At an IAS Part 68 of the Supreme Court of the State of New York, held in and for the County of Kings at the Courthouse thereof, at 360 Adams Street, Brooklyn, NY 11201, on the 23rd day of October, 2018.

PRESENT:
HON. JOHNNY L. BAYNES,
JSC.

----------x **Index No. 514714/17**

BED-ROSS GROCERY, LLC., d/b/a
BEDFORD GARDENS SUPERMARKET,

Plaintiff,

-against- **DECISION AND ORDER**

BEDFORD GARDENS COMPANY L.P.,

Defendant,

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Defendant, Bedford Gardens Company, L.P., (hereinafter "Defendant"), moves by Notice of Motion dated February 1, 2018, for an Order pursuant to CPLR § 2121(b) granting Summary Judgment in favor of Defendant and against Plaintiff, Bed-Ross Grocery, LLC, d/b/a Bedford Gardens Supermarket (hereinafter "Plaintiff").

Defendant is owner of a building located at 104 Ross Street, Brooklyn, NY 11211 (hereinafter the "premises"), Plaintiff is a commercial tenant within the premises, operating a supermarket on the first floor of the premises and utilizing the basement for storage. A lease exists between the parties setting forth their rights and responsibilities, and plaintiff has operated at said premises since 1990. The lease has been periodically renewed and in full force and effect

on April 20, 2014. On that date, sewage and water backed up into the plaintiff's portion of the premises. Plaintiff alleges in its complaint that the backup of sewage into the leased portion of the premises violated plaintiff's right to quiet enjoyment of the premises and resulted in a partial constructive eviction from the leased premises.

Defendant claims that plaintiff cannot sue for breach of contract but only for negligence, for which the three year statute of limitations has expired. Defendant further contends that "even if plaintiff's claim is one sounding in contract, the claim is barred by the lease agreement" and relies on Paragraph 4 of the lease in which defendant states that "plaintiff agreed to waive liability for defendant making or failing to make repairs." Affirmation of Michael S. Goldenberg in support of the motion for summary judgment dated February 1, 2018, ¶ 5. The affirmation goes on to opine that "if the Court accepts the plaintiff's argument that this is not a negligence claim, the claim is barred by the hold harmless language in the lease. Defendant here relies on Paragraph 8 of the Lease which purportedly "exculpates the defendant from liability for property damage unless caused by the defendant's negligence".

Plaintiff responds by asserting Article 9 of the Lease which states "[i]f the demised premises are partially damaged or rendered partially unusable by fire or other casualty, the damages thereto shall be repaired by and at the expense of Owner and the rent and other items of additional rent, until such repair shall be substantially completed, shall be apportioned from the day following the casualty according to the part of the premises which are unusable". Memorandum of Law in Opposition, p.3, ¶ 3. Article 9 is fairly specific in excluding tenant's "furniture and furnishings or fixtures or equipment, improvements or appurtenances removable by [Plaintiff] and agrees that [Defendant] will not be obligated to repair any damage thereto or replace the same". What the clause does not do is say that the Defendant is not responsible to

repair the demised premises.

Summary judgment, while a drastic remedy, is warranted when there are no factual disputes to be resolved by the trier of fact. *Mallard Construction Corp v County Fed Savings*, 32 NY2d 285 [1973], whether all issues to be resolved are strictly issues of law, *Long Island RR Co v Northport Industrial Corp.*, 42 NY2d 455 [1977], or when the uncontroverted facts can only be determined in one fashion as a matter of law. *Alvord and Swift v Stewart and Miller Constr. Co., Inc.*, 46 NY2d 276 [1978]. "It is well settled that '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 demonstrate the absence of any material issues of fact'." *Olan v Ursino*, 235 AD2d 406 [AD2d 1997].

Once this showing is made, the burden shifts to the party opposing the motion for Summary Judgment. *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]. In considering a motion for summary judgment, the Court must view all facts in a light most favorable to the non-moving party. *See, Zuckerman v City of New York*, 49 NY2d 557 [1980]. In this instance, there is no factual information about how the sewage overflowed into plaintiff's premises. There have been no depositions. There is simply no admissible evidence placed before the Court which would makes a prima facie showing of entitlement to judgment as a matter of law. There is no means of determining if plaintiff was, at a bare minimum, constructively evicted from the premises. There is only the affirmation of defendant's counsel which is not made based on personal knowledge. Whether the lease will ultimately result in liability cannot be ascertained absent the application of the facts of the occurrence. Those material facts must be determined by a trier of fact at trial.

WHEREFORE, it is hereby

ORDERED AND ADJUDGED that the motion of Defendant Bedford Gardens Company, L.P., for an Order pursuant to CPLR § 2121(b) granting Summary Judgment in favor of Defendant and against Plaintiff, Bed-Ross Grocery, LLC, d/b/a Bedford Gardens Supermarket is denied in all respects.

The foregoing constitutes the Decision and Order of the Court.

ENTER

J. Baynes

JOHNNY L. BAYNES, JSC

HON. JOHNNY LEE BAYNES

KINGS COUNTY CLERK
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