

<b>ESRT 250 W. 57th St, LLC. v 13D/West 57th LLC</b>
2018 NY Slip Op 31139(U)
May 6, 2018
Supreme Court, New York County
Docket Number: 158006/2015
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK  
Part 57**

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**ESRT 250 WEST 57<sup>TH</sup> ST, LLC.**

**Plaintiff(s)**

**Index no. 158006/2015**

**-against-**

**DECISION/ORDER**

**13D/WEST 57<sup>th</sup> LLC and KENNETH SQUIRE,**

**Defendant(s)**  
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**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this the Plaintiff/Counterclaim-Defendant and the Counterclaim Defendants for summary judgment**

**PAPERS**

**NUMBERED**

<b>Notice of Motion and Affidavits and Exhibits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Affidavits</b>	<b>3</b>
<b>Sur-Reply Affidavits</b>	

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Plaintiff's and Counterclaim-Defendants motion for summary judgment is granted.

This is a motion of ESRT 250 West 57<sup>th</sup> Street St. (**Plaintiff**) and Fisk Building Associates L.L.C. (**Fisk**) and Empire State Realty Trust, Inc. (**Empire**) for summary judgment granting the Plaintiff monetary damages against the 13D/West 57<sup>th</sup> LLC (**13D**) and Kenneth Squire (**Squire**; Squire and 13D, collectively, the **Defendants**) and dismissing the Second Affirmative defense.

Fisk leased the demised premises to 13D pursuant to a lease agreement (**the Lease**), dated May 14, 2003, by and between Fisk and 13D. Pursuant to an Assignment and Assumption Agreement (**the Assignment**), dated October 7, 2013 by and between Fisk and ESRT, Fisk assigned its right, title and interest in the

Lease to ESRT. 13D subleased the space to Investors Communications without the landlord's approval as required by the Lease.<sup>1</sup> Investors and 13D failed to pay the rent. ERST terminated the Lease and commenced this action for the unpaid rent and other damages under the Lease.

In defense of the action, the Defendants asserted among other defenses and counterclaims that it was constructively evicted because a neighboring tenant known as High Times Magazine had a marijuana smell emanating from their space that was so pervasive that it made 13Ds space unusable.

Plaintiff moved to dismiss the counterclaims and affirmative defenses of 13D and Squire. By decision dated, March 4, 2016, Judge Kern dismissed all of the affirmative defenses of 13D and Squire except failure to state a cause of action and dismissed all of the counterclaims. The defendants appealed and the First Department affirmed her decision. During this time, the Defendants moved to renew and reargue the motion to dismiss and amend their answer. Judge Kern denied the motion to renew and reargue and permitted the Defendants to amend its answer only to the extent of an affirmative defense of lack of standing.

Summary Judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit. CPLR § 3212(b). The burden is initially on the movant to make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. Failure to make such a prima facie showing requires denial of the motion. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]. Once the showing has been made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact which requires a trial. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, at 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980].

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<sup>1</sup> ERST 250 West 57<sup>th</sup> Street, LLC v. 13D/West 57<sup>th</sup> LLC and Kenneth Squire, 148 A.D.3d 621 (1<sup>st</sup> Dept. 2017).

Plaintiff has met its burden of showing it is entitled to summary judgment as a matter of law because there is no factual dispute as to whether the defendant failed to pay rent under the Lease. In addition, the Defendants have failed to show that the Plaintiff is not the landlord under the lease pursuant to the Assignment (i.e., the Plaintiff has standing). The Defendants have failed to raise a triable issue of fact as to whether money is due the Plaintiff for breach of the Lease occasioned by the failure to pay rent and whether attorney's fees and the brokerage commission should be awarded as damages due the Plaintiff.

In the summons and complaint, ERST sued for (i) \$88,037.31 in respect of the 1<sup>st</sup> cause of action (additional rent from March 1, 2015 to June 26, 2015) against 13D plus interest from May 1, 2015, plus attorneys fees and disbursements incurred in commencing and prosecuting this action, (ii) \$20,209.34 in respect of the 2<sup>nd</sup> cause of action (the deficiency between rent due and rent collected) plus interest thereon from July 15, 2015, plus Plaintiff's attorneys fees and disbursements incurred in commencing and prosecuting this action against 13D and (iii) \$88,037.31 in respect of the third cause of action (guaranty of all rent due until 13D vacates in the condition required by the lease and 2 months of escalated rent) against Squire plus interest thereon from May 1, 2015 plus Plaintiff's attorneys fees and disbursements in commencing and prosecuting this action. The demand in plaintiff's motion also requests damages by virtue of the payment of the brokerage commission.

The Plaintiff asked at oral argument that the Court exercise its jurisdiction to amend the wherefore clause in the Summons and Complaint pursuant to CPLR §3025(c) to amend to conform to the evidence to add the claim for damages for the brokerage commission. The Court exercises its jurisdiction and amends the pleadings to the proof to include the brokerage commission. However, it is not clear from the papers submitted as to the amount of the damages for the brokerage commission or attorney's fees.

Therefore, judgment is granted for (i) \$88,037.31 in respect of the 1<sup>st</sup> cause of action (additional rent from March 1, 2015 to June 26, 2015) against 13D plus interest from May 1, 2015 plus attorneys fees and disbursements incurred in commencing and prosecuting this action, (ii) \$20,209.34 in respect of the 2<sup>nd</sup> cause of action (the deficiency between rent due and rent collected) plus interest

thereon from July 15, 2015, plus Plaintiff's attorneys fees and disbursements incurred in commencing and prosecuting this action against 13D and (iii) \$88,037.31 in respect of the third cause of action (guaranty of all rent due until 13D vacates in the condition required by the lease and 2 months of escalated rent) against Squire plus interest thereon from May 1, 2015 plus Plaintiff's attorneys fees and disbursements in commencing and prosecuting this action. A hearing is scheduled for June 20, 2018 to determine the amount of the Plaintiff's damages for attorneys fees and the brokerage commission.

Dated: May 6, 2018

A handwritten signature in black ink, appearing to read 'A B', is written over a horizontal line.

Hon. Andrew Borrok

J.S.C.

Hon. Andrew Borrok