can no longer claim defendants were enriched at its expense (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

Accordingly, it is

ORDERED that the motion is granted, and the Clerk of the Court is directed to enter judgment in favor of defendants dismissing the action, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that so much of the motion as seeks sanctions against plaintiff is denied for failure to sufficiently allege frivolous conduct pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1.

This constitutes the decision and order of the court.

12/22/2022
DATE

LOUIS L. NOCK, J.S.C.

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